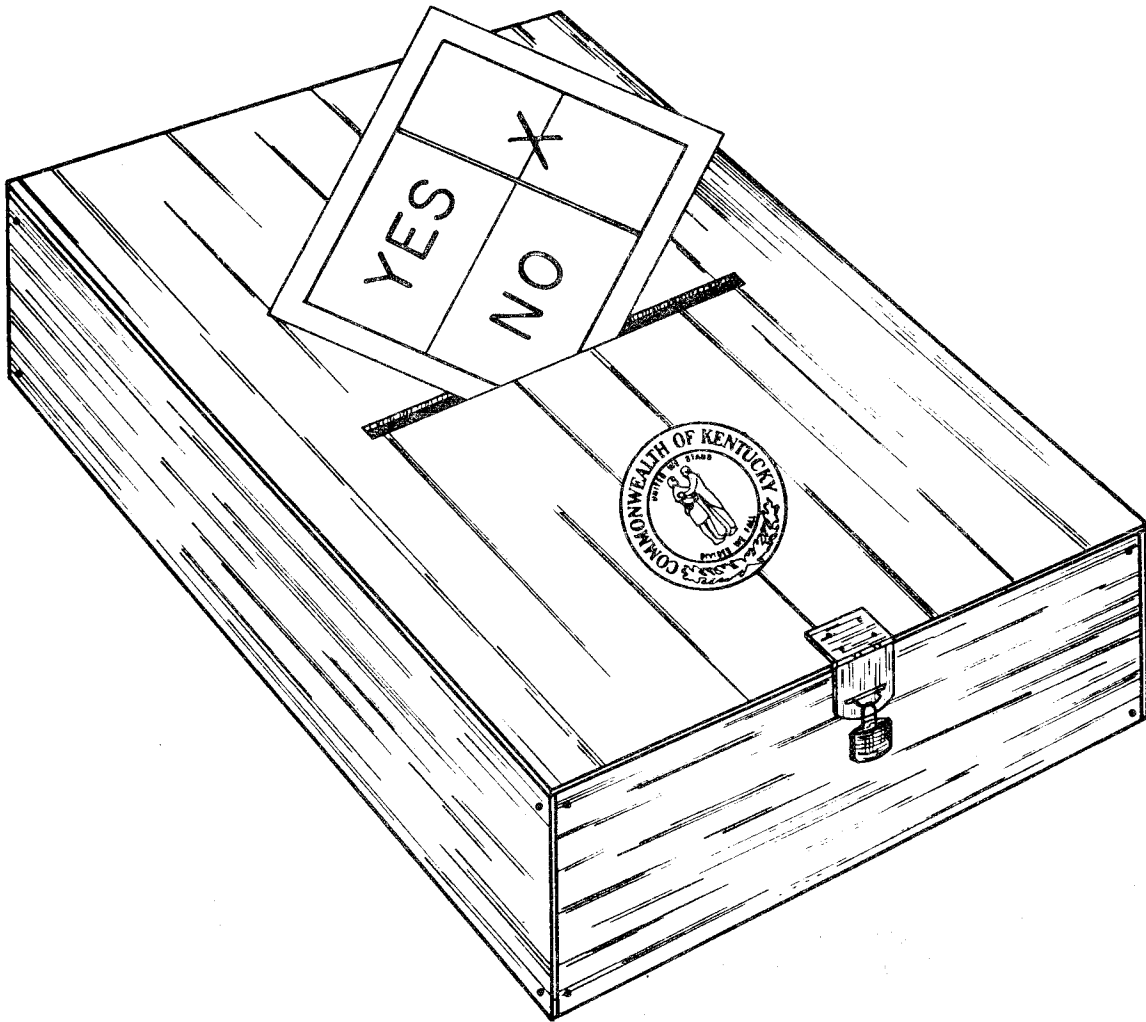


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KENTUCKY'S ELECTION CONTEST AND RECOUNT STATUTES



Research Report No. 158

LEGISLATIVE RESEARCH COMMISSION
Frankfort, Kentucky

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KENTUCKY'S ELECTION CONTEST AND RECOUNT STATUTES

Prepared by
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Research Report No. 158

*Legislative Research Commission
Frankfort, Kentucky
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FOREWORD

Procedures for recounting election returns and contesting elections are means of ensuring that an election outcome is free from errors or illegal activities. Noting several problems in Kentucky's current laws that govern these important election validation processes, the Kentucky General Assembly, through 1978 House Concurrent Resolution 73, has directed the Legislative Research Commission to study the Kentucky Revised Statutes relating to election recounts and election contests for the purpose of developing clarity and consistency in the statutory procedures.

This report summarizes safeguards prescribed by law for the election process and reviews and evaluates the current election contest and recount statutes. It recommends that the appropriate interim committee and the General Assembly first resolve basic policy issues concerning the nature and purpose of the election recount and then revise the statutes accordingly to correct other problems identified in the report.

This report was prepared by Mrs. Joyce S. Honaker and was edited by Dr. Charles Bush.

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Legislative Research Commission
Frankfort, Kentucky
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SUMMARY

Recounts of election returns and contesting of elections are means for ensuring that an election outcome is free from errors and unaffected by illegal activities, such as bribery or fraud. The body of Kentucky law on these important processes provides inadequate protection, however. 1978 House Resolution 73 directs the Legislative Research Commission to review the current Kentucky statutes governing election recounts and contests for the purpose of achieving greater clarity and consistency in these laws.

Recounts are sought and election contests are initiated because someone believes that the safeguards in the election system have failed to ensure a valid outcome. After summarizing the safeguards prescribed by law for the election process, this report reviews the current election contest and recount statutes. Using the criteria of clarity and consistency, it enumerates problems found in the current statutes and discusses policy alternatives. A major finding of this study is that the election recanvassing and recount laws represent two fundamentally different policies regarding the nature and purpose of the recount process. The recanvassing law, applicable to voting machine returns in some elections, treats the recount as a simple error-checking process conducted by election administrators at public expense. The recount statutes in KRS Chapter 120 describe the recount as a judicial function, paid for by the petitioner and sometimes other private parties, in which the loser attempts to find errors in the official returns and the winner attempts to preserve his apparent victory. Before choosing methods for clarifying and resolving conflicts between statutes governing specific aspects of election recount and contest processes, a clear definition of the nature and purpose of the recount should be determined.

The preliminary recommendations of this study are as follows:

1. KRS Chapter 120 should be amended to include separate definitions of "election contest" and "recount" and separate statutes governing the two processes.
2. The appropriate interim joint committee should select one of several alternative definitions of the recount process applicable to all elections, with the exception of those disputed elections that must be determined by the General Assembly or one of its houses.
3. The committee should direct that legislation be drafted conforming to the definition of the recount it selects and correcting related problems identified in this study.
4. If costs of recounts are to be generally borne by candidates or voters, the interim committee and General Assembly should consider providing recounts at public expense in close elections or in instances when the initial results are reversed by the recount.
5. Any publicly-financed recount should verify all returns rather than only selected returns.
6. The interim committee and General Assembly should consider providing public payment of contest costs when the election contest trial shows that election officials were responsible for errors or irregularities.

CHAPTER ONE

THE ELECTION PROCESS

The purpose of election contesting and recounting procedures is to validate election results. Recounts are sought and contests initiated because someone believes that the safeguards in the election system have failed to ensure a valid outcome. The need for contest and recount procedures can be minimized by an effective and secure election process. A review of the laws governing voting and vote tabulations in Kentucky and a brief summary of other statutory safeguards in the election process will serve to identify the prescribed steps for obtaining a valid outcome by minimizing errors and illegalities in the process itself. Legal safeguards are effective, of course, only if clearly stated and fully implemented. The primary sources of error in any election system are human. Likewise, people, not laws, voting machines or ballot boxes, are ultimately responsible for fraud, bribery and other illegal activities that may lead to an election contest.

Methods of Voting and Vote Tabulation

As a general rule, votes in Kentucky elections are cast and recorded on voting machines rather than paper ballots. The lever voting machine is the only mechanical voting device authorized for use in Kentucky elections.¹

Paper ballots may be used for absentee and emergency voting and to supplement voting machines that cannot accommodate the number of candidates and issues in an election. An absentee paper ballot is provided to a voter who cannot be at the polls on election day because he is disabled, will be absent from the county in which he is registered to vote, or is in jail, having been charged but not yet convicted of a crime (KRS 117.075 and 117.085). Applications for absentee ballots are restricted to the voter or his spouse, and are mailed to the voter. A physician's statement of temporary or permanent disability is required if an absentee ballot is sought for reasons of disability.

Emergency paper ballots may be used for voting at the polls if a voting machine malfunctions during the election (KRS 117.215). Supplemental paper ballots are used if a voting machine's space for ballot labels cannot accommodate the number of candidates on the ballot and the State Board of Elections approves (KRS 118.215). Use of supplemental paper ballots is limited, however, to nonpartisan races and "yes" or "no" voting on public questions.

In general and special elections, voters may cast write-in votes for candidates whose names do not appear on the ballot. Voting machines are equipped with pens and paper rolls, concealed by sliding metal tabs, to permit write-in voting.²

Preparation and Use of Voting Devices

Preparation of Ballots and Machines

Prior to an election, the Secretary of State certifies to each county clerk the candidates and questions to be voted upon and the order in which they will appear on the ballot (KRS 118.215 and 118.225). Each county clerk is responsible for having ballot labels for voting machines, absentee and emergency paper ballots, and supplemental ballots when necessary, printed for use in his county (KRS 117.145).

Absentee ballots are mailed to the voter prior to election day (KRS 117.085). Supplemental paper ballots and voting machines are delivered to each precinct at least one hour before the polls open (KRS 117.195). Emergency paper ballots remain in the county clerk's custody unless and until they are needed in any precinct (KRS 117.215).³

When not in use at an election or in court custody during an election contest, voting machines acquired by a county remain in the county clerk's custody. The clerk is directed to protect the machines from damage, deterioration and tampering (KRS 117.135).

After receiving the printed labels for any election, the county clerk places them on each machine, as nearly as possible in the order certified by the Secretary of State. The ballot labels are secured by transparent covers, the ballot frame, and a locking device.⁴ After placing the ballot labels in the ballot frame on the face of the machine, the clerk verifies that the public counter that records the number of voters is set at zero and that the counters that record the votes for each candidate and for and against each public question register zero. The clerk locks the operating mechanisms and devices protecting the counters and ballot labels and records the number of each machine opposite the number of the precinct in which it will be used (KRS 117.155).

At least two days before the election, the members of the county board of elections examine the voting machines and determine whether the ballot labels are properly placed, the public and vote counters are set at zero, and the various protective devices are in place. If the machines are in order, the board members sign the record book showing voting machine assignments. The clerk then gives the keys to the machines to the board members, who give the clerk a receipt for them. Any candidate and a representative of any political party having candidates in the election may witness the examination of the machines (KRS 117.165).

