

Citizens' Oversight Projects (COPs)

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September 19, 2016

TO: Steven J. Reyes, Chief Counsel
CC: c/o Robbie Anderson (Robbie.Andersonsos.ca.gov)
CC: Elections Officials in most populous 24 counties in CA

RE: "County Clerk/Registrar of Voters (CC/ROV) Memorandum #16295"
Sent to All County Clerks/Registrars of Voters
September 15, 2016
"RE: General Election: One Percent Manual Tally"

Dear Mr. Reyes and Mr Padilla:

We had the opportunity to review your CCROV document to "provide guidance to county elections officials on the provisions of Elections Code section 15360 (One Percent Manual Tally) with respect to vote-by-mail and provisional ballots."

It seems from your document that there are many misunderstandings regarding 15360 and so we hope we can shed some light on the differences between what you state and our understanding.

Purpose of the Manual Tally Misstated

You say that

the position of the Secretary of State that the one percent manual tally requirement set forth in Elections Code section 15360 does not require provisional ballots or all vote-by-mail ballots to be included in the tally. Such a requirement would be inconsistent with the stated purpose of the one percent manual tally, which is to tabulate ballots in which voting system devices are used "[d]uring the official canvass."

The stated purpose of the One Percent Manual tally is actually not found in 15360. However, in the

definitions we find the following definition (underlining added):

336.5. "One percent manual tally" is the public process of manually tallying votes in 1 percent of the precincts, selected at random by the elections official, and in one precinct for each race not included in the randomly selected precincts. This procedure is conducted during the official canvass to verify the accuracy of the automated count.

You claim that the purpose is to “tabulate ballots in which voting system devices are used.” The purpose according to the election code is “to verify the accuracy of the automated count.” So to say the purpose is only to “tabulate ballots” is missing the point. Just tabulating ballots alone does not verify the accuracy of the automated count. If you are recommending that a significant number of ballots be left out, does that still verify the accuracy of the automated count? You do not provide any evidence that leaving those ballots out is possible yet still accomplish the ultimate purpose, to verify the accuracy of the automated count.

VBM and provisional ballots are processed by automated equipment

We must underline that VBM, polls ballots, and provisionals are all tabulated by automated equipment. So if your statement implies that they need not be included because they are excluded from tabulation by automated equipment, that is incorrect because all ballots are processed by automated equipment.

VBM and provisional ballots are processed during the official canvass

You point out the phrase “[d]uring the official canvass” as if Vote-by-Mail (VBM) and provisional ballots are not processed during the official canvass, and maybe you are implying also that they are processed either before or after the official canvass. Again, that is absurd. Both the VBM and Provisional ballots are all be processed during the official canvass period.

Increasing precincts and batches does not also mean they can be omitted

Then you point out that “Sections 15360(a)(1)(B)(ii) and (a)(2)(B)(iii)(II) specifically provide elections officials with the discretion to include additional precincts and batches of vote-by-mail ballots.”

We agree with that, but having discretion to include *additional precincts* does not also mean election officials can *omit* otherwise required precincts and batches from the audit.

Section 15360 clearly includes all ballots cast in the scope of the audit

The law in section 15360 is actually very clear regarding polling-place and VBM ballots. 15360 (a) (1) (A) “A public manual tally of the ballots, including vote by mail ballots, cast in 1 percent of the precincts chosen at random by the elections official.”

The term “cast” is not explicitly defined in the election code. Merriam Webster dictionary defines the term “cast” with respect to voting as “to deposit (a ballot) formally.” That is, either when it is placed in a ballot box or in the case of VBM ballots, when they are mailed. Provisional ballots are not considered cast until they are validated. But once validated, they are cast, and therefore are included in the set.

Provisional Ballots not explicitly omitted from audit scope in 15360

The wording of 15360 does NOT provide any explicit language about provisional ballots. The original intent of author Debra Bowen in SB1235 was clear in the original language which included the phrase “including provisional ballots and ballots cast at satellite locations.” This phrase was removed to harmonize the bill with the Assembly version (AB2769 Benoit). We assert that this harmonization does NOT mean that provisional ballots should be omitted nor that election officials can conduct a 1% manual

tall that excludes them. And certainly, the arguments you provide based on “during the official canvass” and the notion that the purpose was merely to “tabulate ballots in which voting systems are used,” does nothing to support the assertion that election officials can omit these ballots under any threshold of reasonableness.

Details of our case misleading

You mention in the discussion and background that litigation is currently underway in San Diego County Superior Court challenging, amongst other things, whether or not provisional ballots are to be included in the one percent manual tally (*Citizens Oversight, Inc. v. Vu*, San Diego County Superior Court case number 37-2016-00020273-CLMC-CTL). On July 25, 2016, the court issued an unpublished minute order denying the petitioner's motion for a temporary restraining order.

