



**Interim Report to the  
Citizens of Washington State:**

***Analysis of the  
2004 Governor's Election***

**Evergreen Freedom Foundation  
Voter Integrity Project  
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## **Executive Summary**

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Free and fair elections are indispensable to political freedom. Unfortunately, the election process in our state has been badly compromised, beginning many years ago according to some reports. The uncorrected problems grew exponentially, and a few more were added to the pile in 2004.

By the time our November 2004 election came around, conditions for the perfect storm were at hand—and it occurred. As a result of significant abuses, ranging from fraud to incompetence, we must conclude that our November 2004 elections do not represent a full and fair vote tally of lawfully cast ballots.

The election process must be uniform and secure, and this is the primary job assigned to our state's chief election officer, the Secretary of State, and to every county auditor. But our elections this past November were neither uniform nor secure, because many election officials from the top down did not comply with state and federal election laws. The resulting abuses affect more than the gubernatorial contest, and they impact both the Republican and Democrat parties.

Virtually every problem we have identified had already been addressed in reform legislation passed by the federal government in 2002 and our state government in 2003. Unfortunately, most of our state election officials did not implement these new laws, which went into effect July 2004. It was so bad, that the attorney arguing the recanvassing issue for the Secretary of State before our Supreme Court did not use the current law to build his case and argue his points. The attorney for the Democrats did the same thing, resulting in a “recanvassing” decision from our justices that actually violates existing law.

Most of our findings have been released over the past few months on several Seattle talk radio shows, but many citizens live beyond the reach of those stations. Also, several other individuals and organizations are conducting excellent research, and we are trying to compile the best of it into one document. Of course, new findings will surface daily, but this document will lay the foundation for whatever follows.

The issues we cover in our report include:

- Convicted felons have had access to King County's election-related computer system.
- Homeless people with no proof of residency were allowed to list county buildings as their place of residence.
- Illegal aliens voted.
- An undetermined number of soldiers didn't get to vote because they received their ballots late.
- King County had identified outstanding concerns about its vote-counting software and elections systems that were not addressed prior to this election. The Secretary of State's report about King County's problems warns officials that these problems could “significantly increase the possibility of a successful election contest.”

- At least 8,419 more votes were cast in five counties than the number of people who signed in to vote.
- People who have died are not removed from eligible voter lists in a timely manner. Numerous examples exist of dead people casting votes that were counted.
- On nine occasions, King County election officials discovered unsecured ballots and added them to the vote totals.
- Hundreds of provisional ballots were counted before determining if the individuals were even eligible to vote.
- More than 55,000 ballots were changed (“enhanced”) by King County election workers, in some cases wiping out the original intent of the voter.
- Ballots were later found unsecured in voting machines, but they were counted.
- The legislature charged the Secretary of State with writing 52 new rules and canvassing board limitations to implement the new law. He did not do this. As a result, no consistency in standards existed from one county to the next in regard to preparation of ballots, the operation of vote tallying systems, canvassing and recounts, absentee ballots and ballot security.
- Hundreds of signatures on provisional ballots appear to be fraudulent.
- Voters’ privacy rights were violated when a King County judge ordered their names released to the Democrat Party.
- The Secretary of State certified the election on December 30, guaranteeing by doing so that it was “a full, true and correct representation of the votes cast for the issues and offices.” He knew this was not the case.

**Our report concludes, at a minimum, gross incompetence and negligence occurred in the election process, and in some cases, fraud was committed.**

Restoring free and fair elections is not optional, but most legislators and election officials appear reluctant to enforce the law and make necessary procedural changes. This means citizens must be relentless in pursuit of reform. In this report, citizens will not only find a compilation of valuable data, they will also find numerous recommendations and action items to help make election reform a reality.

## Overview

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The Evergreen Freedom Foundation (EFF) completed an in-depth review of the 2004 governor's race because we believe free and fair elections are indispensable to political freedom and the future of our Republic. It is essential that the sanctity of the ballot be secured in order to ensure legitimate elections and maintain public confidence in our election system.

The election process must be uniform and secure. This is the primary job of our state's chief election officer, the Secretary of State, and each county auditor. But our elections were neither uniform nor secure. Our investigation concluded that election officials at the local and state levels did not fully comply with state and federal election laws, and the resulting abuses prevented a full and fair vote tally of lawfully cast ballots. This affects the Democrat, Libertarian and Republican Parties and every election for every office. It threatens to undermine our entire election system.

On January 16, 2005—eleven weeks after the election—both Secretary of State Sam Reed and King County Supervisor of Elections Dean Logan were interviewed on a Seattle TV news program. Both said they weren't sure who won the Governor's election!<sup>1</sup> On January 17, Reed said 20 of the state's 39 counties had problems and cautioned lawmakers not to expect perfection in a state with three million voters. He went to note the inevitability of a small error rate by "human beings working their hearts out. This is a very, very human process." Dean Logan said, "It's certainly not pretty...it was a messy process."<sup>2</sup> The systematic failure by state and local elections officials to implement federal and state laws to protect the integrity of the ballot has seriously undermined the confidence of the voters.

The Secretary of State is the state's chief election officer for all federal, state, county, city, town, and district elections.<sup>3</sup> The Secretary of State's principal job is to ensure uniformity and security for the election process, including those state election activities required by federal law. For the 2004 General election, the Secretary of State failed to execute his three most important duties: 1) to see that ballots are handled across the state in a uniform manner; 2) to see that procedures are in place to protect our election system from the possibility of fraud, and 3) to ensure that votes are accurately tallied.

Elections officials at the state and county level appeared to ignore the key provisions of the Washington State Constitution (Article VI) particularly the requirement that only legal residents who meet the registration law "shall be allowed to vote."

The "Rule of Law" appeared to be disregarded in the desire to get as many people to vote as possible. The right to vote is a restricted right called the "elective franchise", but elections officials are treating the "right to vote" as an unrestricted right. It is an "elective franchise" restricted by the Constitution and state laws which means it is restricted to:

1. Citizens of the United States (Article VI, Section 1);

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<sup>1</sup> "What Went Wrong?" Up Front with Robert Mak. KING, Seattle, WA. 16 Jan. 2005.

<sup>2</sup> McGann, Chris. "Senate panel hears of vote woes." Seattle Post-Intelligencer 18 Jan. 2005.

<sup>3</sup> RCW 29A.04.230

2. Citizens who have lived in Washington state, county, and precinct thirty days immediately preceding the election (Article VI, Section 1);
3. Citizens who are eighteen years of age or older (Article VI, Section 1);
4. Citizens who have not been convicted of infamous crimes (unless their civil rights have been restored) (Article VI, Section 3); and
5. Persons who are judicially declared mentally competent (Article VI, Section 3).

Government officials have not treated the integrity of the elections as a core function of government. In many areas, the election systems are archaic. Elections should be recognized as a core function of government with the standard that every qualified citizen should be encouraged to cast a ballot and know that his or her vote won't be negated by voter fraud. The entire election process must be reliable, accurate, open and transparent.

Election officials have strived for years to increase the voter turnout by making it easier for people to vote while they have not been attentive to the Constitution and state laws regarding voting, particularly the constitutional requirement in Article VI, Section 7 that reads, **“the legislature shall enact a registration and shall require compliance with such law before any elector shall be allowed to vote.”**

Years ago voting fraud was controlled because most voters voted in person at a precinct, and there the precinct workers (one from each of the major political parties) checked voters' identification. However, in recent years, the ability to detect fraud has been reduced by the following facts:

1. Voters are no longer required to show identification at the polls.
2. The increase in absentee voting and lack of requiring identification of absentee voters.
3. Washington state's permissive motor vehicle licensing laws permit illegal aliens to get licenses, further adding to the risk of illegal voters.
4. Motor voter registration and registering voters at welfare offices.
5. State employees ask individuals applying for licenses, renewing licenses, or applying for welfare if they would like to register to vote. No proof of identification or proof of citizenship is required. It is very easy for individuals to vote regardless of whether they meet the constitutional requirements to be a voter.

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### **Secretary of State Election Reform Non-compliance**

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As a result of voting problems in the 2000 presidential election, particularly the Florida recounts, Congress passed the Help America Vote Act (HAVA) of 2002. Through special request legislation from the Secretary of State,<sup>4</sup> the Washington state legislature addressed HAVA and other election concerns in a major rewrite and reorganization of the state election laws in 2003. The changes were made effective July 1, 2004. Sadly, most state and many county election officials have displayed an amazing lack of knowledge of the current state and

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<sup>4</sup> 2003-04 Senate Bill 5221, signed by Gov. Gary Locke on May 7, 2003.

federal election laws and particularly the reorganization of state election laws effective July 1, 2004.

As part of the legislation, the Secretary of State was required to issue new or revised administrative rules (WACs) in 52 areas. **He did not do this!** Instead the Secretary of State issued an emergency WAC on May 4, 2004, nearly a year after Governor Locke signed the reform legislation, and incorrectly stated the purpose of the reforms: “The purpose [of the emergency WAC] is to update all of the statutory references in Title 434 from Title 29 RCW to Title 29A RCW after the legislature passed a bill reorganizing Title 29 RCW into Title 29A RCW. The only changes to the WACs were to amend the citations to the appropriate section in Title 29A.”