Shortly before the election, the county board of elections must instruct the election officers for each precinct in the use of the voting machine (KRS 117.185). When the locked machines and keys are delivered to each precinct, they are examined a third time, by the precinct election officers, to make certain that the ballot labels are arranged as shown on the voter instruction cards and that the machine has not been operated since the public and vote counters were set at zero. To correct improperly arranged labels or reset a counter, the election officers must summon the elections board members, who unlock the machine, correct the problem, and relock it in the election officers' presence. If the board members cannot be located or cannot reach the precinct within one hour after the polls are open, the election officers must

obtain a reserve machine from the county clerk, who takes custody of the original machine.⁵

Use of Voting Devices

Upon receiving proper application for an absentee paper ballot, the county clerk mails the voter the ballot, voting instructions, and two official envelopes for returning the ballot (KRS 117.085). When sent to the voter, the outer envelope, marked "Absent Voter's Ballot," includes the address and official title of the county clerk, space for the voter's signature, and the voter's address and precinct number typed by the clerk. The inner envelope is blank except for a detachable flap which contains notice of the penalty for illegal absentee voting and the voter's address and precinct number typed by the clerk below a space for the voter's signature.⁶

The voter marks the absentee ballot to indicate his choices and, in general or special elections, may vote for a candidate not on the ballot by writing the candidate's name in the appropriate location. He then seals the ballot in the inner envelope, signs the detachable flap, places the inner envelope in the outer envelope, seals and signs the outer envelope, and mails the packet to the county clerk.

Upon receiving the ballot, the clerk deposits it in a locked ballot box without opening the outer envelope. The box, secured by three locks, remains locked until the absentee ballots are to be counted. The keys are retained by the members of the county board of elections or the county absentee ballot board, if one is appointed (KRS 117.325 and 117.265).

If supplemental paper ballots are used in an election, the county clerk supplies each precinct with enough ballots for its registered voters, sufficient voting booths, a locked ballot box to which the clerk retains the key, string for securing the stubs of voted ballots, and rubber stamps for labelling spoiled and unused ballots (KRS 117.195). The ballots have consecutively numbered detachable stubs (KRS 117.145). After voting on candidates for offices listed on the voting machine, the voter takes the supplemental paper ballot into the voting booth, marks the ballot, removes the numbered stub, hands the stub to an election officer, and deposits his ballot in the locked ballot box (KRS 117.225). If the voter spoils his ballot, he returns it to an election officer, who stamps it "spoiled," initials it, and places it in a special envelope for spoiled ballots. The voter is then given a second supplemental ballot, which he marks and deposits in the ballot box after detaching the stub and giving it to an election officer.

If a voting machine becomes inoperable during the election, the county clerk provides a reserve machine or emergency paper ballots, with consecutively numbered stubs, and a locked ballot box. The statutes do not prescribe specific procedures for voting by emergency ballot and do not require that they be marked in a voting booth. Presumably, election officers arrange the polling place to assure the voter's privacy and the secrecy of his emergency paper ballot, to comply with constitutional and statutory mandates for voting by secret ballot (Kentucky Constitution, Sec. 147, and KRS 118.025).

The lever voting machine is a self-contained voting device providing the functional equivalents of the voting booth, ballot, ballot box and vote-counter, although it does not provide a durable record of the individual

voter's choices as the paper ballot does.⁷ When a voter has signed the precinct list of registered voters, an election officer depresses or turns a mechanism permitting the voter to vote and operates other devices to prevent him from voting on any particular issue or group of candidates for which he is ineligible to vote, such as primary election candidates of political parties other than his own.

Facing the front of the voting machine, the voter operates a lever which closes a curtain, attached to the machine, around him. He may then depress one lever for each office and issue to indicate the candidate or position of his choice. When he depresses a lever, an "x" is revealed. While he remains within the curtained area, the voter may correct an error in his vote by returning the lever he mistakenly depressed to its original position and by then depressing the correct lever. He may vote for a candidate who is not listed on a general election ballot by moving the sliding metal tab located beside or above the appropriate office row or column and by writing the name of the candidate on the paper located behind the tab. Once he moves the metal tab to cast a write-in vote, he cannot change his mind and vote for a candidate for that office whose name is on the ballot. When the tab is moved, the corresponding levers for voting for the listed candidates for the office are locked. In general elections, a voter may operate a single lever to vote for all candidates of one political party.

When he has finished voting, the voter returns the lever with which he previously closed the curtain to its original position. This action records his votes, closes any write-in tabs he opened, returns the levers he depressed to their original positions, records the fact that one additional voter voted, and opens the curtain. Each of the voter's choices is recorded on a separate vote counter within the machine, which accumulates each candidate's votes and the votes for and against public questions. The appropriate counters are each advanced one number when the voter operates the lever to open the curtain. A public counter, which was set at zero before the polls opened, also advances one number, as does a protective counter, which accumulatively records the number of voters who have ever used the machine.

As soon as the polls close, the precinct election judges lock and seal the machine so that its voting and counting devices cannot be operated.

Counting and Tabulating the Votes

Except for write-in votes, the votes cast on voting machines are already counted by the machine when the polls close. The total vote for each candidate and for and against each public question must simply be transferred from the individual counters to the return sheets. Paper ballots must be counted by hand and totalled manually or with the aid of tabulating equipment.

The election precinct officers transfer the votes shown on the vote counters to return sheets, which are forwarded to the county board of elections, county clerk, and local governing bodies of the two dominant political parties. The county board of elections, or others it may designate, count absentee and supplemental paper ballots. Emergency paper ballots may be counted at each precinct or in a central counting center. Candidates or their representatives and representatives of the news media may observe the vote-counting and tabulating processes (KRS 117.215, 117.275 and 117.335).

Counting Paper Ballots

The county board of elections or an appointed absentee counting board meets at the clerk's office after 3:00 p.m. on election day to count the absentee ballots (KRS 117.335). The board opens the ballot box and removes one envelope at a time. The outer envelope and detachable flap are checked to determine if they are in proper order and signed. Ballots in unsigned envelopes are automatically rejected. The county clerk compares the signatures with the voter's signature on his registration card. If the envelopes are in order, the clerk reads the absent voter's name aloud, at which time a challenge of the voter is in order. If the voter's ballot is not rejected on a challenge, the clerk is to open the outer envelope, remove the detachable flap from the inner envelope, and deposit the now-blank inner envelope, unopened, in a ballot box.⁸ After all inner envelopes have been placed in the ballot box, it is shaken, opened, and the absentee ballots are removed and counted by the board.

The absentee votes are recorded on forms prescribed by the State Board of Elections and the results are made public after 6:00 p.m. on election day. The clerk retains the ballots, detachable flaps and outer envelopes for thirty days, after which the county board of elections burns them if no contest or recount proceeding has been instituted.

When the polls close, the precinct election officers stamp "unused" on all supplemental paper ballots that were not spoiled or voted. The stubs from the voted ballots are strung together and placed in an envelope. The precinct judges deliver the ballot box, ballot stubs, spoiled and unused ballots to the county clerk's office for the counting of the voted ballots. After counting the ballots, the board certifies the vote tally to the county clerk and Secretary of State. The county clerk retains the supplemental paper ballots for sixty days, after which the county board of elections burns them, if no contest or recount action has been filed (KRS 117.275).

The statutes prescribe no special procedures for counting and tabulating emergency paper ballots. Whether counted at the precincts or a central location, they are added to the votes cast by machine and the resulting aggregate vote is certified as the election results of the precinct (KRS 117.215).

Tabulating Voting Machine Results

As soon as the voting machine is locked and sealed against voting, the election officers record and certify the number of voters who voted on the machine. Three separate records are compared: the public counter, the difference between the number on the protective counter before and after the voting, and the number of signatures on the precinct voters' list.⁹

The election judges unlock the cover over the vote counters to reveal the total vote cast for each candidate and for or against each public question. The judges then read the totals aloud, completing the canvass of each office or question before proceeding to the next. When a vote total is read, anyone entitled to be present may compare the announced number with the number on the counter. Any errors in the announcement are immediately corrected.

The announced totals are entered in ink, by hand, on quadruplicate and

general return sheets, which show the ballot position and counter number of each candidate and issue position (pro or con) as well as office titles, candidates' names, and other ballot information. Write-in votes must be separately transcribed from the paper rolls on which they were recorded.¹⁰

After the returns are announced and transferred to the return sheets, the machine is locked. Each return sheet is signed by the precinct judges and sealed in an envelope which the judges also sign. The judges deliver the return sheets to those designated by law. The county board of elections tabulates the votes from the precincts and immediately mails the tabulated returns, the general return sheets, and precinct lists to the State Board of Elections (KRS 117.275 and 117.285).

The county clerk sees that the voting machines are properly boxed or covered and securely stored. Machines must be locked against voting for fifteen days after primary elections and thirty days after general elections, during which time the county board of elections retains the keys. A machine may be opened and examined, in the board members' presence, by court order or direction of a legislative committee that is considering an election contest. The court or legislative committee may order that a machine remain locked for a longer period than the statutes require, but they cannot order it to remain locked during the thirty days preceding the next election (KRS 117.295). A machine may be unlocked for testing, if necessary, during a recanvass of the votes (KRS 117.305).

Other Statutory Safeguards of the Election Process

The procedures for protecting ballots and voting machines before, during and after elections and for involving several officers and witnesses in vote-counting and tabulation processes, to assure accuracy and fairness, are supplemented by other statutory safeguards of the election system found in KRS Chapters 116 through 121.

-- Voter registration laws and procedures for challenging the eligibility of voters, coupled with penalties for illegal registration and voting, attempt to ensure that only eligible voters vote in an election.

-- Undue influence of voters and election officers and interference in the election process are the targets of laws limiting entry to voting places, restricting assistance to illiterate or disabled voters, prohibiting bribery or intimidation of voters and election officers, and providing penalties for violations of these restrictions.

-- Assuring fairness and competence of election administrators is the intent of laws prescribing their qualifications, requiring bipartisan selection, prohibiting candidates from administering their own elections, requiring instruction of precinct officers, permitting candidates and issue interest groups to appoint challengers and inspectors, and prescribing penalties for election administrators who fail to perform a duty or who act illegally.

-- A statute permitting a qualified voter or opposing candidate to challenge the "bona fides" of a candidate for party nomination or for election, if no primary was held, provides a mechanism for disqualifying ineligible candidates before the primary or general election (KRS 118.176).

CHAPTER TWO

ELECTION RECOUNT AND CONTEST LAWS

Recounts of election returns and contests of elections are both procedures for determining the validity of the apparent outcome of the election. The specific purposes of the two procedures differ, however.

The purpose of the election recount is to determine whether the initial count and tabulation of the votes accurately records how the electorate voted. Although it may be conducted by or under the direction of a judge, the recount is primarily an administrative task of determining whether voting machines were in order during the election and checking the election officers' returns for accuracy. Judgments may be called for in both vote-counting and recounting processes to interpret unclear marks on paper ballots or to decipher write-in votes. The recounting body may also be required to determine that the ballots and voting machines have remained secure since the election (KRS 120.085 and 120.195). A recount results either in an affirmation of the original results and tabulations or in corrected returns that may sustain or reverse the outcome of the election.