We agree with this limited background information, however you fail to point out that the court denied our motion for a temporary restraining order only because the election was already certified. Had the court had time to process this prior to certification, it is clear that the motion for the TRO would have been granted, as the court said the petitioner will likely prevail in the declaratory relief motion.

You gloss over with the phrase “among other things” the fact that our case also challenges omitting VBM ballots. IYou are correct that the minute order stated that Elections Code section 15360 requires that provisional ballots are to be included in the one percent manual tally.

We Informed County Election Officials

We sent letters to the most populous 24 counties asking them whether they are planning to comply with the law or not. If they do not provide a positive response, we may seek injunctions in those counties to compel compliance with the law. Many counties also omit not only provisional ballots, but more importantly a vast number of later-arriving VBM ballots. Together in San Diego, these comprise 37% of the total number of votes. That is a nontrivial fraction which cannot be ignored.

All Vote by Mail ballots must be included in the scope of the audit

We disagree that Section 15360 does not require that all voted vote-by-mail ballots are to be included in the scope of the manual tally. There is no trace of any changes to the bill nor are there any changes that were made that allow election officials to arbitrarily omit VBM ballots. In fact, this is the main reason the bill was proposed to begin with by author Debra Bowen in the 2005/2006 legislative session.

Legislative Intent

In your letter designated “CC/ROV Memorandum #16295,” you take some time recounting legislative history which you claim proves that the author omitted the phrase “including provisionals” for a reason, that being that it was too hard for elections officials to accomplish that in time, and that it is difficult to assign these ballots back to the precinct.

You wrote:

However, some counties are unable to assign ballots back to the precinct level due to the logistical complexities of handling ballots. In these instances, county elections officials report results by "ballot style" (e.g., all the ballots that have exactly the same candidates and measures are all counted in one group) and do not actually sort the ballots back to the precinct level. For counties unable to assign ballots back to the precinct, it is administratively difficult and time consuming to locate and include these vote-by-mail ballots in the manual count for a precinct.

No Mention of AB985 further revising 15360

You neglect to point out that there was a further revision to Section 15360 in 2011, AB985 which introduced the second option for processing VBM and provisional ballots, to allow larger districts to start the manual tally on the polls ballots which are sorted by precinct and then process the remainder of the ballots (VBM and provisionals) in batches which are NOT sorted by precinct. AB985 was very clear that VBM ballots are to be included in the audit:

Specifically, this bill would permit the elections official conducting the election to conduct a manual tally of the ballots cast in 1% of the precincts chosen at random by the elections official and a separate manual tally of not less than 1% of the vote by mail ballots cast in the election.

The analysis of the bill by the Senate analyst described the change as a cost-cutting measure.

Purpose of the bill. This bill provides county elections officials' cost-cutting flexibility when conducting the one percent post-election manual tally currently required by law. This bill affords all counties the option of conducting two separate one percent manual tallies. One manual tally for precinct ballots and the other for VBM ballots for each election.

It has been now over ten years since the original changes to 15360 have become law, and five years since the second option of AB985 has been available. Any assertion that election officials have been caught off guard or have not had time to prepare is ridiculous.

CACEO Fought to dilute effectiveness of the manual tally audit?

You mention that a June 13, 2006, letter from the California Association of Clerks and Election Officials (CACEO) to then State Senator Debra Bowen included the following:

The purpose of the 1% manual tally is to check the accuracy of the tabulation of the vote counting equipment at the precinct level. The absentee ballots and the provisional ballots are not included in the Election Day precinct count so including these ballots does not verify the accuracy of the voting equipment used at the precincts.

Provisional ballots cannot be processed until all the voter's history is updated in the system, which takes up to ten days to complete. Provisional ballots are then verified for status and, if approved, are added to the precinct tally counts through the Central Count machines. They are not tabulated with precinct specific equipment.

You mention that provisional ballots take more time to process and make a claim that the language clean-up occurred "after" these concerns were raised. It is true the SB1235 was edited on August 7, almost two months later, which was "after" the letter was received, but it was not obviously related given the two month delay. You mention that AB2769 was amended on May 26, 2006, but that was more than a month BEFORE the letter from CACEO was sent. It is true that these amendments did remove language that redundantly said provisional ballots would be included. The language was NOT amended to say explicitly that provisional ballots need not be included. We assert that the language change was simply a clean up to remove redundancy.

"During the Canvass" argument illogical

The logic behind your discussion of the phrase "[d]uring the official canvass" is inside-out and backwards. You claim that the 1% manual tally cannot include provisional ballots, because once those are counted, the

official canvass is “in essence” instantly completed, and there would be no time to complete the 1% manual tally process. Just the reverse is true. Until the 1% manual tally is completed, the official canvass is incomplete. Thus, it is perfectly possible to complete counting all ballots, including provisional ballots, and then start the 1% manual tally, all within the official canvass period. Only when the manual tally is done it is possible for elections officials to certify the canvass, thus completing it. The official canvass is not completed until the manual tally is completed and the election official certifies it. It does not magically complete when the last provisional ballot is counted.