This meant that county election officials were never trained to accurately follow new state and federal election laws. In most cases, county auditors did not update their procedure manuals and properly train election workers.

On November 24, the Secretary of State acknowledged there were no rules for treating absentee and provisional ballots the same across the state. On December 3, he acknowledged there were no rules (WACs) for recounts. But the 2003 Legislature charged him with the responsibility to create these rules. Furthermore, in the first related Supreme Court case in December 2004, the attorney arguing for the Democrats pointed out that “the Secretary of State has never issued uniform standards for county auditors to use in determining whether signatures are sufficiently different to justify a rejection of a vote.”<sup>5</sup>

Additionally, the Secretary of State did not ensure that county election officials had current voting laws. The Thurston County canvassing board, for example, was utilizing the 2002 RCWs (which had been changed effective July 1, 2004).<sup>6</sup> All of this is a gross violation of state law.

The reform legislation clarified limits on canvassing boards requiring that all canvassing/re-canvassing be done by the date the Secretary of State certifies the election.<sup>7 8</sup> This year that was November 17, 2004. No additional canvassing/re-canvassing should have been permitted in the recount process after that date. But it was, with the approval of the Secretary of State.

As the Secretary has noted publicly, each of our 39 county election offices operates independently and may interpret the law differently. The Secretary of State, however, is the “chief election officer for all federal, state, county, city, town, and district elections.”<sup>9</sup> One of his principal responsibilities is to ensure uniform standards exist. If a county auditor violates those standards once they are developed, he or she is responsible under the law. To ignore

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<sup>5</sup> Petitioners’ Motion and Brief in Support of Emergency Partial Relief, December 3, 2004.

<sup>6</sup> Cook, Andy. E-mail to Tom McCabe.

<sup>7</sup> RCW 29A.04.611 and RCW 29A.60.210(10)

<sup>8</sup> RCW 29A.60.210

<sup>9</sup> RCW 29A.04.230

creating the uniform standards in the first place using the argument that each county may interpret the law differently, is not a responsible position.

The argument used by the Secretary of State to defend these actions is that his office was too busy with the potential and actual changes brought about by the presidential primary debate. However, the law was passed by the 2003 Legislature and the Secretary of State had thirteen months to revise the WACs.

The problems in the November 2004 election would have largely been eliminated had the Secretary of State and county election officials complied with the federal and state Constitutions and laws. This includes the thousands of disenfranchised military voters; provisional ballots being inserted directly into the vote counting machines; inconsistent standards in reviewing provisional ballots, verifying signatures, reviewing absentee ballots, counting ballots; lack of ballot privacy; lack of ballot security; illegal canvassing/recanvassing on recounts; and voting by felons and dead people.<sup>10</sup> In particular, the Secretary should have instituted:

- Rules to establish consistency among counties of the state in the preparation of ballots, the operation of vote tallying systems and the canvassing of primaries and elections.<sup>11</sup>
- Standards and procedures to prevent fraud and to facilitate accurate processing and canvassing of absentee ballots and mail ballots.<sup>12</sup>
- Standards and procedures to guarantee the secrecy and security of absentee ballots and mail ballots.<sup>13</sup>
- Laws to establish uniformity among counties in the state in the conduct of absentee voting and mail ballot activities.<sup>14</sup>
- Standards and procedures to accommodate out-of-state voters, overseas voters, and service voters.<sup>15</sup>
- Procedures for a statutory recount.<sup>16</sup>

## **Violations of State Election Law – Brief Summary**

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The following items were clear violations of Washington state law:

- On nine occasions, King County elections officials discovered unsecured ballots and added them to the total count.
- 437 provisional ballots (ballots that by law must be checked to see if the registration is valid) were counted without first being verified.<sup>17</sup> In King County, at least 348

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<sup>10</sup> RCW 29A.04.611

<sup>11</sup> RCW 29.04.611(10)

<sup>12</sup> RCW 29.04.611(33)

<sup>13</sup> RCW 29.04.611(34)

<sup>14</sup> RCW 29.04.611(35)

<sup>15</sup> RCW 29.04.611(36)

<sup>16</sup> RCW 29.04.611(40)

<sup>17</sup> McGann, Chris. "State GOP gets specific about election charges." Seattle Post-Intelligencer 19 Jan. 2005.

provisional ballots were fed directly into the vote-counting machine. In Pierce County, 77 provisional ballots were counted at the polling places without verification in violation of state law. In Stevens County, approximately 12 provisional ballots were cast by individuals who were not eligible to vote (nine because they had never registered to vote and three because their registrations had been cancelled).<sup>18</sup>

- An estimated 3,500 duplicate absentee ballots were mailed to voters. After the error was discovered, King County advised the voters to vote on one ballot and discard the other.<sup>19</sup>
- At least 1,108 convicted felons, whose voting rights had not been restored, voted.<sup>20</sup>
- At least 45 dead people voted.<sup>21</sup>
- At least 15 people voted twice.<sup>22</sup>
- At least 30 federal write-in ballots with a straight party line vote were not counted in the governor's race in King County.<sup>23</sup>
- Eighty-nine voters voted in King County whose registration date on the King County voter files was after the deadline for registering to vote. However, their voter registration deadline was changed to a date before the deadline sometime between December 29, 2004, and January 11, 2005. King County explained this as a human error. A 100 percent check of the actual voter registration should be made. This can only be done during "discovery" in a lawsuit.
- A "no" ballot was counted as a vote for Gregoire.
- A "Christine Rossi" ballot was counted as a vote for Gregoire.
- 55,177 ballots were "enhanced," and 4,962 were duplicated in King County.<sup>24</sup>
- Virtually no procedures were used to verify whether a person who voted was actually eligible to vote.
- When the Secretary of State certified the election on December 30, at least 8,419 more votes were counted in five counties than the number of voters who had cast votes. The law says there must be a legal voter for every vote counted. In King County alone,

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<sup>18</sup> Timothy Borders, et. al. v. King County and Dean Logan, its Director of Records, Elections and Licensing Services; et. al. Declaration of Michael Sheridan in Support of Election Contest Petition. Superior Court of Washington (Chelan County), 2005.

<sup>19</sup> [www.metrokc.gov/elections/news/2004\\_10\\_17.htm](http://www.metrokc.gov/elections/news/2004_10_17.htm)

<sup>20</sup> Modie, Neil. "Who won illegal votes of felons?" Seattle Post-Intelligencer 23 Feb. 2005.

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Ervin, Keith. "Federal ballots get county's attention." Seattle Times. 20 Jan. 2005.

<sup>24</sup> David, Postman. Gilmore, Susan. "Sorting through recount muddle." The Seattle Times. 26 Jan. 2005

5,845 more ballots were cast than voters in 1,318 precincts. In 1,011 precincts, 3,751 more voters were tallied than ballots. This brings the total discrepancies to 9,596 in 2,329 precincts.<sup>25</sup> These reconciliation errors raise serious questions as to how the county canvassing boards could certify the election as a “full, true, and correct representation of the votes cast in the county.”

- The Secretary of State issued administrative rules (WACs) on residency which allowed homeless individuals to claim the King County Elections Office as their residence in violation of state law and the Constitution.
- In some counties, the names and addresses of voters who cast provisional ballots were released to political parties. Political workers sought out these provisional voters and asked them for signatures to validate already-cast ballots, but only *if* the voter had chosen that political party’s candidate. This violates federal and state law as well as the State Constitution. Yet the Secretary of State said nothing, even though, in 2002, he wrote a letter to *The Olympian* stating that election officials could not contact voters on questionable ballots. “No such mechanism exists to do so in state law, and were it to exist, it would be in violation of the constitutional rights of Washington state’s voters.”<sup>26</sup>
- King County elections officials failed to maintain security of both valid ballots and unused ballots. Up to 14 King County employees had access to the vault where the unused ballots were stored. In at least one precinct, tallies during the recount process were significantly different than the actual count in the precinct on election night. Gregoire votes had gone up and Rossi votes had gone down. Absentee ballots had been mixed with precinct ballots, and the audit trail was lost.
- Untested election software (not tested to federal standards) was used in the November 2004 election in Chelan, King, Kitsap, Klickitat, Pierce, Snohomish and Yakima counties.
- Thousands of military ballots were not received back in time to be counted because they were not mailed out on a timely basis.

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### **Violations of the Equal Protection Provision of the U.S. Constitution**

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The December ruling of the Washington State Supreme Court allowing King County to recanvass hundreds of ballots was made after every other county in the state had already certified their results. This meant that special rule applied only to King County. Using inconsistent rules like this in various counties violates the equal protection provision of the U.S. Constitution.

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<sup>25</sup> Vance, Chris. E-mail to Bob Williams. 15 Feb. 2005

<sup>26</sup> Reed, Sam. Editorial. [The Olympian](#). 27 Feb. 2002.

The equal protection clause ensures that all citizens are treated equally under the law and are guaranteed the right to privacy regarding how they have voted. The same voting privacy protection afforded to citizens under the Washington State Constitution was violated by state election authorities. Article VI, Section 7 of the State Constitution was repeatedly violated by state and local election officials by permitting individuals to vote who did not meet the requirements of the state registration laws.