An election contest challenges, and seeks a determination of, the validity of the election process. The contest determination requires judgments on questions ranging from the legality of particular votes to whether corrupt practices, bribery or fraud were committed, and if so by whom, and with what factual and legal effect on the election outcome. If any votes are rejected as illegal, a recount of legal votes does become an element of the contest process. The contest may result in a decision upholding or reversing the election outcome or voiding the election entirely.

Elections Subject to Kentucky Contest and Recount Laws

Kentucky statutes permit recounts and contests of most primary and general elections held in Kentucky. One apparent exception is congressional elections; and it is not clear whether recounts and contests in presidential elections are authorized.

Both state and federal laws govern the process of electing members of the Congress, President, and Vice-President of the United States. The United States Constitution grants the states general authority to prescribe the time, place and manner of electing U. S. Representatives and Senators, but empowers each house of the Congress to judge the elections, returns and qualifications of its members (Article I, Sec. 4 and 5). It also directs each state to appoint its presidential electors in the manner the state legislature prescribes; but electoral votes are counted before the U. S. House of Representatives and Senate, which respectively select the President and Vice-President if no candidate receives the vote of a majority of the presidential electors (Article II, Sec. 1 and Amendment 12).

While the ultimate power to determine the validity of congressional elections rests with the appropriate house of the Congress, the statutes or court decisions of some states authorize congressional candidates to institute a contest action at the state level.¹¹ Kentucky's Court of Appeals has refused

to consider general election contests in congressional races; and Kentucky's general election contest law applies only to elections of state, district, county and city officers, not federal officials (Burchell v. State Board of Elections and KRS 120.155). Kentucky courts have held for various purposes, that members of the Congress are federal rather than state or district officers (Peers v. Davis and Brumleve v. Ruth).

The United States Supreme Court has ruled that states may conduct simple recounts of U.S. Senate elections as a valid exercise of their power to prescribe the time, place and manner of electing congressmen (Roudebush v. Hartke). In Roudebush, the Court described an administrative recount as an integral part of the election process, designed to verify its accuracy. It is not an infringement on the Senate's power to judge the elections, returns and qualifications of its members unless it inhibits the Senate from making an independent final judgment. The Court noted, however, that the Senate is free to accept or reject the results of a recount, just as it may accept or reject the initial returns; and it may conduct its own recount. Kentucky's general election recount law applies only to those elections that may be contested (KRS 120.185). Therefore, congressional candidates, as candidates for federal offices, apparently cannot obtain a state-level recount of the general election results in Kentucky. They may seek a recanvassing of the returns recorded on voting machines in the general election, however (KRS 117.305).

Because primary elections select nominees for office rather than the person who will actually fill an office, there is clearer authority for the states to determine contests and conduct recounts of congressional primary elections.¹² Kentucky statutes seem to permit a candidate for nomination to Congress in a primary election to contest the election or seek a recount, since the primary election contest and recount statutes are not limited to elections in which nominees for state, district or local office are selected (KRS 120.055 and 120.095). A recanvassing of voting machine results is available in congressional primaries (KRS 117.305).

Federal law does permit state legislatures to prescribe methods for determining any controversy or contest in the appointment of presidential electors (3 U.S.C.A., Sec. 5). In Kentucky, presidential electors are nominated by political parties and "appointed" by the voters in the general presidential election. The names of the presidential and vice-presidential candidates, rather than the electors nominated by their respective parties, appear on the general election ballot (KRS 118.305 and 118.325). Current Kentucky law may permit a recount or contest of the outcome of presidential elections in Kentucky, in that federal and state courts have defined the office of presidential elector as a "state office" for various purposes.¹³

Kentucky statutes prescribe separate methods for recounting and contesting primary nominating elections; general elections of most state, district and local officers; elections of the Governor and Lieutenant Governor; elections of General Assembly members; elections of city councilmen in cities of all classes with the council form of government; elections of other elected officials in cities of the fifth and sixth classes with the council form of government; elections on statewide public questions; local elections on whether to permit the sale of alcoholic beverages (local option elections); and elections on all other local public questions. A list of the statutes governing each type of election appears in Appendix I. The major provisions of the current recount and contest statutes are summarized and compared in Tables 1 and 2, respectively.

Election Recount Statutes (Table 1)

Kentucky laws provide two different methods for verifying the accuracy of election returns: a recanvass of the voting machines by the county board of elections and a recount of results by judicial or legislative officers.

Recanvass of Voting Machines

A primary or general election candidate may request the county board of elections to check and recanvass the voting machines in any number of precincts in the county (KRS 117.350). The request must be submitted in writing within ninety-six hours after the polls close. The recanvass applies only to votes recorded on the voting machines and not to votes cast by paper ballot.¹⁴ The recanvassing procedure is available to candidates for nomination or election, but not to proponents or opponents of public questions. The recanvass is conducted at no cost to the petitioner. The cost of the recanvass is a cost of the election paid for by the county and proportionately shared by the city in elections involving city offices (KRS 117.345 and Young v. Jefferson County Election Commission). The state reimburses counties for the costs of each election at the rate of \$85 per precinct.

In making a recanvass, the board of elections first examines the machine without unlocking it against voting, comparing the original canvass with vote counters. The board also "rechecks" the machine, presumably to ascertain whether it is locked and sealed as required and ballot labels are in order. The board may unlock the machine and test it if the original canvass and recanvass tally, but a discrepancy that cannot be accounted for remains.

If the original canvass of the machine is found to be incorrect, the returns are corrected; but the originally certified vote for a candidate cannot be changed unless the candidate is notified. Political party and news media representatives and candidates or their representatives may witness the recanvass.

Judicial and Legislative Recounts

Candidates who were voted upon in a primary election may request a recount by filing a petition for a recount in circuit court within fifteen days after the day of the primary (KRS 120.095). A primary election recount request may also be included in a petition initiating a primary election contest or in the contestee's answer to a contest petition (KRS 120.055 and 120.095). Only primary election candidates who received at least fifty percent as many votes as the successful candidate received may contest the primary. A contestee's answer to a contest petition is generally required within ten days after he is officially notified of the contest; but if he requests a recount in his answer, it must be filed within five days.

The Franklin Circuit Court conducts recounts in elections for nomination to statewide offices. In other primary recount actions, the circuit court of the county in which the "contestee" resides has jurisdiction.

A candidate who petitions the circuit court for a primary election

Table 1
Major Provisions of Kentucky's Election Recount Statutes by Type of Election

Provision	Type of Election									
	Primary	General Elections of Officers					Elections on Public Questions			
		Most State & Local Offices ¹	Governor & Lt. Governor	General Assembly	City Councils	Statewide Questions	Most Local Questions	Local Option		
Availability of Recanvass of voting machines at Public Expense	Available	Available	Available	Available	Available	Not Available	Not Available	Not Available		
Availability of Judicial or Legislative Recount	Available	Available	Not specified (At General Assembly dis-creation)	Not specified (at House or Senate's dis-creation)	Not specified (at city council's dis-creation)	Available	Available	Available		
Standing to Seek Recount	Any candidate who was voted upon	Any candidate who was voted upon	Not specified	Not specified	Not specified	Any qualified voter who voted	Any qualified voter who voted	Any qualified voter		
Method of requesting re-count	Petition to circuit court	Petition to circuit court	Written contest notice to General Assembly	Written contest notice to House or Senate	To city council (method not specified)	Petition to Franklin Circuit Court	Petition to circuit court	Petition to circuit court		
Deadline for seeking Recount	15 days after primary	10 days after election day	30 days after State Bd. of Elections acts	15 days after canvassing bd. acts	Not specified	15 days after results announced	30 days after election day	10 days after election day		
Persons that con-duct Recounts	Circuit Court (Franklin, if statewide)	Circuit Court (Franklin, if statewide)	General Assembly contest board	House or Senate contest board	Not specified (city council)	Circuit Court & commissioners (optional)	Circuit Court & 2 commissioners	circuit court		
Officer or body that finalizes recount	circuit judge	circuit judge	General Assembly	House or Senate	Not specified (city council)	circuit judge	circuit judge	circuit judge		
Cost Payment	not specified (petitioner posts bond)	not specified (petitioner posts bond)	Unsuccessful party	Unsuccessful party	Not specified	Not specified (private parties post bond)	Not specified (private parties post bond)	not specified (petitioner posts bond)		
Appeal Forum and Deadlines	Court of Appeals, within 10 days	Court of Appeals, within 10 days	No appeal pro-vided	No appeal pro-vided	No appeal provided	Court of Appeals, within 10 days	Court of Appeals, within 10 days (disputed ballot rulings only)	Court of Appeals, within 10 days		

¹ Separate methods of contesting elections, presumably including requests for recounts, in elections of non-legislative city officers may be established by ordinance in cities of the fifth and sixth classes with the council form of government.

recount must execute a surety bond for the costs of the recount in an amount set by the circuit judge. The bond must be executed before the recount begins.

Any party to a primary election recount proceeding may appeal the circuit court's decision to the Court of Appeals by filing notice of appeal and a supersedeas bond in the circuit court and filing the record with the Court of Appeals within ten days after the circuit court's judgment is entered. The appellate court may extend the appeal deadline "for cause shown" (KRS 120.075).

In most cases, candidates who received at least one vote in a general election for state, district, county or city office may request a recount by filing a petition in the circuit court within ten days after election day (KRS 120.185). Requests for recounts in statewide races are filed in the Franklin Circuit Court; petitions for recounts in other elections are filed in the circuit court of the county in which the "contestee" resides (KRS 120.155 and 120.185). A candidate who is eligible to bring a general election contest action may request a recount in the contest petition. If he does so, the contest petition must be filed within ten days after the election rather than the thirty days normally prescribed. A contestee in a contest proceeding may seek a recount in his answer to the contest petition, but only if he files his answer within ten days after the election.

Candidates seeking a general election recount by the circuit court must also execute a surety bond for the costs of the recount. General election recount determinations are appealed in the same manner as primary election recount judgments.

A recount of votes in general elections for Governor, Lieutenant Governor and General Assembly members is not explicitly provided by the statutes. However, the contest boards appointed by the General Assembly or one of its houses may conduct a recount in determining an election contest (KRS 120.195 to 120.215 and Broadus v. Mason). City legislative bodies that are empowered by statute to judge the election and qualifications of their members apparently may also conduct recounts. However, the Kentucky Court of Appeals has ruled that recount requests and contest petitions that challenge the election of a majority of the members of the city council place jurisdiction over the recount or contest proceeding in the circuit court rather than the legislative body (Myers v. Shaw and Jackson v. Randolph).

Candidates for the office of mayor of a city of the fifth class and the office of elected city marshal of a city of the sixth class may be entitled to a recount of the general election returns under a city election contest ordinance (KRS 87.170, 87.180, 88.170, 88.190 and 88.230). If the city has failed to enact a contest ordinance applicable to these offices, the general election recount and contest statutes apply to them (KRS 120.155 and Lyttle v. Wilson).