And indeed, in many smaller counties in the state, this is exactly how it is done. They don't have to “hold off” on tabulating provisional ballots because somehow the canvass instantly completes beyond their control, thus giving them no time to do the manual tally.

We note that some states, such as Florida, complete the official canvass and certify the election PRIOR TO starting their manual tally audit. Thus, they must provide a way to reverse certification if anything was found to be amiss. The process in California is better because the audit process is completed during the canvass and BEFORE certification. It allows any mistakes to be corrected within the official canvass period rather than providing some means to undo that certification if something is detected.

So the argument you provide to election officials is hopelessly off track with regard to the “during the official canvass” phrase.

Can “Verify” Purpose be accomplished while omitting provisional ballots?

What we must come back to is the purpose of the 1% manual tally, which is to “verify the automated count” according to Section 336.5. The question is whether omitting provisional ballots can leave enough of a hole for compromised election workers or hackers to “fix” the election. According to the San Diego ROV IT manager, the number of provisionals has increased in recent years and was “inordinately high” in this election, comprising about 10% of the vote. Clearly, if the computer count was modified in the central tabulator, then it could easily tip the election one way or the other if any race were within a 5% margin. The final difference between Bernie Sander and Hillary Clinton in the recent June 6, 2016 primary was less than 15,000 votes out of a total of about 400K Democratic votes, or about 3.75%. Thus such manipulation of the provisional ballots could indeed “flip” this election, and thus provisional ballots MUST be included in the random selection and manual tally process to accomplish the verification goal.

Five-day notice issue is a red-herring

You mention that Section 15360(d) requires at least a five-day public notice prior to the commencement of the one percent manual tally, and that including provisional ballots in the scope of the audit and producing a five-day notice are mutually exclusive, and therefore provisional ballots can be freely omitted. We see this as another red-herring in a hopeless and somewhat embarrassing attempt by the Secretary of State to help counties to justify continued noncompliance of Section 15360.

Of course, if any county implements a two-phase manual tally procedure per changes instituted by AB-985, the five-day public notice requirement applies only to the first phase, which does not include provisional ballots. Those ballots would be included in a second (or subsequent) phase, and no five-day notice is required. Again, this was not mentioned by the document prepared by Chief Counsel Reyes, and is clearly one way both requirements can be fulfilled.

We note that in Arizona, they conduct their first manual tally meeting which is noticed, within two days after the election as mandated by Arizona law. However, to provide flexibility and allow them to perform the random selection much later in the process, that first meeting is utilized only to set dates for the later

random draw and tally. This is another way these two requirements can both be fulfilled. Thus, the requirement for notice is not sufficient reason to omit 10% of the ballots from the audit process.

San Diego Case DOES apply to other counties under expectation of reasonable conduct

Finally, you mention that “the minute order is not the final judgment from the San Diego County Superior Court. In addition, if the directives in the minute order become the final judgment, the final judgment would apply to San Diego County only.”

Although these statements are technically correct, they are not correct in practice. Elections officials are expected to comply with state law. They are expected to be reasonable and prudent in their actions. “Reasonable” typically means that they made decisions based on all information that they knew or should have known at the time. The minute order of the San Diego Superior Court is not the final judgment, but the judge did clearly state that after initial review, it was his judgment that the plaintiffs would prevail. We notified the top 24 counties of this ruling so they could integrate the initial ruling of the judge in their plans.

Secondly, once the court has ruled on the issue, the law is clarified and DOES apply to all counties in terms of informing elections officials, even though the court judgment will not explicitly compel those counties to comply with the ruling of the court. Thus, if election officials are made aware of the judgment, they will be acting unreasonably if they continue to omit VBM ballots or Provisional ballots from the manual tally audit, if indeed the court fully rules in our favor.

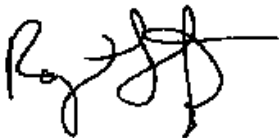
We ask that the Secretary of State eliminate this uncertainty for the November election by intervening in our case such that the result will indeed apply to all counties.

Citizens' Oversight prefers not to engage in litigation and prefers to work directly with elections officials to solve problems, not fight about them. However, we had no choice in this case. We will seek early injunctions in any county where election officials do not provide a positive and explicit statement to us that they will voluntarily comply with the law.

Conclusion

This opinion distributed by the Secretary of State apparently to provide cover to counties to continue to ignore the requirements of 15360 is a disservice to election integrity and only adds to the concerns rightly held by the public that our elections processes are not held to the highest standards. All arguments and rationale put forward by the Reyes representing the Secretary of State are empty and without merit.

Sincerely,



Raymond Lutz
National Coordinator, Citizens' Oversight Projects

CC: Alan L. Geraci, Esq.