The court approved King County to recanvass 573 disputed ballots; they recanvassed 735! Meanwhile, the Washington State Republican Party presented 275 voter statements to election officials in 19 counties, and all of the counties refused to reopen their certification process.

The following eight items also violate that same provision:

- When it came to “enhancing” ballots (so the computer could read a ballot), the Secretary of State did not issue any rules to ensure uniformity around the state. As a result, extremely different standards were used in different counties.
- The failure of the Secretary of State to issue uniform election rules meant that counties employed disparate tests and procedures for comparing signatures. (More than 3,400 ballots in Washington state were rejected in the November election because the signatures didn’t match those on file with elections officials.) No continuity existed between how counties *excluded* signatures. Signature-related rejections made up more than half of all rejections in Skamania County, about one-third in King County and less than one percent in Skagit County. Some counties did not reject any signatures. In one county, there are four levels of signature reviews; in another, just one. Workers in some counties scrutinized absentee signatures to find six identifying traits while others merely eyeballed the handwriting.<sup>27</sup>
- Some counties contacted absentee voters whose signature did not match the one on file with the county while others did not count the ballot. Once again, as required by law, the Secretary of State did not issue rules for uniform standards in handling and canvassing absentee ballots in violation of RCW 29A.04.611(34).
- The failure of the Secretary of State to issue uniform canvassing rules meant different procedures were used to validate and count ballots around the state.
- The Secretary of State issued instructions (not an administrative rule) to counties to take two steps that changed the rules **after** the election. First, they were to inspect all ballots to look for possible under-votes for one of the candidates. Second, they were to inspect each ballot for write-ins, particularly if a voter wrote in the name of one of the candidates already on the ballot, but did not check off the name of that candidate in the proper place on the ballot. Such a finding was to translate into a vote for that candidate. By law, administrative rules for these procedures were to be issued prior to July 1, 2004.

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<sup>27</sup> Willmsen, Christine. Kelleher, Susan. “Ballot checks vary widely across state.” The Seattle Times. 19 Dec. 2004

- When it came to recounts, the Secretary of State did not issue required administrative rules to ensure uniformity and consistency. Thus, different procedures were used around the state for the recount.
- In King County, election workers were inconsistent in deciding whether a vote should be disqualified as an “over vote” (a vote for two candidates). County officials changed the rules in the midst of the recount.
- Unequal treatment in validating provisional ballots occurred because of a lack of standards by the Secretary of State. In some counties, 41 percent of the provisional ballots were validated, while in other counties it was more than 90 percent. In at least five counties (Adams, Chelan, Whitman, Walla Walla and Wahkiakum), signatures on provisional ballots were not checked. Some counties contacted voters whose signatures did not match the one on file with the county while others did not count the ballot.

### **Absentee Ballot Irregularities**

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In some counties, election board workers determined the validity of signatures on absentee ballots.

In other counties, the job was done by the canvassing board.

In some counties, people who cast ballots and were questioned when their signatures didn't match were notified by the county of the problem.

In other counties, they weren't.

Thus in some counties the questionable ballots were counted; in others, they were thrown out.

**This is a failure of the Secretary of State to comply with state law and issue rules and regulations (WACs) that spell out in detail consistent rules on how votes will be distributed, counted and what to do if there is a question about a vote or the voter.<sup>28</sup>**

On November 24, 2004, the Secretary of State agreed this was a problem and said he would use his rule-making authority to ensure absentee ballots and provisional ballots are treated the same across the state.<sup>29</sup> Needless to say, this should have occurred before the election, but even post-election, uniformity did not occur.

- King County sent absentee ballots to individuals for whom they did not have signatures on the computer file. This is a violation of the constitution and state law.

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<sup>28</sup> RCW 29.04.611(34)

<sup>29</sup> “Historical race demonstrates need for serious election reform.” [Washington Secretary of State website](#). 24 Nov. 2004.

King County in October sent an estimated 3,500 voters duplicate absentee ballots to the same address. Those voters were advised to vote and return one ballot and discard the other. Election officials wanted to assure the public that safeguards were in place to ensure that the votes were only counted once per voter.<sup>30</sup>

- King County initially rejected 573 absentee ballots that did not have matching signatures. The King County Superintendent of Elections reported that these signatures on the absentee ballots had been checked twice, first by an election worker and then by a supervisor, against the digital signatures before they were rejected. Because the county was not able to find digital signatures for the 573 ballots, they were rejected as invalid.<sup>31</sup> However, in the manual recount, King County illegally recanvassed 735 ballots and decided to count 566 of them. This raised Gregoire's lead from 10 votes to 130.

## **Military Ballots**

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More than 8,000 military ballots were not counted because they were not mailed out on a timely basis.<sup>32</sup> Election officials dispute this and say they mailed all the ballots by October 8. But the Department of Defense and the United States Post office had already recommended mailing absentee ballots at least 45 days prior to the deadline for the receipt of the ballots. For states with late primaries, such as ours, they recommended a state write-in ballot.<sup>33</sup> Instead, our state was the last in the nation to get ballots out to the military, and King County election officials shifted the responsibility to the Department of Defense and the Post Office.<sup>34</sup>

In King County, 87.9 percent of the *absentee* ballots were returned and counted, but only 81.7 percent of the *military* ballots were returned and counted. The response of election officials has been gravely disappointing.

## **Residency Violations**

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It appears no procedures were used to verify whether a person who registers to vote is actually a U.S. citizen and a Washington resident and, therefore, eligible to vote. This is a violation of the state constitution,<sup>35</sup> state laws<sup>36</sup> and the federal Help America Vote Act.

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<sup>30</sup> "Safeguards in place for voters who receive duplicate ballots." [King County Elections Information website](#). 17 Oct. 2004.

<sup>31</sup> Washington State Republican Party, an unincorporated association, Christopher Vance, a citizen of Washington state; and Jane Milhans, a citizen of Pierce County v. King County Division of Records, Elections and Licensing Services; and King County Canvassing Board. Declaration of Dan Brady. Superior Court of Washington (Pierce County), 2004.

<sup>32</sup> EFF Public Records request to 39 county auditors.

<sup>33</sup> Report of the U.S. Election Assistance Commission on Best Practices for Facilitating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act. Sept. 2004

<sup>34</sup> 2004 Elections Report to King County Executive Sims. Feb. 2005, pg 11.

<sup>35</sup> Article VI, Sections 1 and 7

<sup>36</sup> RCW 29A.04.151; RCW 29A.08.230 and RCW 29A.08.110

King County is the perfect example for what not to do in determining residency for voters. Precinct 1823 is particularly revealing: more than 300 individuals who voted gave *500 4th Avenue, the King County Administration Building*, as both their residence and mailing addresses. Some who voted using the county address gave overseas mailing addresses, such as India, Japan, and Switzerland. Forty-eight people in the infamous Precinct 1823 listed their residence as 511 3rd Avenue. According to weblogger and investigator Stefan Sharkansky, this appears to be some sort of private mailbox service. In the machine recount, Precinct 1823 gave 203 votes to Gregoire and 87 votes to Rossi, for a net Gregoire gain of 116 votes.

Sharkansky continues: “And then there are the two Messrs. Harder—Mike Harder of 509 3rd Avenue, Apt. 507, who registered to vote on April 28, 2004, and Michael D. Harder of 509 3rd Avenue, Apt. 507, who registered to vote on July 20, 2004. Both Messrs. Harder are flagged as permanent absentee voters.<sup>37</sup> 465 (61 percent) of Precinct 1823 voters registered during 2004 and nearly all of them “live” at 500 4th Avenue. By contrast, only 13 percent of all of King County voters registered in 2004.

The Secretary of State issued an administrative rule<sup>38</sup> on residency requirements that allows homeless people to register to vote and list their residence as the King County Administrative Building. As stated above this conflicts with the state constitution and several state laws. It also conflicts with statements on his webpage regarding residency requirements.<sup>39</sup>

There are numerous reports of Seattle voters claiming residence at their work location or a mailbox facility in violation of RCW 29A.04.151. Ongoing investigations are looking into this.

Kevin DeGraaf of Sammamish reported that his absentee ballot was not counted because he is registered at an address more than 10 years old, even though he got his absentee ballot mailed to his current address. His wife got her ballot at their current address also, but her vote counted because the King County records reflected the correct address.<sup>40</sup>

Donald Morin from Sumner reported that his mother’s absentee ballot was changed from his residence to her nursing home. She didn’t change it, and he has power of attorney for her, and he didn’t change the address either. Who made the change is still undetermined.<sup>41</sup>

In Clark County, individuals voted who showed Oregon driver’s licenses as well as a bill with a Clark County address. When questioned, these individuals said they were Clark College students. This is a violation of federal law, HAVA.<sup>42</sup> It also violates the state law on residency which says that no student gains residency just by attending school.<sup>43</sup>

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<sup>37</sup> [www.soundpolitics.com](http://www.soundpolitics.com). 22 Dec. 2004.

<sup>38</sup> WAC 434-208-100

<sup>39</sup> [www.secstate.wa.gov/elections/voterguide/faq2.aspx](http://www.secstate.wa.gov/elections/voterguide/faq2.aspx)

<sup>40</sup> [www.soundpolitics.com](http://www.soundpolitics.com). 1 Jan. 2005.