Any qualified voter who voted in an election on a statewide public question, including constitutional amendments and proposals to convene a constitutional convention, may demand a recount or contest the election by filing a contest petition with the clerk of the Franklin Circuit Court. The petition must be filed within fifteen days after the State Board of Elections has completed the official canvass and announced the statewide results (KRS 120.280 to 120.300).

If a recount is demanded and the court determines that the contest peti-

tion presents sufficient grounds, the court requires the contestant to give bond for the costs and orders the ballots of the precincts in which the recount is sought sent to the courthouse in Frankfort. The court may appoint two special commissioners to help make the recount. The commissioners are entitled to be paid \$3.00 per day and actual traveling expenses for their services. The "contestant's" attorney(s) and the Franklin County commonwealth's attorney, representing the "contestee," may be present at hearings on the recount. The contestant and contestee may each appoint one inspector to witness the recount. A qualified voter who participated in the election may become a contestee in the contest/recount action by so petitioning and giving bond for the costs.

Within three days after the recount of ballots is completed, the recount and any disputed and uncounted ballots are reported to the court. The court reviews disputed and uncounted ballots and adds those found to be legal to the ballots that were recounted.

Any party to a "contest" in an election on a statewide public question may appeal the Franklin Circuit Court's determination to the Court of Appeals according to the procedures applicable to appeals in primary or other general election recount and contest actions.

Any qualified voter may demand a recount of the results of a local option election by following the procedures applicable to recounts of general elections of county officers (KRS 242.120)¹⁵, whereas, recounts in elections on all other local public questions may be sought only by a qualified voter who voted in the election (KRS 120.250 to 120.270).

To request a recount of an election on most local public questions, the eligible voter files a recount petition with the circuit clerk for the county in which the election was held within thirty days after the election. The petition must state the reasons for requesting a recount (KRS 120.250). A simple allegation that the votes were miscounted, affecting the election results, suffices (Durr v. Washington County). The petition must be against the county, city or district in which the election was held. If the local governmental unit fails to defend the action, a voter may become a defendant. The "contestant" and any nongovernmental defendants must give bond for costs.

Two court-designated commissioners assist in the recount, with one representing the "contestant" and one representing the "contestee." The attorneys of the parties may be present at hearings and the recount. The court determines the election result after counting all legal ballots. It certifies any corrected result to the county board of elections; and the court's judgment supersedes the official returns.

KRS 120.270 prohibits an appeal from the recount of ballots. The statute does permit, however, the circuit court's ruling in any questioned ballots to be made a part of the record and reviewed, revised or reversed by the Court of Appeals.

Election Contest Statutes (Table 2)

A primary election contest challenges "the right of the successful candidate, and of any other candidate for nomination to...[an] office, to such nomination" (KRS 120.055). Only a candidate who received at least one-half as

Table 2

Major Provisions of Kentucky's Election Contest Statutes by Type of Election

Provision	Type of Election									
	Primary	General Elections of Officers					Elections on Public Questions			
		Most State & Local Offices ¹	Governor & Lt. Governor	General Assembly	City Councils	Statewide Questions	Most Local Questions	Local Option		
Standing to Initiate Contest	Candidate with 50% as many votes as winner	Candidate with 25% as many votes as winner	Not specified	Not specified	Not specified	Qualified voter who voted	Qualified voter who voted	Qualified voter		
Method of Initiating Contest	Petition to circuit court	Petition to circuit court	Written notice to General Assembly	Written notice to House or Senate	Not specified	Petition to circuit court	Petition to circuit court	Petition to circuit court		
Deadline for Initiating Contest	15 days after primary	30 days after election	30 days after State Bd. of Elections acts	15 days after canvassing board acts	Not specified	15 days after results announced	30 days after election	30 days after election		
Forum that Determines Contest	Circuit court (Franklin, if statewide)	Circuit court (Franklin, if statewide)	General Assembly	House or Senate	City council	Franklin Circuit Court	circuit court	circuit court		
Cost Payment	Not Specified	Not Specified	Unsuccessful Party	Unsuccessful Party	Not Specified	Not Specified (Private parties post bond)	Not Specified (Private Parties post bonds)	Not Specified		
Appeal Forum and Deadlines	Court of Appeals within 10 days	Court of Appeals, within 10 days	No appeal provided	No appeal provided	No appeal provided	Court of Appeals, within 10 days	Court of Appeals, within 10 days	Court of Appeals, within 10 days		

¹Separate methods of contesting elections of non-legislative city officers may be established by ordinance in cities of the fifth and sixth classes with the council form of government.

many votes as the successful candidate may initiate a primary election contest. The contest petition must be filed in the appropriate circuit court within fifteen days after the primary and must state the specific grounds for contesting the election. In the case of candidates for nomination to offices for the state at large, the petition is filed in Franklin Circuit Court. In all other cases, the petition is filed in the circuit court for the county in which the contestee resides.

When the petition is filed, the circuit clerk has a summons served on the contestee, who must file his answer to the contest petition not more than ten days later. His answer may include grounds for contest in his favor and against the contestant. The contestant may reply to the contestee's answer within five days after the answer is filed.

The circuit clerk docket the contest action as soon as he receives proof that summons was served on the contestee. The clerk then notifies the presiding judge, who proceeds with the trial within five days after the contestee files his answer. The judge conducts the trial and determines the contest without a jury. He may examine witnesses orally or require or permit the parties to take evidence by deposition (KRS 120.065).

The circuit judge has three statutory options in determining a primary election contest once the trial is completed. He may judge the contestee to have been fairly nominated; he may judge the contestant to have been fairly nominated; or he may determine that there has been no valid election and the nomination is vacant. A ruling voiding the election is permitted "if it appears from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither the contestant nor contestee can be adjudged to have been fairly nominated" (KRS 120.065).

Any party may appeal the circuit court's judgment in a primary election contest in the manner previously described for appealing the results of a primary election recount. The final judgment in a primary election contest is certified to the official with whom the certificates of nomination are filed for the office in question, either the Secretary of State or the county clerk (KRS 120.085).

Kentucky statutes prescribe four different tribunals and procedures for contesting general elections of state, county, district and city offices and permit city councils of cities of the fifth and sixth classes to establish procedures for determining contests in elections of non-legislative city officers. Most general election contests are determined by circuit courts (KRS 120.155 to 120.175). The General Assembly determines contested elections for Governor and Lieutenant Governor (Kentucky Constitution, Sec. 90, and KRS 120.195 and 120.205). Each house of the General Assembly has jurisdiction over contested elections of its members (Kentucky Constitution, Sec. 38, KRS 120.195 and 120.215). City legislative bodies in cities of all classes with the council form of government are empowered to judge the election and qualifications of their members (KRS 83.470, 84.060, 85.070, 86.060, 87.040 and 88.050). The circuit court has jurisdiction over contests in which the election of a majority or more of the city councilmen is disputed, however (Stanley v. Goff). The legislative bodies of cities of the fifth and sixth classes may also determine, by ordinance, how contested elections for other city offices are to be decided (KRS 87.130 and 88.190). If no ordinance has been adopted, the general contest law applies (KRS 120.155).¹⁶

The contest law applicable to general elections of most state and local officers permits a candidate who received at least twenty-five percent as many votes as the successful candidate to contest the successful candidate's election (KRS 120.155). The contest petition is filed in the circuit court of the county in which the contestee resides, or in the Franklin Circuit Court if the contest concerns an office of the state at large. The petition must be filed within thirty days after the election. If the contestant also seeks a recount, the contest petition must be filed within ten days after election day (KRS 120.185). The petition must state the grounds of the contest.

A contestee's answer to a general election contest petition, which may deny the allegations and list specific grounds of contest against the contestant, must be filed within twenty days after summons is served on him. If the contestee seeks a recount, his answer to the contest petition must be filed within ten days after the election (KRS 120.185), which is, of course, sometimes impossible. The contestant may reply to the contestee's answer within ten days after it is filed.

The case is docketed and the judge notified as soon as the circuit clerk receives proof that the summons was served on the contestee. The court is to proceed with the trial "without delay" and complete the proceeding "as soon as practicable" (KRS 120.165). As in the case of primary elections, the court may determine that either the contestee or contestant was fairly elected or it may determine that there has been no fair election, due to substantial fraud, intimidation, bribery or violence. If the court rules that there has been no election, the office is deemed vacant.

Either party may appeal the circuit court's determination of the general election contest in the same manner as primary election recount and contest decisions are appealed (KRS 120.175 and 120.075).

The current statutes do not state who may initiate a contest of an election for Governor, Lieutenant Governor or General Assembly member, but in other instances in which a contest statute failed to specify who had standing to bring the contest action (*Rose v. Epperson*), Kentucky courts have held that only a defeated candidate may contest an election. Because the Kentucky Constitution vests jurisdiction over contested elections for Governor and Lieutenant Governor in the General Assembly and deems each house to be the sole judge of elections of its members, each legislative tribunal may presumably decide whether to hear contests initiated by persons who were not candidates for the offices (Constitution, Secs. 90 and 38).

The statute governing the initiation of contest proceedings in the General Assembly or either house requires the contestant to give written notice stating all the grounds of the contest (KRS 120.195). The contestee need not give counternotice.

In the case of contest of elections for Governor and Lieutenant Governor, the contestant must file the notice within thirty days after "final action" of the State Board of Elections, presumably meaning the board's issuance of certificates of election after completing the tabulation of returns [KRS 118.425(4) and *Broadus v. Mason*].

The notice of a contest of an election to the state House of Representatives or Senate must be filed within fifteen days after the final action of the county board of elections or the State Board of Elections, whichever canvasses the returns. Since both boards are instructed to count and tabulate

the votes in elections of General Assembly members, it is not clear when the fifteen-day period begins (KRS 117.275 and 118.425). Because the State Board of Elections is required to perform the second tabulation and issue the certificates of election, the state board's issuance of the certificates apparently marks the beginning of the fifteen-day time period.

Once notice of the contest is given, the parties may begin to take evidence by depositions, which are sealed by the officers taking them and sent to the clerk of the House or Senate. The legislative branch or board with jurisdiction over the contest may obtain additional evidence.

The preliminary determination of a contested election for Governor or Lieutenant Governor is made by an eleven-member board of three senators and eight representatives. The members are selected by lot on the third day after the General Assembly next meets after the contested election. A legislator selected may be excused from serving on the contest board, and he must be excused and replaced by another drawing if he is related to either party to the contest, or if any other proper objections of his partiality are made (KRS 120.205). Members of the House or Senate board to determine a legislative election contest are chosen in the same manner and time as the gubernatorial contest board. The legislative contest boards consist of not more than nine nor less than five members of the house that determines the contest (KRS 120.215).

The decision of a majority of the members of the contest board is reported to both houses of the General Assembly, in the case of contested elections for Governor or Lieutenant Governor, and to the house that created the board, in the case of legislative contests, for final determination. A joint session of the two chambers, with the Speaker of the House of Representatives presiding, determines the outcome of executive office contests.

KRS 120.205 lists several alternative decisions that may be reached by the General Assembly or one of its houses in a contest action. In the event of a tie vote in the election, the right to the office is determined by lot. If the person elected was not legally qualified to receive the office, and the first two years of his term have not expired, a new election may be ordered. If a person other than the one returned is found to have received the highest number of legal votes, he is judged elected and entitled to the office. The costs of legislative contest proceedings are to be paid by the unsuccessful party to the contest (KRS 120.195).

Elections on statewide public questions may be contested by any voter who voted on the question (KRS 120.280). The petition must be filed with the Franklin Circuit Court clerk within fifteen days after the State Board of Elections announces the vote. The petition must state the grounds for contesting the election. If the court determines that the petition states sufficient grounds to justify the contest, it requires the contestants to give bond for the costs. The circuit clerk publishes a notice of the contest and grounds in at least one newspaper of general circulation in the state and any local area particularly affected (KRS Chapter 424).

A contestant may notify the Franklin Circuit Clerk of his intention to contest the election before the official count is announced. If he does so, the Secretary of State notifies the county boards of election commissioners to hold the ballots cast in the election, subject to the circuit court's order.

Any voter who participated in the election may petition to be made a con-

testee if he acts within five days after the contest is instituted and gives bond for the costs. If no voter becomes a contestee, the Franklin County commonwealth's attorney represents the Commonwealth for the purpose of assuring a fair and honest determination of the contest.

The trial and appeal procedures prescribed for contests of general elections of state officers also apply to contests of elections on statewide public questions (KRS 120.280 and 120.300).

A qualified voter may contest a local option election in the same manner as general elections of county officers are contested (KRS 242.120). The members of the county board of elections are named as contestees. Any qualified voter may intervene as a contestee by filing a petition to be made a party to the action.

Elections on all other public questions voted upon by the electorate of a county, city or district may be contested by a qualified voter who voted on the question (KRS 120.250 to 120.270). The contest petition must be filed with the circuit clerk of the county in which the election was held within thirty days after election day. The petition is against the county, city or district in which the election was held and states the grounds of contest. Permissible grounds are

the casting of illegal votes, the exclusion of legal votes, the unfair or illegal conduct of the election, tampering with the returns, the alteration of the certificates of the results, bribery, fraud, intimidation or corrupt practices, or any conduct or practice tending to frustrate, obstruct or interfere with the free expression of the will of the voters (KRS 120.250).

If the circuit court determines that the petition states sufficient grounds, it requires the contestant to give bond for costs and requires the defendant governmental unit or district to answer within twenty days. If the county, city or district fails to defend the action, any voter may become a defendant by so requesting within thirty days after the contest petition was filed and by giving security for costs. Any voter may assist the defendant by applying and giving security for the portion of the costs that may be adjudged against him.

The circuit court's determination of the contest may be appealed by the unsuccessful party in the same manner as other contested election judgments (KRS 120.270).

Grounds for Contesting Elections

The present statutes do not provide one comprehensive listing of permissible grounds for contesting an election.

KRS 120.015, relating to contests over the nomination or election of any state, county, city or district officer, establishes alleged violations of several of the corrupt practices laws as grounds for contest. The cited laws are KRS 121.025, prohibiting corporate campaign contributions to candidates; KRS 121.045, prohibiting contributions to candidates by or for persons whose affairs would be supervised, regulated or controlled or whose property would be assessed for taxation by the candidate if elected to office; KRS 121.055,

prohibiting candidates from making an expenditure, loan, or promise of money or anything of value, and from agreeing to take certain actions as an officer, in consideration for the vote and support of another person; and KRS 121.310, prohibiting employers from coercing their employees' votes.

KRS 120.055, relating to primary election contests, and KRS 120.155, relating to most contests of regular elections of officers, require grounds of contest to be stated in the contest petition, but do not specify any grounds beyond those just enumerated. However, KRS 120.065 and 120.165, concerning judgments in primary and general election contests, direct the court to void the nomination or election if it appears that there has been "such fraud, intimidation, bribery or violence in the conduct of the election" that neither contestant nor contestee can be judged to have been fairly nominated or elected.

KRS 120.205 states an additional ground for contesting elections of Governor, Lieutenant Governor or General Assembly members: the fact that the person who received the highest number of votes was not "legally qualified to receive the office at the time of his election."

KRS 120.250, relating to contests of election on most local public questions, contains the most comprehensive list of the permissible grounds of contest, which are

the casting of illegal votes, the exclusion of legal votes, the unfair or illegal conduct of the election, tampering with the returns, the alteration of certificates of the results, bribery, fraud, intimidation or corrupt practices, or any conduct or practice tending to frustrate, obstruct or interfere with the free expression of the will of the voters.

The laws governing recounts and contests of election on statewide public questions do not clearly distinguish the two processes. KRS 120.290 contains grounds for voiding individual ballots or all ballots in a given precinct for purposes of determining the legal (re)count of votes, determining the contest, or perhaps both. Individual ballots may be voided if the court finds they were procured by fraud, duress, bribery, intimidation or "for valuable consideration." All ballots in a precinct are void if it is impossible to ascertain the correct result in that precinct, due to error, fraud or other irregularity, or if the contestants prove there was bribery or intimidation of voters in the precinct and were not implicated in that bribery or fraud.

Costs of Election Contest and Recount Proceedings

The cost of recanvassing voting machines at a candidate's request is a cost of election paid for by the county and proportionately shared by the city in elections involving city officers (KRS 117.305, 117.345 and Young v. Jefferson County Election Commission). The state reimburses counties for the cost of each election at the rate of \$85 per precinct (KRS 117.345).

KRS 120.195 directs that costs of contest proceedings conducted by the General Assembly be adjudged against the unsuccessful party.

The remaining election contest and recount statutes do not specifically address the issue of how the costs of these proceedings are to be paid. By

not stating that governmental units may be required to pay costs of contest and recount proceedings, the statutes effectively require that one or more of the private parties to a contest or recount action bear the costs (KRS 453.010 and CR 54.04). Since election contests and recounts are special actions, rather than ordinary and equitable actions, KRS 453.040, which generally permits the successful party to recover his costs from the unsuccessful party in ordinary and equitable actions, does not necessarily apply (Hatcher v. Petry). The recount and contest statutes that require the petitioner to give surety bond for the costs of the proceeding imply a legislative intent that the petitioner pay the costs, regardless of the outcome (Hatcher v. Ardrey). The statutes governing elections on public questions and requiring surety bonds to be executed in advance by all private parties to the recount or contest may contemplate an apportionment of costs among the parties. Alternatively, those statutes requiring the execution of surety bonds by all private parties may simply seek to assure, in advance of court action, that costs can be paid by whichever party is ultimately required to pay them.

In the absence of clear statutory language regarding the payment of costs in recount and contest proceedings, the applicable law appears to be Rule 54.04 of the Rules of Civil Procedure, which grants the trial court rather broad discretion in deciding the issue. Subsection (1) of Rule 54.04 states that

costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the Commonwealth, its officers and agencies shall be imposed only to the extent permitted by law. In the event of a partial judgment or a judgment in which neither party prevails entirely against the other, costs shall be borne as directed by the trial court.

CHAPTER THREE

FINDINGS, POLICY ALTERNATIVES AND RECOMMENDATIONS

The two criteria prescribed by House Resolution 73 for evaluating the current election contest and recount statutes are clarity and consistency. After presenting a statement of general standards used to evaluate the current laws based upon those criteria, this chapter discusses problems found in the current statutes, alternatives for greater clarity and consistency in the statutes, and preliminary recommendations.

General Standards of Evaluation

Statutes governing election contests and recounts should clearly indicate the purpose and nature of the two processes and the distinctions between them. The laws should clearly specify whether contest and recount procedures are available; who may initiate a contest and seek a recount; deadlines for requesting a recount and contesting an election; the scope of recounts and the grounds for bringing a contest action; the forum for conducting recounts and determining election contests; the necessary parties to a recount proceeding and election contest; whether a contest judgment or recount determination may be appealed, and to whom; deadlines for appeal; who bears the costs of the proceedings; and at what point a contest or recount action is completed, with what effect. The election contest and recount procedures should be as nearly uniform for all elections as is constitutionally and practically possible. Where necessary, contest and recount laws should be consistent with laws governing the election process.

Problem Areas in the Current Election Contest and Recount Statutes

A review of the current laws relating to election recounts and contests revealed twenty-six problem areas. All of the problems listed below can be resolved without a legislative reconsideration of the basic purpose and nature of the election recount. However, several problems relate directly to the definition of the election recount process to be used in Kentucky. If the current distinctions between the recanvass and recount are retained, relatively minor changes can be made to clarify and resolve inconsistencies in the recount and contest statutes. If the basic inconsistency between the recanvass and recount laws is to be resolved, major changes in the recount statutes, and additional changes in the contest process, must be considered. After problems are identified, policy alternatives for defining the recount process are discussed.

1. The recanvassing law (KRS 117.305) does not clearly indicate the scope of county elections board members' authority when vote counters and return sheets match, but other errors affecting the election outcome are discovered.

While the current recanvassing law permits county boards of elections to recheck machines and correct errors in returns upon a candidate's demand, the scope of the boards' authority is not clearly stated. In the 1973

Lexington-Fayette Urban-County mayor's race, ballot labels on one voting machine were reversed, resulting in a reversal of the candidates' votes on the pre-prepared return sheet contained in the printer pack attachment to the machine. Although the nature and effect of the error was discovered on a recanvass, the election board was apparently unsure of its authority to correct returns accordingly (Rives v. Pettit).

2. There is no express authority for county elections boards to check returns from paper ballots for clerical or mathematical error, short of a full recount of individual ballots, analogous to the recanvass of voting machines and correction of returns permitted by KRS 117.305.

3. Since the recanvassing law applies only to primary and general elections of officers, it does not permit a rechecking of voting machines and returns from them in elections on public questions.

Although the costs and time required for a complete recount of paper ballots may have led to the exemption of returns from absentee and other paper ballots from the recanvassing law, a partial check of these returns could be permitted. The authors of a recent study on election contests and recounts recommend that election administrators be authorized to check and correct errors in returns, short of a full recount, on their own initiative. They suggest that,

such authority ...include at least a recanvass for purposes of checking clerical error in the returns; reexamination of machine totals where returns indicate the likelihood of some kind of tabulation or transcription error, e.g., counters which show no votes, or individual race totals that exceed recorded public counter values; and correction of obvious clerical or arithmetic errors on the face of returns.¹⁷

With or without permitting the boards to initiate a partial error-check, KRS 117.305 could be amended to expressly permit the boards to recanvass voting machines in all elections and to check and correct clerical or arithmetic errors in all returns.

4. Standing to demand a recount in or to contest a local option election is accorded any qualified voter. In elections on other public questions, standing is limited to qualified voters who voted on the question.

KRS 242.120 could be amended to limit standing to challenge local option elections to qualified voters who voted on the question; or, standing to initiate a recount in or to contest other elections on public questions could be granted to any qualified voter, regardless of whether he voted on the question.

5. The statute governing recounts and contests of local option elections improperly cites repealed laws once governing recounts and contests of elections of county officers, rather than the current laws governing recounts and contests of such elections.

6. It is unclear why recounts and contests of local option elections are governed by statutes relating to elections of officers rather than those relating to elections on other local public questions.