<sup>41</sup> Morin, Donald. Notarized letter from Morin to EFF. 17 Nov. 2004

<sup>42</sup> Tweet, Margaret. E-mail to Brent Boger.

<sup>43</sup> RCW 29A.04.151

King County Superintendent of Elections Bill Huennekens said if his office finds people who are registered at illegal addresses, he has no statutory authority to simply cancel their registrations.<sup>44</sup>

State law, however, requires the county elections division to send all new voters a registration card by first-class mail: “The postal service shall be instructed not to forward a voter registration card to any other address and to return to the auditor any card that is not deliverable.” If the card is returned as not deliverable, the auditor shall promptly send the voter a confirmation notice. Then, “the auditor shall place the voter’s registration on inactive status pending a response from the voter to a confirmation notice.”<sup>45</sup>

Stefan Sharkansky pointed out, “the existence of hundreds of registered voters at non-residential addresses is an obvious security hole, and the lack of procedures to prevent such registrations is an open invitation to commit fraud. When a voter is registered at a real address, her neighbors and others can verify for themselves whether that person is a live human being who is eligible to vote. When people are registered at private mailbox services, who knows who these people are, whether or not they even pick-up their mail there, whether they’re eligible and competent, or if they even exist?”

“Indeed, I’ve already found some seriously suspicious cases, such as where three or more people share the same mailbox, are all registered as permanent absentee voters and have unusual coincidences in names and voting history.”<sup>46</sup>

## **Failures in Ballot Security**

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State law has specific procedures for maintaining tight control of ballots once they are cast. Audit trails, sealed containers and specific accountability points exist for ballot protection. Election officials in at least five counties failed to maintain control of ballots, and they were unable to reconcile vote totals to the number of votes cast.

Jefferson County was an example of how to properly administer this portion of an election. Auditor Donna Eldridge and her elections staff reconciled the total number of voters who voted to the total ballots counted in all three counts before she certified the returns. We hope the procedures of this model are replicated across the state.

Prior to the election, state and King County election officials knew that King County had “significant shortcomings with basic election security” and that “serious concerns have been raised by national computer experts and local activists concerned with the security of elections, including the activities of the County’s major elections vendor.”<sup>47</sup>

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<sup>44</sup> [www.soundpolitics.com](http://www.soundpolitics.com). 30 Dec. 2004.

<sup>45</sup> RCW 28A.08.110

<sup>46</sup> [www.soundpolitics.com](http://www.soundpolitics.com). 27 Dec. 2004.

<sup>47</sup> King County Citizens’ Election Oversight Committee, Report on King County Elections, May 2004, pages 48-49

This same report also stated, “Although unlikely, if a malicious programmer did gain access to the tabulation programming, it would not be difficult to evade detection by the current testing process, because absentee counting is spread out over many days.”<sup>48</sup>

In October, King County mailed an estimated 3,500 voters duplicate ballots at the same address. Those voters were advised to vote and return one ballot and discard the other. King County officials alleged they had safeguards in place to ensure their votes count and that only one ballot per voter was counted.<sup>49</sup> EFF recommends a 100 percent audit be made of the individuals who were sent the duplicate ballots to make sure none of these absentee voters voted twice.

The Help America Vote Act information on the Secretary of State webpage indicates that “by 2004, individuals registering to vote must provide a drivers license number or the last four digits of their social security number if they do not have a drivers license. Individuals who do not have either are assigned a unique identification number. Election officials must check either the drivers’ license or social security number against numbers in existing databases.”<sup>50</sup>

This was not done! Because of this, thousands of ballots were illegally added to the vote count.

Kenneth Seal filed a declaration (in the Pierce County Superior Court lawsuit) claiming that the 573 ballots in King County that were the subject of the second Supreme Court decision were not secure. “Elections Division employees explained to me that neither observers nor deputies from the King County Sheriff’s Office went with ballots to the King County Administration Building. This was not normal procedure since ballots are always accompanied, when moved to another facility, by a deputy sheriff.”<sup>51</sup>

EFF has received reports that up to 14 employees in King County had access to the vault where the unused ballots were stored.<sup>52</sup> Dan Brady, an election observer for the Republican Party, also signed an affidavit on December 15 stating: “I understand that around-the-clock security by a deputy was not provided until after the machine recount began in late November. Furthermore, ballots that were rejected and not counted were not kept in the same manner as those ballots that were counted. Counted ballots were placed in sealed containers and kept in a fenced, locked area in the Mail Ballot Operation Satellite. Rejected ballots were not placed in sealed containers and were in open trays. Observers noted that the rejected ballots were not, at least on one occasion, kept in a fenced, locked area.”<sup>53</sup>

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<sup>48</sup> King County Citizens’ Election Oversight Committee, Report on King County Elections, May 2004, page 52

<sup>49</sup> “Safeguards in place for voters who receive duplicate ballots.” [King County Elections Information website](#), 17 Oct. 2004.

<sup>50</sup> [http://www.secstate.wa.gov/elections/reform\\_federal2.aspx?i=b](http://www.secstate.wa.gov/elections/reform_federal2.aspx?i=b)

<sup>51</sup> Washington State Republican Party, an unincorporated association, Christopher Vance, a citizen of Washington state; and Jane Milhans, a citizen of Pierce County v. King County Division of Records, Elections and Licensing Services; and King County Canvassing Board. Declaration of Kenneth Seal. Superior Court of Washington (Pierce County), 2004.

<sup>52</sup> McHorwitz, Marcia. E-mail to Anne Cowles.

<sup>53</sup> Brady Declaration (see footnote 20).

In King County, ballot security was particularly bad. After the polls close, ballots are to be kept in sealed containers that are under the control (watchful eye) of at least one Democrat and one Republican. Control logs are to be maintained. This did not occur.

Furthermore, King County kept unused ballots in the same room as used ballots, even during the recounts. This is a violation of common sense and state law.

## **Canvassing Problems**

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State laws regarding the counting of ballots (canvassing) are contained in a separate section of the law RCW 29A.60. These laws were revised and reorganized in 2003 and made effective July 1, 2004. The Secretary of State failed to update the rules (WACs) to reflect these changes.

“‘Canvassing’ means the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns of a primary or general election and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election.”<sup>54</sup>

The clear intent of the law is to count the ballots and correct any errors under the canvassing/re-canvassing section of the law, RCW 29A.60. Any errors had to be corrected and documented prior to the certification, which was November 17.<sup>55</sup>

No uniform state standards were used to canvass ballots. **This is in violation of RCW 29A.04.611(10).** For example, on December 19, the *Seattle Times* wrote, “More than 3,400 ballots in Washington were rejected in the November election because the signatures didn’t match those on file with elections officials. And counties excluded them at wildly different rates. Signature-related rejections made up more than half of all rejections in Skamania County, about one-third in King County and less than 1 percent in Skagit. Some counties did not reject any signatures.... Signatures might go through four levels of review in one county and in another just one. Workers in some counties scrutinize absentee signatures to find six identifying traits, while others merely eyeball the handwriting.”<sup>56</sup>

Specifically, in King County election workers were inconsistent in deciding whether a vote should be disqualified as an “overvote” (a vote for two candidates). The county issued guidelines several days into the machine recount, then told counting teams after the hand recount had started to direct all potential overvotes to the partisan canvassing board. **This is a violation of state law.**<sup>57 58</sup>

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<sup>54</sup> RCW 29A.04.013

<sup>55</sup> RCW 29A.60.210

<sup>56</sup> Kelleher, Susan, and Christine Willmsen. “Ballot checks vary widely across state.” *The Seattle Times* 19 Dec. 2004.

<sup>57</sup> RCW 29.04.611(10).

<sup>58</sup> [www.soundpolitics.com](http://www.soundpolitics.com). 22 Dec. 2004.

More than 3,400 ballots in Washington State were rejected in the November election because the signatures didn't match those on file with elections officials. No continuity existed between how these counties excluded signatures. Signature-related rejections made up more than half of all rejections in Skamania County, about one-third in King County and less than 1 percent in Skagit. Some counties did not reject any signatures. Signature review went through different reviews in the various counties.

As we tracked county election returns on the Secretary of State's website, we noticed the numbers frequently changed, but often didn't tie out. For example, in Grays Harbor County, on November 15, election officials discovered they had overcounted their votes and had sent a false total to the Secretary of State. On November 16, Grays Harbor estimated they had 1,221 votes to be counted. After the votes were counted, the vote count rose by 2,060.<sup>59</sup>

- In Cowlitz County, the number of ballots counted went up by 73. But officials reported they only had 50 ballots to be counted and still had 25 left.
- The Secretary of State's webpage reflected the lack of control over ballots:
  - *November 15.* Ballots left to count decreased by 19,957, but ballots counted increased by 32,104.
  - *November 16.* Ballots left to count decreased by 15,514, but ballots counted increased by 15,229.
  - *November 17. 9 a.m.* Ballots left to count decreased by 6,152, but ballots counted increased by 8,184.
  - *November 17. 11:50 a.m.* Ballots left to count decreased by 466 to 5,661, but ballots counted increased by 1,095.

## **Provisional Ballot Violations**

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According to WAC 434-253-047, "a special ballot (i.e. a provisional ballot) cannot be counted if the registered voter did not sign either the poll book or the special ballot envelope." First-time voter identification is required. However, the Secretary of State failed to issue guidelines on provisional ballots to comply with the federal Help America Vote Act. Accepting ballots for first-time voters without requiring identification is a clear violation of the HAVA.

The federal law describing how provisional ballots are to be administrated and counted was ignored. Section 5 of the federal law gives the individual who casts a provisional ballot written information to help them determine if their ballot was counted. "The appropriate state or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of the individual was counted, and, if the vote was not counted, the reason the vote was not counted." If this law had been followed, there would have been no

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<sup>59</sup> Harris, Timothy. E-mail to Erin Shannon. 16 Nov. 2004.

reason for a judge or county election officials to even consider releasing the names of provisional voters.

Secrecy provisions of the State Constitution (Article 6, Section 6); the privacy provisions of the federal Help America Vote Act 2002 (Section 302); and the privacy provisions of the state election laws were violated. In some counties, names of provisional balloters were released in violation of these provisions. “The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph (5) (B). Access to information about an individual provisions ballot shall be restricted to the person who cast the ballot.”<sup>60</sup>

In King County, at least 348 provisional voters (those whose voting rights are in question), some of whom may not have been properly registered to vote, improperly put their ballots directly into vote-counting machines at polling places.<sup>61</sup> Officials will never know how many provisional ballots were improperly fed into voting machines.

Bill Huennekens, King County Elections Superintendent, said, “Did it happen? Yes. Unfortunately, that’s part of the process in King County, and where we have over 2,600 precincts and over 540 polling locations and nearly 4,000 workers. It’s a very human process and in some cases that did happen.”<sup>62</sup> These illegal actions occurred despite King County election officials being fully aware of the weaknesses in their system in regard to handling provisional ballots, particularly as identified in the May 2004, warnings from the King County Citizens’ Election Oversight Committee (*see the **King County Election Problems section of this report***).

In Pierce County, over 73,000 people voted at the polls, and of these, over 11,000 (15%) were provisional voters.<sup>63</sup>

State law requires a provisional ballot to be canvassed for a signature that matches a voter registration record.<sup>64</sup> According to the Democrat affidavit filed with their first Supreme Court challenge, “In Whitman, Walla Walla and Wahkiakum counties, no signature verification whatsoever was done for provisional ballots.” Another declaration revealed that Adams and Chelan counties did not check signatures on provisional ballots.<sup>65</sup>

These violations occurred despite the fact that the Secretary of State’s plan to implement the federal Help America Vote Act (HAVA) stated: “In order to implement additional requirements in HAVA, the Secretary of State will adopt administrative rules for tracking the

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<sup>60</sup> HAVA, Section 302.

<sup>61</sup> McGann, Chris. “GOP bid to stall Gregoire is turned back.” *Seattle Post-Intelligencer*. 11 Jan. 2005.

<sup>62</sup> Ervin, Keith. “Election Scrutiny reveals provisional-vote flaws.” *Seattle Times*. 5 Jan. 2005.

<sup>63</sup> Timothy Borders, et. al. v. King County and Dean Logan, its Director of Records, Elections and Licensing Services; et. al. Declaration of Michael Sheridan in Support of Election Contest Petition. Superior Court of Washington (Chelan County), 2005.

<sup>64</sup> WAC 434-253-047

<sup>65</sup> David T. McDonald, et. al., v. Secretary of State Sam Reed, et. al. Declaration of Joshua C. Jungman in Support of Petition for Writ of Madamus. Supreme Court of Washington. 2004.

resolution of an individual voter's provisional ballot by local elections officials. Administrative rules will be adopted for informing the voter (and only the voter) if requested by free access. The rules may include options such as toll-free telephone or TTY number or notification by mail or other accessible format as identified by the voter. The counties will be required, by administrative rule, to inform the voter how they can learn the resolution of their ballot."<sup>66</sup>

The Secretary of State said the system would be in place on January 1, 2004.<sup>67</sup> Had this law been followed, there would have been no reason for a judge or county election officials to even consider releasing the names of provisional voters.

By illegally releasing the names of the individuals whose signatures on their ballot did not match the one on their original voting card, political parties selectively gathered signatures after the election for validation purposes. The unequal treatment of these provisional voters based on party preference clearly violates the equal protection provisions of the U.S. Constitution.

Unequal rules were also applied to signatures. In 38 counties, signatures were compared to the original voter card; however, in King County, the signatures were compared to the provisional ballot application and not to the original voter registration card.<sup>68</sup> This is a violation of state law, which requires that the signature on an absentee ballot return envelope be "the same" as the signature in the voter registration files, as determined by the canvassing board or its designated representative.<sup>69</sup>

Furthermore, WAC 434-253-047 requires a signature for a provisional ballot that matches a voter registration record.

On November 24, 2004, the Secretary of State said he would use his rule-making authority to ensure absentee ballots and provisional ballots are treated the same across the state. Had they been adopted, we likely would have avoided the problems with provisional ballots. There appear to be no controls statewide to ensure that a provisional ballot cast in one county and sent to another county is actually counted!

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## **Ballot Enhancement Violations**

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There appears to be no statutory authority for enhancing ballots. The Secretary of State issued a rule on this matter for which we can find no legal authority.<sup>70</sup> If the Secretary of State can provide legal authority to us, the question remains, why did he not issue detailed procedures to each county auditor so enhancing ballots would be done uniformly?

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<sup>66</sup> <http://www.secstate.wa.gov/elections/pdf/Washington%20State%20Plan.htm>, Page 8.

<sup>67</sup> <http://www.secstate.wa.gov/elections/pdf/Washington%20State%20Plan.htm>, Page 20.

<sup>68</sup> Willmsen, Christine. Kelleher, Susan. "Ballot checks vary widely across state." The Seattle Times. 19 Dec. 2004

<sup>69</sup> RCW 29A.40.110(3)

<sup>70</sup> WAC 434-261-080

In February 2003, the Secretary of State completed a review of the King County 2002 elections and concluded the following regarding ballot enhancement, “The county is not consistent in their ballot enhancement procedures. The reviewer observed that ballot enhancement, while done in full view of political observers, did not use the procedures outlined in the Washington Administrative Code. **Inconsistencies in how this procedure is handled significantly increase the possibility of a successful election contest.**” Yet these problems were not corrected!

The rule issued by the Secretary of State states, “ballots shall be enhanced when such enhancement will not permanently obscure the original marks of the voters. Ballots shall be enhanced by teams of two or more people working together.” This apparently did not occur in King County, where elections officials said 55,177 ballots were enhanced and 4,902 duplicated.<sup>71</sup> In some cases in King County, it is impossible to determine the original mark of the voter, because the county illegally permanently obscured voters’ original marks on ballots that were enhanced by using white tape or dark ink.<sup>72</sup>

At least five observers in King County complained because they were at a distance that made it impossible for them to properly observe all of the enhancement. However, what they did observe was very troubling. Ballot enhancing was done with black felt markers by county workers working alone (not in pairs).<sup>73</sup>

The rule requires an audit trail and defines control procedures for enhanced ballots, but these requirements were not met. It requires that written procedures shall be established for “detailing the situations in which ballots may be enhanced or duplicated. These procedures shall be included as part of the county canvassing manual.” This requirement has not been met in King County.

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## Recount

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In the recount process, county canvassing boards illegally recanvassed thousands of ballots, some of which were not even secured – and then they were illegally added to the vote totals.

State law has detailed procedures for counting ballots (canvassing and recanvassing) to ensure the integrity of ballots. When the election is over, the only ballots that can be canvassed are ballots counted on Election Day and stored in secure containers, plus absentee ballots postmarked on Election Day, but arriving later, and which have been maintained in secure containers.

Any errors must be corrected by recanvassing, but all recanvassing, by state law, must be completed by the date of certification which was November 17, 2004. Instead, ballots

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<sup>71</sup> Gilmore, Susan, and David Postman. “Sorting through recount muddle.” *The Seattle Times* 29 Dec. 2004.

<sup>72</sup> Robinson, Marilyn. E-mail to Bob Williams. 19 Jan. 2005.

<sup>73</sup> Ibid

(including unsecured ballots) were illegally counted in the recount process and added to the vote totals. No chain of custody was maintained.

The Secretary of State ordered a manual recount on December 3, 2004, in accordance with RCW 29A.64.011. “‘Recount’ means the process of retabulating ballots and producing amended election returns based on that retabulation, even if the vote totals have not changed.”<sup>74</sup> This recount statute says a manual recount “applies to the recounting of votes cast by paper ballots and to the recounting of votes recorded on ballots counted by a vote tally system.” In other words, you can only recount votes that have first been counted. The law has no provision for canvassing boards to recanvass that which has never been canvassed to begin with.

But the Secretary of State did not issue a rule (WAC) on recounts as required by state law, and he appears not to understand RCW 29A.64, the chapter of state law dealing with recounts. On December 3, 2004, the Secretary of State issued procedural guidelines (not an administrative rule as required by state law) allowing for a manual recount of unsecured and/or previously uncanvassed ballots in violation of state law.

These procedural guidelines admitted that “no rules have been promulgated in the Washington Administration Code addressing recounts specifically.”<sup>75</sup> However, these procedural guidelines violate state laws not only because they are not a WAC in violation of RCW 29A.06.611(40), but also because they state that canvassing boards may recanvass during a recount which is in violation of both RCW 29A.60.210 and RCW 29A.64.