KRS 242.120 could be amended to cite the current statutes governing

recounts and contests of elections of county and other public officers. Alternatively, the statutes governing recounts and contests of elections on other public questions could be cited and amended to delete the present exclusion of local option elections from the general law.

7. Costs of the recanvass in primary or general elections affecting state offices are borne by the county with no additional state reimbursement required for this extra cost of an election.

Kentucky courts have ruled that the cost of a recanvass is a cost of the election (Young v. Jefferson County Election Commission). Under KRS 117.345, the county pays for the costs of elections, and cities bear their proportionate share of the costs of elections in which candidates for city offices are voted upon. Upon proper documentation of election costs, the state reimburses counties at the rate of \$85 per precinct, in addition to any amount the state pays for ballot paper. While the wording of KRS 117.345 would appear to permit the county to bill the city for a recanvass of voting machines requested by a candidate for city office, it provides no latitude for charging this extra cost to the state in elections of state officers or of candidates for state offices.

8. In general, the recount and contest statutes do not allow adequately for the special characteristics of the voting machine, as opposed to paper ballots; yet KRS Chapter 117 makes the voting machine the principal voting device in Kentucky.

Two specific problems of this type are found in KRS Chapter 120.

First, the recount laws usually direct the circuit judge to order the voting machines and ballots, or simply the "ballots," transferred to the county courthouse, the circuit court, or, in recounts of statewide elections, to Frankfort. The laws ignore the costs and problems associated with transporting voting machines. It would seem more appropriate to physically decentralize the recounting of voting machine results, particularly in recounts of statewide elections.

Secondly, and of more serious legal import, the contest laws inadequately treat possible voting machine malfunctions in defining grounds for a contest and the circuit court's authority in determining the contest. In Kirby v. Wood, a contest case resulting from the failure of one voting machine counter to record more than nine votes, the Court of Appeals ruled that the trial court could not declare that there had been no election. It noted that only fraud, intimidation, bribery and violence are grounds for a court determination that there has been no election in general elections of public officers.

9. KRS Chapter 120 and statutes authorizing city legislative bodies to determine election contests or specify contest procedures by ordinance do not clearly state whether a recount, as opposed to a recanvassing of voting machines, is available in disputed elections for Governor, Lieutenant Governor, General Assembly member, city councilman, mayor of a city of the fifth class or elected city marshal in cities of the sixth class.

The question of whether to conduct a recount could be left to the discretion of the General Assembly and local legislative bodies or could be required by statute. In either event, the authority or requirement should be stated in the statutes.

10. A recanvass of voting machines, but apparently not a recount of all votes, is available in general elections of members of the U. S. Congress. A recanvass and recount are available in primary elections of congressional candidates.

For consistency and clarity, the General Assembly should decide whether to provide recounts in primary and general elections affecting congressional offices. In making its decision, the General Assembly must weigh the possible utility of the recount of congressional races against the possibility that the recount determination will be rejected by the U. S. House or Senate and the effort duplicated by one of those bodies. An expanded recanvass of returns, as described under problem number three, above, could be provided in congressional elections in lieu of a full recount.

11. KRS Chapter 120 does not clearly state whether the general election recount and contest statutes apply to presidential elections and thus to Kentucky's selection of its presidential electors.

The General Assembly should clearly indicate whether it intends to make state contest and recount processes available in presidential elections.

12. Only the statute governing recounts of elections on local public questions other than local option denies the right to appeal the circuit court's recount determination in full.

For consistency, appeal rights should be the same in all election recount laws. Since Section 115 of Kentucky's Constitution generally guarantees a right to at least one appeal in civil cases tried in the Court of Justice, the appeal rights under KRS 120.270 should be expanded to conform with the laws governing recounts in other cases, if the recount remains a circuit court function.

13. The time limits prescribed by KRS Chapter 117 for preserving absentee ballots and keeping voting machines locked against voting after elections is too short relative to current election contest petition deadlines.

KRS 117.335 requires absentee ballots to be retained for thirty days after the election. They are then burned unless a contest petition has been filed. Voting machines must be locked against voting for fifteen days after the primary and thirty days after a general election (KRS 117.295). Since the current primary election contest deadline is fifteen days after the election and two of the current general election contest deadlines are thirty days after the election, the possibility exists for destruction of ballots just before local officials receive notice of a last-minute contest filing. Ballot-destruction laws should be more carefully coordinated with current or revised laws governing contest and recount petition deadlines.

14. The deadlines for filing contest and recount petitions are inconsistent with one another. They vary both in length of time and in the point at which the time period begins to run.

The recanvassing law requires a written request for a recanvass of voting machines to be filed within 96 hours after the polls close on election day. Under KRS 120.195 and court interpretations, contests of elections determined by the General Assembly must be initiated within thirty days (in the case of the Governor's and Lieutenant Governor's races) and fifteen days (in the case of elections of General Assembly members) after the canvassing board issues

the certificate of election. Contest and recount petitions in elections on statewide public questions must be filed within fifteen days after the State Board of Elections announces the statewide results. All other recount and contest deadlines begin to run from the day of election and include fifteen days for filing a primary election contest or recount petition, thirty days for filing a general election contest petition, and ten days for requesting a general election recount.

The selection of a general set of deadlines for all election contest and recount petitions requires a determination of both the appropriate starting point for the time period and its length. Deadlines that begin on election day ignore variations in the speed with which returns are canvassed, while deadlines that begin with the announcement of the official vote or issuance of certificates of election assume that those actions and their timing are well publicized. Dating the deadline from the issuance of certificates of election also results in recount or contest actions that question a person's title to an office. Although this is not a significant legal problem in most instances, it complicates the recount or contest action and may lead to the assumption that the title to the office having been awarded is irrevocable.¹⁵

As a general rule, it seems appropriate to base a deadline for a recount or contest petition on the day on which the initial returns have been canvassed completely but possibly before the certificates of election are awarded, to avoid any assumptions regarding title to the office. If the recounts are viewed as error-checking procedures, and particularly if disputes remaining after the recount may be made grounds for contesting the election, the recount petition deadline should be shorter than the contest deadline. Deadlines for both contests and recounts should be sufficiently short to resolve primary election disputes before the general election ballots are prepared and to resolve post-general election challenges before an elected official must begin to exercise the duties of his office. While there are no patent prescriptions for specific time limits for filing recount and contest petitions, ten days after the official canvass of votes is publicly announced should be sufficient for recount petitions to be formulated, and thirty days is probably the maximum time needed to prepare a contest petition.

15. The statutes governing contests of elections for Governor, Lieutenant Governor and General Assembly member do not say who may initiate a contest.

For the sake of clarity, the current laws on standing to seek a contest determination by the General Assembly, House or Senate, should explicitly list those who may contest an election or expressly state that this authority resides with each session of the General Assembly, House or Senate.

16. Statutes permitting city councils of cities of the fifth and sixth classes to prescribe, by ordinance, the method for determining contested elections of local non-legislative officers are inconsistent with the general policy governing contests for non-legislative city offices.

17. The authority granted city councils, in cities with the council form of government, to determine the elections, returns and qualifications of their members is consistent with the constitutional power commonly granted state legislative bodies but is inconsistent with the treatment of contested elections of other local officers.

If consistency of the election contest and recount procedures is to be

obtained, the General Assembly should reconsider the policy of exempting certain city elections from the general contest and recount laws. The authority of city councils to determine contests of elections of their members is apparently a long-standing Kentucky statutory policy.¹⁹ A bill draft currently being considered by the Local Government Statute Revision Commission, 80 BR 78, would place most contested city elections under the general election contest and recount laws, by repealing the statutes relating to local determination of election contests and adopting the general election laws to govern city elections in most respects. As of June 15, 1979, the bill did not repeal KRS 83.470, empowering the board of aldermen of a city of the first class to judge the election of its members.²⁰

18. The grounds for contesting elections are usually stated at some point in most of the current election contest statutes, but not in a comprehensive or consistent manner.

In revising the election contest laws, one section should be devoted to listing grounds on which any election may be contested.

19. The current election contest statutes are inconsistent in requiring advance security for costs in some instances but not in others.

Advance security is not required of contestants in primary and general elections unless a recount is also requested. Voters contesting elections on most public questions must execute a surety bond before the contest is heard. A voter who chooses to act as contestee in contests of elections on public questions must also give security for costs.

20. With the exception of statutes governing contests determined by the General Assembly or one of its houses, the current statutes do not clearly state who pays for the costs of an election contest.

The uncertainty regarding costs in both contest and recount statutes is discussed in Chapter Two.

21. The distinction between the "recount" and "contest" processes is not clearly stated in KRS Chapter 120.

The current laws contain no clear, concise definitions of "election contest" or "recount"; nor do they specify their respective characteristics or purposes and the differences between them. While KRS Chapter 120 permits each action to be brought separately, their differences are obscured by an emphasis upon methods for joining the two actions through pleadings and counterpleadings of the parties to a contest. The cross-references between the contest and recount statutes compound the confusion. For example, a candidate requesting a primary or general election recount is instructed to file his petition in the circuit court of the county in which a contest petition for the same election would be filed. In most cases, a primary or general election contest petition is filed in the circuit court of the county in which the contestee, the petitioner's opponent, resides. Yet the corresponding recount section does not explicitly make the petitioner's primary or general election opponent a party to the recount. A general election candidate is granted thirty days after election day to contest the election; yet, a contestee who seeks a recount must answer the contest petition within ten days after the election, clearly an impossibility if his opponent contests on the eleventh day. Statutes relating to most elections on public questions seem to treat the recount as the first stage of a judicial contest proceeding rather

than a separate action. Court of Appeals decisions in contest and recount cases indicate that understandable confusion of the two processes has occurred at the pre-trial or trial stages (See for example, Hogg v. Howard and Rives v. Pettit.)

22. The recanvassing law (KRS 117.305) and the recount provisions of KRS Chapter 120 represent fundamentally different policies regarding the purpose and nature of the election recount and result in inconsistent treatment of those seeking a recount in different types of elections.

A recent survey of election contest and recount laws notes that state statutes emphasize, in varying degrees, one of two different definitions of the recount process:

- [1] At one extreme the recount is simply a way of ensuring the accuracy of the original count, and it is done at official initiative and public expense. A similar type provides recounts at public expense in close races on candidate demand.
- [2] More restrictive systems operate on the assumption that the original returns are correct, and that candidates challenging them are probably raising frivolous issues on the off-chance that some error will be discovered on recount. These systems usually treat the whole process as a game played by the candidate and the officials with stakes (fees and deposits), elements of chance (surviving procedural hurdles), and risk (very poor odds for the challenger).²¹

The recanvass of voting machines in primary elections and general elections of officers approximates the first definition of the recount process. The recount provisions of KRS Chapter 120 suggest the second set of assumptions about the purpose and nature of the recount.

The recanvassing statute provides a rechecking of the returns against the numbers shown on the voting machine counters free of charge to candidates in primary and general elections. As previously noted, it does not apply to elections on public questions nor to paper ballots in any election. A recount petition, accompanied by security for the costs of the recount, must be filed in the appropriate circuit court to obtain a recanvass of voting machines in elections on public questions or to obtain a recount of paper ballots.