Guidelines for a recount issued by Secretary of State Ralph Munro in 1996 said, “The recount procedure provided by statute is a mechanical function of re-tallying the ballots cast and accepted as valid by the precinct election officers or the canvassing board during the canvass of the election. The decision of the canvassing board with respect to the inclusion or exclusion of a particular ballot in question is to open to question during the recount.”<sup>76</sup> *Why did the Secretary of State’s office issue the December 2004 procedures which were clearly in violation of past practices and state law?*

Furthermore, prior to issuing these guidelines on December 3, there were no consistent standards between or within counties. King County appeared to operate without any written rules for the first recount and only issued rules late in the second recount.

On December 16, about half way through the King County recount the procedures were changed. One of the King County workers reported, “Initially we were tallying clearly marked overvotes as overvotes and putting them back in the box with the rest of the ballots when we had completed counted a precinct. That changed about halfway through the count of

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<sup>74</sup> RCW 29A.04.139

<sup>75</sup> Washington. Secretary of State. Procedural Guidelines for Manual Recount Governor Race. 4 Dec. 2004.

<sup>76</sup> Munro, Ralph. Secretary of State. Bulletin on Statutory Procedures and Suggested Guidelines for the Conduct of a Mandatory Recount. Olympia, WA. 1996.

absentee ballots when the canvas board ordered that all overvotes, no matter how clearly marked, be sent to the board for review.”<sup>77</sup>

Precinct ballots were mixed with absentee ballots and the audit trail was lost during the recount. A write-in vote for “Christine Rossi” was determined by the canvassing board to be a vote for Christine Gregoire. Brian Thomas who was a recount worker reported how a “no vote” ballot for Gregoire was counted for Gregoire anyway. “Next to the “X”ed-out bubble was printed the words ‘No Vote’ with an arrow pointing to the name Christine Gregoire.” But the ballot was counted for Gregoire.<sup>78</sup>

Snohomish, Whatcom, Kittitas, Chelan, and Pierce Counties added votes in the recounts from newly found votes. This is illegal (under RCW 29A.64). State law (RCW 29A.60) is clear that ballots not in secured containers cannot be added to a canvass or a recanvass. The only option is to include them in an election challenge (RCW 29A.68).

Adding to the concerns:

- Snohomish County added 224 ballots that had been located in a mail tray buried in the middle of a large stack of empty mail trays.
- Kittitas County added 34 ballots located during the first (machine) recount after they were mistakenly set aside.
- Whatcom County added 7 ballots that were provisional ballots inadvertently placed in a stack of empty envelopes.
- Chelan County added one ballot that had been incorrectly disqualified as a duplicate.<sup>79</sup>
- Pierce County added one ballot that had been lodged in the bottom of a voting machine during the manual recount.

## **Certification Problems**

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Legally, Dino Rossi could not have been certified as governor-elect on November 17 unless the canvassing boards in every single county had already gone through the process of looking at every single questionable ballot signature. The final decision on whether or not to count the ballot signature as valid had to be made by the canvassing board at or prior to the certification meeting.

Errors discovered after certification may be brought up in challenge process if a challenge is mounted. The law provides a specific remedy for “prevention and correction of election frauds and errors.”<sup>80</sup>

The Secretary of State certified the recount results on December 30, even though an investigation of five counties revealed that 8,419 more votes were counted than the number of

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<sup>77</sup> [www.soundpolitics.com](http://www.soundpolitics.com), 22 Dec. 2004.

<sup>78</sup> [www.soundpolitics.com](http://www.soundpolitics.com), 3 Jan. 2005.

<sup>79</sup> David, Postman. Gilmore, Susan. “Sorting through recount muddle.” The Seattle Times. 26 Jan. 2005

<sup>80</sup> RCW 29A.68.011.

people who voted in those counties: 3,539 in King; 1,738 in Snohomish; 1,640 in Pierce; 1,018 in Clark; and 484 in Kitsap.<sup>81</sup> These reconciliation errors raise serious questions as to how the county canvassing boards could certify the election as a “full, true, and correct representation of the votes cast in the county.”<sup>82</sup> The Secretary of State and the county canvassing boards in at least King, Pierce, Snohomish, Clark, and Kitsap counties did not comply with state law.

Pierce County Auditor, Pat McCarthy defended the fact that Pierce County had more votes than voters who voted and said, “given the size and complexity of the election, the closeness of the governor’s race, and the human factors inherent in every election, it is near impossible to be absolutely perfect.”<sup>83</sup>

King County Election officials said the discrepancies were similar to those of past elections and were mostly because of human error in recording data.”<sup>84</sup> Furthermore, in King County, ballots from precincts were mixed in with absentee ballots, and the audit trail was eliminated. In King County, ballots were treated in different ways, at different times, by different people.

The Jefferson County Auditor reconciled the voter registration list totals to the total ballots counted 100 percent before certifying for each of the three counts. This is a fundamental internal control and is the only way to assure the public that illegitimate ballots weren’t thrown into the mix or legitimate ballots weren’t excluded from the count. This reconciliation needs to be done by precinct and by ballot type. If the number of ballots doesn’t match the number of voters, one must assume that either a mistake was made or fraud occurred in order to alter the election outcome. If you cannot reconcile, there is no way of knowing if you have an honest outcome. Thus, it is not possible to certify that you have a “full, true and correct representation of the votes cast in the county.” This reconciliation is required by state law.

But unreconciled vote totals cannot be considered a “full, true, and correct representation of the votes cast.

1. At the precinct level, “the precinct election officers shall count the number of voted ballots and make a record of any discrepancy between this number and the number of voters who signed the poll book for that precinct or polling place, complete the certifications in the poll book, prepare the ballots for transfer to the counting center if necessary, and seal the voting devices.”<sup>85</sup>
2. After counting all ballots, they “must be sealed by two of the election precinct officers at the polling places, and a log of the seal and the names of the people sealing the container must be completed. ...If the canvassing board opens a ballot container, it

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<sup>81</sup> Cook, Rebecca. “GOP questions vote discrepancies; 8,500 and counting.” Seattle Post-Intelligencer. 3 Jan. 2005.

<sup>82</sup> WAC 434-262-070

<sup>83</sup> Modeen, Martha. “Pierce County defends its count.” Tacoma News Tribune. 8 Jan. 2005.

<sup>84</sup> McGann, Chris. “Rossi files suit for a new vote.” Seattle Post-Intelligencer. 8 Jan. 2005.

<sup>85</sup> RCW 29A.44.280

shall make a full record of the additional tabulation or examination made of the ballots. This record must be added to any other record of the canvassing process in that county.”<sup>86</sup>

3. The county canvassing board was required to verify the abstract of votes. Votes cast are required by law to be an accurate reflection of the sum of those individual precinct and absentee ballots totals.”<sup>87</sup>
4. The county canvassing board was required to investigate any error between the votes cast and the total voters.<sup>88</sup>
5. The county canvassing board was required to document the corrective action taken.<sup>89</sup>
6. “If a discrepancy is noted between the information recorded on the transmittal sheet and the seal, the county auditor shall immediately be notified. The nature of the discrepancy shall be entered on the receipt log, the container set aside, and the ballots contained therein not tallied until the discrepancy is resolved. The log shall list the precinct, the nature of the discrepancy, and the corrective action taken. If the county auditor cannot resolve the discrepancy or arrive at a satisfactory explanation for the discrepancy; the ballots shall be treated as ballots for which a question of validity has arisen, and shall be set aside and referred to the canvassing board for their consideration as provided by law or administrative rule.”<sup>90</sup>
7. The county canvassing board was required to “sign a certification that the abstract is a full, true, and correct representation of the votes cast for the issues and offices listed thereon.” In addition they had to state the total number of registered voters and votes cast in the county.<sup>91</sup>
8. Each member of the county canvassing board was required to a certificate “attesting to the authenticity of the information presented to the canvassing board.”<sup>92</sup>

State law requires corrections to canvassing (vote totals) prior to certification. There is no provision to correct voter rolls to agree with a canvassing count AFTER certification. Further, no county’s certified copy of the abstract of votes shall be considered complete for acceptance by the secretary of state until all of the material required by statute or regulation has been received by the Secretary of State.

In response to a public records request from the Evergreen Freedom Foundation, the Secretary of State’s office did not provide the certificate from three counties and did not have a copy of the county seal from twenty-one counties. The Secretary of State’s office belatedly provided

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<sup>86</sup> RCW 29A.60.110.

<sup>87</sup> WAC 434-262-040

<sup>88</sup> WAC 434-262-050

<sup>89</sup> WAC 434-262-060.

<sup>90</sup> WAC 261-040 and chapter 434-262

<sup>91</sup> WAC 434-262-070

<sup>92</sup> RCW 29A.60.200

this information; however, a manual inspection of the Secretary of State's files revealed the Secretary of State did not have all of the required seals when he certified the election on December 30, 2004. In addition, his office had no copies of any "written narrative documenting errors and discrepancies discovered and corrective action taken" by any of the county canvassing boards in violation of state law.

## **Fraud**

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In a report to the 2003 session of the Legislature, the Secretary of State said our state had a system in place to check for felons and individuals who registered twice. Yet at least 489 felons slipped through the cracks of this system.<sup>93</sup>

The Building Industry of Washington (BIAW) researched the voting patterns in some counties and discovered felons, voters who voted twice and even voters who said they didn't sign affidavits from Democrat campaign workers attempting to get more provisional ballots validated.

On January 8, 2005, in the *Seattle Post-Intelligencer*, King County Elections Director Dean Logan acknowledged that several dead people were credited with voting.<sup>94</sup> Logan said his office has reported to the county prosecutor the names of two people who told reporters they cast absentee ballots for their dead spouse.

Martin Ringhofer said he's been getting absentee ballots for his parents, Margarete and Ludwig Ringhofer, since they died in 1996 and 1997. He said he's called King County a couple of times to get them removed from the list, but to no avail. Ballots for his long-deceased parents showed up last fall for both the primary and general election.

At least 26 people voted twice. At least 44 people who died well before the November general election were credited with voting in the November election.<sup>95</sup>

On November 1, Edward (Butch) Monaghan discovered the county had already received ballots with signatures from both his wife and him. Both say they hadn't received the ballots, and they hadn't yet voted. The only evidence in the case is two canary-yellow envelopes with the Monaghan names written in felt-tip pen—an instrument the Monaghans say they never use.<sup>96</sup>

A significant difference exists between the votes cast for the two candidates in hand re-count versus the machine re-count — at least in the three biggest counties. In the King County machine recount, Gregoire got 58 percent versus Rossi 40 percent; yet in the hand re-count, the additional 553 votes came out 65 percent for Gregoire and 32 percent for Rossi. This

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<sup>93</sup> Vance e-mail. See table.

<sup>94</sup> McGann, Chris. "Rossi files suit for a new vote." *Seattle Post-Intelligencer*. 8 Jan. 2005.

<sup>95</sup> Vance e-mail. See table.

<sup>96</sup> [www.soundpolitics.com](http://www.soundpolitics.com)

seems unreasonable. Statistical chance suggests that there shouldn't have been such a difference between the two counts.

In Pierce County, the machine re-count gave 46 percent of the votes to Gregoire and 51 percent to Rossi. In the hand re-count, the 447 votes added split 52 percent for Gregoire and 45 percent for Rossi.

In Snohomish County, the machine re-count gave 48 percent to Gregoire and 50 percent to Rossi. When 203 votes were added in the hand re-count, they were split 57 percent for Gregoire and 37 percent for Rossi.

Looking at all the other counties combined, the machine recount gave Gregoire 44 percent and Rossi 54 percent. The hand re-count added 515 votes which broke at 41 percent for Gregoire and 57 percent for Rossi. These two counts by the other counties are much more statistically believable than those of King, Pierce and Snohomish counties.

## **King County Election Problems**

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We were shocked when our investigation indicated that the Secretary of State, his staff and King County Elections' staff were aware of the serious and significant problems in King County elections in February 2003, and did not ensure the problems were corrected.

The Secretary of State's February 2003 report on the Elections Procedures in King County in 2002 clearly showed significant problems in King County elections that were not corrected prior to the November 2004 election.<sup>97</sup>

Here are a few of the problems identified in the report:

- On page 14 of the report the Secretary of State stated King County's warehouse for ballot security "does not fully comply with the definition of "secure storage." One of the issues the Republicans have raised in the challenge is that ballots were not kept in "sealed container and secure storage."
- On page 14 of the report, the Secretary of State expressed concerns over ballot enhancement and said, "The County is not consistent in their ballot enhancement procedures. The reviewer observed that ballot enhancement, while done in full view of political observers, did not use the procedures outlined in the Washington Administrative Code. **Inconsistencies in how this procedure is handled significantly increase the possibility of a successful election contest.**"<sup>98</sup>

In addition, in May 2004, a Citizens Committee reported to the King County Council on the seriousness of the problems in King County Elections. These problems were not corrected.

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<sup>97</sup> [http://www.secstate.wa.gov/office/news.aspx?news\\_id=192](http://www.secstate.wa.gov/office/news.aspx?news_id=192)

<sup>98</sup> Report on King County Elections – May 2004 [http://www.metrokc.gov/MKCC/docs/CEOC\\_report.pdf](http://www.metrokc.gov/MKCC/docs/CEOC_report.pdf)

- On page 47, significant problems were identified in the handling of provisional ballots:
  1. “There is currently no way to identify a provisional ballot that has been counted in error at the polling place.”
  2. “Some provisional ballots are counted at poll sites in error during each election.”
  3. “Some provisional ballots are incorrectly processed during the canvass period.”
  4. “With the increased turn-out expected in the 2004 presidential election, there will be an increase in the number of provisional ballots cast.”
  5. “While the correct process requires that provisional ballots should be validated during canvassing before being tabulated and that they should not be counted at polling places, running a ballot through the poll site tabulator is an easy mistake for a voter to make. Poll workers are not always able to watch provisional ballots closely enough to prevent them from being counted.

Because King County **did not** correct these known problems in the November election, an unknown number of provisional voters, some of whom may not have been properly registered to vote, improperly put their ballots directly into vote-counting machines at polling places. Officials may never know exactly how many provisional ballots were improperly fed into voting machines.

- On page 48 of this report, significant problems were identified in the security of the ballots:
  1. “Reviews of Elections Section by the Secretary of State and the King County Council’s consultant have highlighted significant shortcomings with basic election security.
  2. “Serious issues have been raised by national computer experts and local activists concerned with the security of our elections, including the activities of the County’s major elections vendor.”
  3. “Security practices have been improved in response to concerns. However, security should be addressed proactively, fixing issues after they arise harms public confidence. Indeed, some observers have expressed concerns about MBOS security.”
- On page 52, the report read, “Although unlikely, if a malicious programmer did gain access to the tabulation programming, it would not be difficult to evade detection by the current testing process, because absentee counting is spread out over many days.”

We are unable to find out what steps, if any, King County took to correct this problem. It is our belief that until these problems are corrected this is an open invitation to fraud.

While working for the Secretary of State in 1992, Dean Logan, the Director of Elections was in charge of the state's certification and training program for county officials. One of the key parts of that program was ballot security. In fact, he reviewed Pierce County's absentee ballot system and held it up as a model for "extensive security mechanisms were in place to provide a thorough and detailed audit trail of all absentee ballots issued and returned during the election reviewed."<sup>99</sup> One wonders why he failed to implement these ballot security measures in King County.

King County failed to maintain control of ballots. On nine occasions, King County elections officials discovered unsecured ballots and added them to the total count.

Prior to the May 2004 election, King County counted ballots with missing signatures in violation of state law. King County had numerous voting records on their computer system without valid signatures and made no effort to look for the manual records and correct the problem. Also King County sent absentee ballots to individuals for whom King County did not have a valid signature on file.

We could not determine why King County had such a high percentage of validated provisional ballots. In San Juan County only 44 percent were valid; 54 percent in Kittitas; 65 percent in Pacific. One wonders why there are so many more valid provisional ballots in King County.

King County had more ballots counted than the number of voters who voted. What happened to the built-in control procedures in state law on canvassing returns?

On January 11, the number of phantom voters had fluctuated from 3,539 to 1,217 to "somewhere around 1,800" according to Elections Superintendent Bill Huennekens.<sup>100</sup> Mr. Huennekens said it was impossible to come up with a precise number, because workers were adding and deleting names of registered voters as they updated the list in preparation for a special election. State law, however, states that elections officials must maintain the back-up records for at least two years to insure the accuracy and currency of voters lists.<sup>101</sup> King County should have their back-up records.

Mr. Logan said that many of the unexplained ballots probably were cast by registered voters who failed to sign-in when they went to the polling places.<sup>102</sup> That cannot legally occur because ballots are not issued until a voter signs-in. Further, at the end of the day, poll workers must reconcile the votes cast against the total number of signatures on the polling register.

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<sup>99</sup> Secretary of State Election Certification & Training Program. Special Election Procedure Review, "Pierce County Absentee Ballot Procedures." January/February 1994

<sup>100</sup> Ervin, Keith. "New error found in vote tally." The Seattle Times. 11, Jan. 2005

<sup>101</sup> RCW 29A.08.770

<sup>102</sup> Ervin, Keith. "New error found in vote tally." The Seattle Times. 11, Jan. 2005

In Jefferson County, the story is different. Auditor Donna Eldridge reconciled the voter registration list totals to the total ballots counted. Election workers came up with the same numbers in each of the three counts.

This fundamental internal control of reconciling ballots is the only way to assure the public that illegitimate ballots weren't thrown into the mix or legitimate ballots weren't excluded from the count. This reconciliation is supposed to be done by precinct and by ballot type. If the number of ballots doesn't match the number of voters, this is a red flag to look for the problem, not to sweep it under the rug and chalk it up to human error. Without ballot reconciliation, there is no way of knowing if an election outcome is true and honest; thus, it is impossible for any auditor to certify a "full, true and correct representation of the votes cast.

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## **Findings**

Numerous state election laws were violated, including those related to questionable provisional and absentee ballots; lack of ballot security; inconsistent statewide standards; failure to check identification of new voters; lack of ballot privacy; uncounted military ballots; inconsistent, and some illegal ballot enhancement; illegal canvassing/recanvassing on recounts; and voting by felons and dead people. The new federal reform law, the Help America Vote Act (HAVA) of 2002, was violated by state election authorities.