23. The recanvassing and recount statutes differ on requiring petitioners to give advance security for costs in some instances but not in others.

KRS 117.305 requires no advance security deposit or bond, since the recanvass of voting machines is conducted at public expense. Most of the recount statutes require the petitioner to give surety bond before the recount is conducted. Statutes governing recounts of elections on most public questions require the petitioner and any voter who chooses to defend the action to give security for costs.

24. With the exception of recounts conducted during General Assembly contest determinations, the current statutes imply, but do not clearly state, who pays for the cost of a recount.

The vagueness regarding costs in both contest and recount proceedings is discussed in Chapter Two.

25. Recount statutes do not clearly state whether a recount of selected precincts is sufficient or a full recount should be undertaken.

A candidate may request the county board of elections to check and recanvass the voting machines of any precinct or any number of precincts. Apparently, in multi-county district or statewide races, a recanvass may be requested in any county in which the candidate's name appeared on the ballot. Since the candidate and not the county board of elections initiates the recanvass, the petitioner defines its scope (KRS 117.305).

The primary and general election recount statutes direct the circuit court to order the voting machines, ballots, ballot boxes and all papers pertaining to the election transferred to the circuit court (KRS 120.095 and 120.185). These laws imply either that a full recount must be conducted, or that while a partial recount may be requested, a full recount may result from the pleadings of the parties.²²

The statutes governing recounts of elections on all public questions except local option seem to permit a partial or complete recount, depending on the petitioner's and defendant's demands. KRS 120.260 and 120.290 direct the circuit court to order the ballots of the counties and precincts in which the recount is demanded sent to the courthouse.

26. In the statutes governing recounts of elections on statewide public questions, but not in other recounts, the court is directed to reject, as illegal or void, ballots it finds were procured by fraud, duress, bribery, intimidation or for valuable consideration.

In most instances, allegations of fraud, bribery and other illegalities in the conduct of the election are simply grounds of contest.

Policy Alternatives: Definition of the Recount Process

Achieving greater consistency and clarity in the recount statutes requires determining an appropriate combination of assumptions and policies concerning the purposes, beneficiaries, forum, function, scope, and costs of the recount. The basic alternatives found in current Kentucky law are presented below, followed by alternatives in other states' statutes.

Purposes and Functions

Current Kentucky recount statutes generally seem to be based on the assumption that the purposes of the recount are to check for errors in vote counting and tabulation, correct clerical and arithmetic errors in returns and tabulations, and correct mistakes resulting from errors in vote counters' judgments in interpreting marks on paper ballots. The statutes assigning recount responsibilities to circuit courts imply that an additional purpose is to provide a suitable forum and procedure for losing candidates and the losing side in public question elections to seek a reversal of the initial outcome, based on the allegation of error. Significantly, the statute governing recounts of elections on most local public questions suggests that the purpose of the recount is also to provide a forum for judging allegations that votes are illegal because they were procured by illegal means.

Primary Beneficiaries

In general, Kentucky recount statutes appear to assume that the losing candidate and issue proponents and opponents are the principal beneficiaries of the recounting process. They must initiate the recount, define its scope initially and pay for it, posting security for costs in advance. Although it must be candidate-initiated, the recanvassing process is treated as benefiting the public, to the extent that it is publicly financed.

Forum

In general, Kentucky recount statutes prescribe a judicial or quasi-judicial forum for conducting the recount. Either the circuit court judge or commissioners appointed by him conduct the recount, with the judge ruling on commissioners' decisions regarding uncounted and disputed ballots and making the final determination. The recanvassing law, on the other hand, provides an administrative forum for conducting a partial recount.

Assignment of Costs

In general, Kentucky recount statutes assign costs to the assumed beneficiaries of the recount: the losing candidate, both the proponents and opponents in elections on public questions, or the public, in the case of the recanvassing law. Opposing non-governmental parties to recounts in elections on public questions must both post security for costs, but cost assignment is not specified. If costs may ultimately be imposed on the initial petitioner if he is unsuccessful, rather than apportioned among the parties to the recount, an element of "fault" underlies the assignment of costs in public question election recounts.

Scope of the Recount

The scope of the recanvass is defined by the petitioning candidate. The scope of recounts conducted by legislative bodies in determining contests is apparently determined by the legislative body itself. The scope of recounts conducted by circuit courts is defined by the parties to the recount. Although a full recount may result from this process, a partial recount is more likely to be requested by those who must pay for it.

Without departing significantly from the basic assumptions and policies of the current law, Kentucky recount statutes could be revised to provide one recounting system which would include:

- retention and expansion of the coverage of the recanvassing law, with public financing, as previously suggested;

- candidate or voter-initiated and financed recounts in the judicial forum, with provision for court appointees or election administrators to perform the recount with judicial supervision and final determination;

- elimination of illegalities in the election process as a recount determination issue in elections on local public questions;

- specific guidelines or requirements for assigning costs to the parties to a judicial recount.

Other policy alternatives are available which would more significantly restructure the recount process. The recanvassing law could be repealed and the recount defined as one judicially-conducted process paid for by the non-governmental parties. Or the recount could be modelled after the recanvassing law to provide one administratively-conducted error-correction procedure at public expense. A recent review of state laws on election contests and recounts suggests the following additional alternatives for the General Assembly's consideration.²³

1. Full or partial recounts, at public expense, initiated by candidates or electors.

Massachusetts and Rhode Island have adopted this alternative.²⁴ In both states, recounts are conducted by election administration officials or bodies. In Massachusetts, the costs of recounts are borne by municipalities, which are responsible for conducting elections. In Rhode Island, the state board of elections conducts recounts, which are paid for by the state. Recounts may be selective in both states.

In some respects, conditions necessary to obtain a recount are more restrictive in these two states than in Kentucky, as might be expected with public financing. Rhode Island provides a recount on any losing candidate's request; however, referendum elections are not subject to its recount laws. Rhode Island also provides no right to challenge the outcome of the elections analogous to Kentucky's contest laws. In Massachusetts, groups of voters, rather than candidates, initiate recounts in primary and general elections, including elections on public questions. In statewide general elections, recounts are conducted only if the vote difference is no more than one-half of one percent of the total vote cast.

2. Full recounts at public expense if the vote difference is close.

Twenty-one states provide recounts in close elections, at public expense, using one of three different methods for initiating the recount. In six states, election officers automatically conduct the recount; in four states, election officers routinely conduct a recount unless the losing candidate waives his right to a recount; and in the remaining eleven states, candidates or voters must ask for the recount. The states use several different means of defining a "close" election. The most common basis for defining a close election is by a percentage difference between the votes for the winning and losing candidates. Three states define a close election in terms of the ratio between the votes cast for the winner and the loser. In two states, the difference in the number of votes, alone, defines whether the election is "close." In some states, the percentage difference used to distinguish close elections varies according to voter turnout. The larger the turnout, the smaller the percentage difference that triggers a recount. States sometimes base the definition of a close contest on the type of election. When percentage differences are used to define a "close" election, they range from as little as one-tenth of one percent in Arizona elections to as high as ten percent in those Maine elections in which fewer than 1,000 votes were cast. As a general rule, a difference of one percentage point or less triggers general

election recounts and a difference of two percentage points or less commonly results in an automatic primary election recount.²⁵

Recounts conducted at public expense are generally full rather than selective; in all but three of the states, state or local election officials order and conduct or supervise the recount.

3. Public financing of any full or partial candidate or voter-initiated recounts that reverse election results.

While thirty-two other states require a fee, deposit, bond or advance payment of estimated costs as a condition for obtaining a recount of at least some elections, twenty-seven of the states refund the deposit or otherwise relieve the petitioner from paying for the recount if the election results are reversed.²⁶ Idaho law requires a full recount at public expense if the results of a candidate-initiated selective recount indicate that the outcome might be reversed.²⁷

If the General Assembly provides for public financing of recounts in all elections, in close elections, or in instances in which a candidate or voter-initiated recount identifies significant error, it must determine which units or levels of government will bear the cost. Apportionment of costs among levels and units of government based on the type of election, (state, district, county or city) would be consistent with the present statutory prescriptions on election costs. The county, as the level of government responsible for the preparation of voting equipment, conduct of elections, and initial counting process, might be required to pay for recounts that identify significant errors in the initial returns. However, since the election process is governed by state law, as prescribed by Sections 153 and 155 of Kentucky's Constitution, it could be argued that the ultimate responsibility for costs of recounts that reveal major errors should instead rest with the state government.

Contests

A reconsideration of the purposes, functions and cost assessment provisions of recount laws warrants similar consideration of instances in which the costs of election contests might be appropriately charged to state or local governments. The authors of Contested Elections and Recounts adopt the viewpoint, not typically reflected in state election contest laws, that there is an overriding public interest in the validity of the election outcome, that the states should provide at least one method for validating elections at public expense, and that contestants and contestees should bear the costs of contests only if they are clearly at fault. Based on these premises, they recommend that:

State statutes on cost assessment in contests should provide that costs are assessed against parties in a contest only if the state has recount provisions which permit a mandatory recount at public expense in close elections. In all other states contest costs should be paid by state and/or local governments. . . .

State statutes on cost assessment should provide that costs are to be charged against the contestant only if the trial shows no basis for the allegations brought by the contestant.

State statutes on cost assessment should provide that costs are to be charged against the contestee only if the trial shows that the contestee was clearly at fault and responsible for errors, fraud, or other irregularities occurring in the election.

State statutes on cost assessment should provide that costs be charged against the appropriate level of government if the trial shows that election officials or individuals over whom the contestee or contestant had no control were responsible for the errors. . . .

State statutes on cost assessment should provide that, when the public is responsible for contest costs, the state government pay the costs of district-wide or statewide contests, while local governments pay the costs of local contests. [Underlined in source.]²⁸

While these recommendations would represent a significant departure from Kentucky's present policies on cost assessments in election contests, and conflict with current efforts to reduce government spending, they warrant legislative consideration. If the policy of providing public financing of recounts in which errors are found is adopted in Kentucky, consideration should be given to governmental payment of contest costs when the trial shows that election officials were responsible for errors, including use of malfunctioning voting machines, or fraud.

Preliminary Recommendations

Development of comprehensive legislation to clarify and resolve inconsistencies in election recount and contest laws first requires determination of the type of recount system to be used in Kentucky. The preliminary recommendations of this study are as follows:

1. KRS Chapter 120 should be amended to include separate definitions of "election contest" and "recount" and separate statutes governing the two processes.

2. The appropriate interim joint committee should select one of several alternative definitions of the recount process applicable to all elections, with the exception of those disputed elections that must be determined by the General Assembly or one of its houses.

3. The committee should direct that legislation be drafted conforming to the definition of the recount it selects and correcting related problems identified in this study.

4. If costs of recounts are to be generally borne by candidates or voters, the interim committee and General Assembly should consider providing recounts at public expense in close elections or in instances when the initial results are reversed by the recount.

5. Any publicly-financed recount should verify all returns rather than only selected returns.

6. The interim committee and General Assembly should consider pro-

viding public payment of contest costs when the election contest trial shows that election officials were responsible for errors or irregularities.

FOOTNOTES

1. Legislative Research Commission, Mechanized Vote Recording: A Survey, Research Report No. 116 (Frankfort: Legislative Research Commission, 1975), p. 3. Although KRS 117.125 does not expressly prohibit other mechanical voting systems, the specifications it lists are found only in the lever machine.

2. KRS 117.125, 117.145 and 117.265. Interview with and demonstration of voting equipment by R. J. Harp, Harp Enterprises, Inc., Lexington, Kentucky, 10 May 1979.

3. Interview with R. J. Harp, 10 May 1979.

4. Ibid.

5. KRS 117.205 requires the county board of elections and precinct officers to prepare the reserve machine for use in the same manner that the county clerk prepared the original machine. Since the reserve machine is needed because the board members are not available to correct the original machine, this instruction cannot be followed to the letter.

6. Although not required by KRS 117.085, the envelopes for absentee ballots supplied by at least one Kentucky election supply firm also provide space for the county clerk to type the voter's name below the signature lines. The additional entry compensates for problems in deciphering voters' signatures. Interview with R. J. Harp, 10 May 1979.

7. The following summary of the lever voting machine's operation is based on Legislative Research Commission, Mechanized Vote Recording, pp. 9-13 and 25-26 and interview with R. J. Harp, 10 May 1979.

8. Since the outer envelope had to be opened earlier to check and compare signatures on the inner envelope's flap, this statutory instruction is confusing. This inconsistency would be resolved by a bill, LRC 6, prefiled in November, 1978, by Representative James Dunn and others for the Interim Joint Committee on Elections and Constitutional Amendments.

9. Some counties use a fourth form for recording the number of voters. An election officer lists the voter's name as he signs the precinct list, providing an unofficial record of the voters in the order they voted. Interview with R. J. Harp, 10 May 1979.

10. A printer pack may be attached to newer models of lever machines manufactured by AVM Corporation. The pack permits vote totals to be impressed directly from the vote counters onto a return sheet and multiple carbon copies of the return sheet. When uncovered, vote counters on machines manufactured by the Shoup Voting Machine Corporation appear immediately below the names of candidates and questions on the front of the machine. The face of the machine can be photographed to provide a record for checking the written entries on the return sheet. AVM or Shoup voting machines are used in 119 of Kentucky's 120 counties. Legislative Research Commission, Mechanized Vote Recording; telephone interview with Charlotte Mullins, Executive Director, State Board of Elections, 9 May 1979; and interview with R. J. Harp, 10 May 1979.

11. Institute for Research in Public Safety, Indiana University, Contested Elections and Recounts, Volume I: Federal Perspective (Washington, D.C.: National Clearinghouse on Election Administration, Federal Election Commission, 1978), pp. 21-22 and 29-30.

12. Ibid., p. 30.

13. Fitzgerald v. Green, 134 U.S. 377, 10 S. Ct. 586 (1890), Walker v. United States, 93 F. 2d 383 (1937), and Chenault v. Carter, Ky., 332 S.W. 2d 623 (1960). If a state lacks a procedure for determining contests regarding the appointment of its presidential electors, federal law provides for congressional resolution of issues that may result. 3 U.S.C.A., Sec. 15.

14. Office of the Attorney General, Commonwealth of Kentucky, Opinion No. 77-386, June 29, 1977.

15. KRS 242.120 erroneously cites KRS 122.070 to 122.100 as the laws governing contested general elections of county officers. In 1974 Acts of the General Assembly, Chapter 130, KRS 122.070 to 122.100 were repealed and recodified as KRS 120.155 to 120.185.

16. See also Lyttle v. Wilson, 252 Ky. 392, 67 S.W. 2d 498 (1934).

17. Institute for Research in Public Safety, Indiana University, Contested Elections and Recounts, Volume II: State Perspective, p. 157.

18. Ibid., p. 164.

19. See dissenting opinion of Judge Hobson in Pratt v. Breckinridge, 112 Ky. 1, 46, indicating that this policy predates the 1891 Kentucky Constitution.

20. Municipal Issues Task Group, Local Government Statute Revision Commission, Proposed Municipal Legislation: Report of the Task Group on Municipal Issues to the Local Government Statute Revision Commission (Frankfort: Local Government Statute Revision Commission, March, 1979); April 16, 1979 memorandum from Jamie Franklin, Local Government Statute Revision Commission, transmitting 80 BR 78 as revised by the Commission; and June 18, 1979 conversation with David Morris, Cities Committee Staff Administrator, Legislative Research Commission.

21. Institute for Research in Public Safety, Volume II, p. 47.

22. In Hatcher v. Ardrey, 242 S.W. 2d 105, 107 (1951), the court stated that "the scope of the recount will depend upon the respective demands of the parties and upon the establishment of the integrity of the ballots." It further stated that although the initial petition need not request a full recount, the candidate initially petitioning for a primary or general election recount must execute bond "sufficient to cover all of the potential costs of the recount proceeding."

23. Institute for Research in Public Safety, Volume II, pp. 45-88 and Appendix B, and Volume III: Legal Memoranda.

24. Ibid., Volume II, pp. 50-52, and Volume III, pp. MA1-12 and RI1-10.

25. Ibid., Volume II, pp. 51-54. The twenty-one states are Alaska, Ari-

zona, Colorado, Connecticut, Florida, Georgia, Maine, Michigan, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Utah, Vermont, Washington, Wisconsin and Wyoming.

26. Ibid., pp. 173-174 and 203-205. Sixteen states do not require advance security to obtain a recount, and one leaves the issue of security to the court's discretion.

27. Ibid., Appendix B, and Volume III, pp. ID7-8.

28. Ibid., Volume II, pp. 129-130.

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APPENDICES

APPENDIX I

Constitutional and Statutory Laws Governing Election Contests and Recounts

I. Primary Nominating Elections

- A. Contests: KRS 120.055 to 120.085
- B. Recounts:
 - (1) Recanvass of voting machines: KRS 117.305
 - (2) Recount of votes generally: KRS 120.095

II. General Elections of Officers

A. Most State, District and Local Offices

- (1) Contests: KRS 120.155 to 120.175, Kentucky Constitution, Section 153
- (2) Recounts:
 - (a) Recanvass of voting machines: KRS 117.305
 - (b) Recount of votes, generally: KRS 120.185

B. U.S. Congress

- (1) Contests: U.S. Constitution, Article I, Section 5; (Representatives) 2 U.S.C.A., Section 381, et seq.
- (2) Recounts:
 - (a) Recanvass of voting machines: KRS 117.305
 - (b) Recount of votes, generally: U.S. Constitution, Article I, Section 5; (Representatives) 2 U.S.C.A., Sec. 381, et seq.

C. Presidential Elections

- (1) Contests: 3 U.S.C.A. 15 or 3 U.S.C.A. 5, KRS 120.155 to 120.175 and Article II, Section 1 of the U.S. Constitution
- (2) Recounts:
 - (a) Recanvass of voting machines: KRS 117.305
 - (b) Recount of votes, generally: 3 U.S.C.A. 15 or 3 U.S.C.A. 5 and KRS 120.185, and Article II, Section 1 of U.S. Constitution

D. Governor and Lieutenant Governor

- (1) Contests: KRS 120.195 and 120.205; Kentucky Constitution, Section 90.
- (2) Recounts:
 - (a) Recanvass: KRS 117.305
 - (b) Recount: KRS 120.195 and 120.205 (At discretion of General Assembly)

E. General Assembly

- (1) Contests: KRS 120.195 and 120.215; Kentucky Constitution, Section 38.
- (2) Recounts:
 - (a) Recanvass: KRS 117.305
 - (b) Recount: KRS 120.195 and 120.205 (At discretion of House and Senate)

F. City Legislative Bodies in Cities with Council Form of Government

- (1) Contests (Class of City): KRS 83.470 (1st class); KRS 84.060 (2nd class); KRS 85.070 (3rd class); KRS 86.060 (4th class); KRS 87.040 (5th class); KRS 88.050 (6th class); KRS 120.155 to 120.175 if majority of council seats are contested: Jackson v. Randolph, 1958.
- (2) Recounts:
 - (a) Recanvass: KRS 117.305
 - (b) Recount: Same as Contest

G. Mayor of City of the Fifth Class and Elected City Marshal of City of the Sixth Class

- (1) Contest: KRS 87.180 (5th class); KRS 88.190 (6th class); If city fails to enact ordinance governing contest, KRS 120.155 to 120.175 apply.
- (2) Recount: Same as Contest

III. Elections on Public Questions

A. Statewide Public Questions including Constitutional Matters

- (1) Contests: KRS 120.280 to 120.300
- (2) Recounts: Same as Contest

B. Most County, City and District Public Questions

(1) Contests: KRS 120.250 to 120.270

(2) Recounts: Same as Contest

C. Local Option

(1) Contests: KRS 242.120

(2) Recounts: Same as Contest



GENERAL ASSEMBLY COMMONWEALTH OF KENTUCKY

REGULAR SESSION 1978

HOUSE RESOLUTION NO. 73

THURSDAY, MARCH 9, 1978

The following bill was reported to the Senate from the House and ordered to be printed.

A CONCURRENT RESOLUTION directing the Legislative Research Commission to study the Kentucky Revised Statutes relating to contested elections for the purpose of clearly defining the procedures for contesting or recounting any election and making such procedures consistent for all elections.

WHEREAS, there are now different procedures for contesting each type of election, i.e., primary, general, governor and lieutenant governor, a public question and constitutional amendments, and the differences are unnecessary; and

WHEREAS, there are variances in filing deadlines for election contests - primary, 15 days from the primary; general, 30 days after election day; governor and lieutenant governor, 30 days after final action of the state board of elections; members of the General Assembly, 15 days after the final action of the county board of commissioners; public question, 30 days after the election; constitutional amendments, 15 days after the official canvass and announcement of the vote by the state board of elections; and

WHEREAS, there is a need for separate sections for recounts and election contests so as to clearly distinguish the two procedures; and

WHEREAS, the statutes are unclear on who is to conduct a recount; and

WHEREAS, there is a need to closely examine the statutes and develop clearly-defined procedures for conducting recounts and contesting elections;

NOW, THEREFORE,

Be it resolved by the House of Representatives of the General Assembly of the Commonwealth of Kentucky, the Senate concurring therein:

1 Section 1. That the Legislative Research Commission
2 is directed to conduct a study of the Kentucky Revised
3 Statutes relating to election recounts and election con-
4 tests for the purpose of developing consistency and
5 clarity in the procedures for conducting recounts and
6 contesting elections.

7 Section 2. The findings and recommendations of this
8 study shall be reported to the Legislative Research Com-
9 mission and to the appropriate interim committee no later
10 than June 1, 1979.

11 Section 3. Staff services to be utilized in
12 completing this study are estimated to cost \$12,000.
13 These services shall be provided from the regular commis-
14 sion budget and are subject to the limitations and other
15 research responsibilities of the commission.