Furthermore, the Secretary of State misallocated the resources of his office by subjugating compliance with the election laws to the Presidential Primary debate.

**We conclude, at a minimum, most state election and several county election officials are guilty of gross negligence.**

**In addition, fraud occurred in some counties.**

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## **Conclusion**

This election has been fraught with error and fraud. Had the Secretary of State made the necessary rule changes as required, the problems plaguing this election may not have occurred.

The Secretary of State should immediately issue rules in order to amend the problems addressed above.

The Evergreen Freedom Foundation will continue collecting testimony and evidence as more people come forward. We will continue to call for uniform and secure election in the state of Washington in order to ensure legitimate elections and maintain public confidence in our election system.

## **Election Integrity and Reform Recommendations**

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We know many though not all the details of what is *alleged* to have happened during the November 2004 elections versus what *actually* did happen. We know enough to say we had neither free nor fair elections.

When interviewed, the Secretary of State cannot say who won the gubernatorial election. Neither can the King County Director of Elections. This is particularly troubling since Congress and the 2003 Washington State Legislature passed reform legislation that would have prevented nearly all the current mess had it just been implemented. Many elected officials are calling for new laws, and certainly some are needed.

But it is hardly reassuring to get new laws when existing reform laws were mostly ignored.

This is not just about the gubernatorial election. It is not about one political party versus another. It isn't about the recall of a sitting elected official or a re-vote. In fact, conducting a re-vote before cleaning up the current mess means we face the prospect of another election rife with incompetence and fraud.

Below is an exploration of remedies to prevent the same abuses in the future.

- 1. Government agencies must be forced to comply with the law.** The present system of distributed responsibility with no accountability leads to debacles like our November 2004 election. King County is the worst, since the top election official is appointed instead of elected, and is not subject to the limited control of the electorate.

In the meantime, lawmakers ought to investigate and or insist on the following:

- A. Non-compliance with the new federal and state laws.** Require the Secretary of State (SOS) and county auditors to explain why they did not implement the 2002 Federal Help America Vote Act (HAVA) and the 2003 Legislative changes in SB 5221 which were effective July 1, 2004. Part of those revisions required the Secretary of State to issue new or revised administrative rules (WACs) in 52 areas (amended to 53 in the 2004 session) through RCW 29A.04.611. Those WACs were not issued. The SOS says changes in our state's primary system precluded his office spending time on this, but the law does not give this type of latitude.
- B. Determine why the SOS overrode the state canvassing law.** The SOS failed to change WAC 434-262-050 to agree with RCW 29A.60.210, which limited the authority of the canvassing board to canvass up to the day the board certified the election results. This year the certification date was November 17, 2004. Errors detected after certification are supposed to be remedied through a court challenge (RCW 29A.68.011), not through additional canvassing/re canvassing (RCW 29A.64).
- C. Determine why the significant problems with King County elections department identified in a 2003 Secretary of State election review and a 2004 Citizens**

**Advisory Committee report to the King County Council were not corrected.**

These problems were so serious that the SOS warned in February 2003 that a successful election challenge could be mounted.

- D. **Determine why the SOS did not ensure every county election official had the new laws required to be implemented by July 1, 2004 (RCW 29A.04.235).**
- E. **Determine why the SOS violated the statutory provisions for residency.** The Secretary of State's authority for permitting the homeless to use government buildings for their residence address on their voting applications (WAC 434-208-100) violates the statutory definition of residence (RCW 29A.04.151), the voters' oath (RCW 29A.08.230), and RCW 29A.08.110. Furthermore, RCW 29A.08.110 requires the auditor to send all new voters a registration acknowledgement to their mailing address, with a notice to the Post Office not to forward the registration to any other address.
- The registration is to be returned to the auditor if it is undeliverable to the voter. The auditor then sends the voter a confidence notice, to which the voter must respond before becoming eligible to vote. The Secretary of State's WAC is also in violation of RCW 29.08.230, the voter registration oath, which states, "I will have lived at this address for thirty days immediately before the election."
- F. **Determine why dead people voted.** According to RCW 29A.08.510, voter files are supposed to be updated monthly against death certificates. This did not occur. Why?
- G. **Review voting rights for people who are incapacitated and/or under guardianship.** When a court has imposed guardianship for an incapacitated person and has determined that person is incompetent for the purpose of rationally exercising his or her right to vote, under chapter RCW 11.88, that person cannot vote. The courts must give this information to county auditors who should then make sure this person is not an eligible voter.
- Apparently this system is not working very well. The legislature should review it.
- H. **Determine why felons voted.** Upon receiving official notice of a person's felony conviction in either state or federal court, the county auditor has to cancel the defendant's voting address (RCW 29A.08.520). Effective January 1, 2006, by order of HAVA, the voter file must be matched against the Department of Corrections file. Our SOS reported 3 to the 2003 Legislature that a system was in place to do this. If so, it was not used in the 2004 elections. Why?
- I. **Correct unequal treatment of provisional ballots.** Standards vary all over the state. Some counties approved 44% of the provisional ballots and others 94%. This is a violation of the Equal Protection Clause of U.S. Constitution. Legislative hearings are needed to ensure county auditors are treating provisional ballots in accordance with RCW 29A.08.625. Inactive voters who cast provisional ballots cannot have their

provisional ballot counted unless the reason for canceling their registration was an error.

Additionally, confirmation notices for provisional ballots must be on a form prescribed by, or approved by the Secretary of State (RCW 29A.08.635).

- J. **Figure out the statutory authority for ballot enhancement.** We are unable to find any statutory authority for WAC 434-261-080—ballot enhancement. If the legislature consents to ballot enhancement, an RCW should be developed and the Secretary of State should be required to develop statewide standards for enhancing ballots. Voters should be notified if their ballot was enhanced.
- K. **Determine statutory authority for WAC 434-262-070.** Does this WAC have statutory authority to allow canvassing as a method of correcting errors in a recount or canvassing “by the county canvassing board reconvened specifically for that purpose?” We cannot find authority in RCW 29A.64 for this WAC. In fact, the law does not provide for this.
- L. **Require distinction for different types of ballots.** The legislature needs to require that the Secretary of State develop clearly distinguishable ballots for each type: regular, absentee and provisional. That way, if provisional ballots illegally/accidentally get inserted into the vote-counting machines at a precinct, the vote can be corrected.
- M. **Require tested and certified election software.** Election software untested against the federal standards was used in the November 2004 election in Chelan, King, Kitsap, Klickitat, Pierce, Snohomish, and Yakima Counties. The legislature needs to require counties to test the software using federal standards before the February elections.
- N. **Ensure only legally qualified citizens are registered to vote.** The Secretary of State did not follow the law or his own guidelines which state: “By 2003, a voter who registers by mail must provide a copy of photo identification or a number of other pieces of identification. By 2004, individuals registering to vote must provide a driver’s license number or the last four digits of their Social Security Number if they do not have a driver’s license. Individuals who do not have either are assigned a unique identification number. Election officials must check either the driver’s license or Social Security Number against numbers in existing databases.” This did not occur. Why?
- O. **Ensure the necessary changes are made to allow the new HAVA standards to be enacted in our state by January 1, 2006.** How will the SB 5221 changes that go into effect January 1, 2006, be implemented by the counties and Secretary of State?

Unresolved issues include:

- a. Effective January 1, 2006, no one can vote until the Secretary of State does a verification check using the driver's license files from Department of Licensing or the last four digits of the Social Security Number (RCW 29A.08.107 and RCW 29A.08.651). How will the state get the driver's license number or the last four digits of the Social Security Number for existing voters? (RCW 29A.08.010)
  - b. How will the state get a signature attesting that the voter is a U.S. citizen? (RCW 29A.08.010)
  - c. Effective January 1, 2006, the Secretary of State's voter list is the official list of eligible voters for all elections. (RCW 29A.08.105). Before anyone can vote, the Secretary of State must review the information provided by each voter registration applicant to ensure that the driver's license number or the last four digits of the Social Security Number match the information provided by the Washington State Department of Licensing or DSHS. If a match is not made, the Secretary of State must respond with the applicant to resolve the discrepancy. Only after the Secretary of State has confirmed that the applicant's driver license number or the last four digits of the Social Security Number match existing records may the applicant be placed on the official list of registered voters. (RCW 29A.08.107)
  - d. Effective January 1, 2006, county auditors must screen all new voter registrations against the state voter database to prevent duplication. Dual registration or voting detection means "to detect persons registered in more than one county or voting in more than one county." (RCW 29A.08.610) How will this be accomplished?
  - e. How will the voter registration database be kept updated for last-minute voter registrations in thirty-nine counties? RCW 29A.08.651.
2. **Require all currently registered voters to reregister and show proof of citizenship by December 31, 2005.** This is necessary in order to clean up the voter rolls and to comply with the January 1, 2006, requirement that the voter file contain the driver's license number or the last four digits of the Social Security Number. If voters are not required to reregister, then the legislature needs to determine specifically how the Secretary of State will get the key data for existing voters.

RCW 28A.08.010 requires the following for all voters effective January 1, 2006:

- A. Applicant's name needs to be changed to their *legal name*. This is crucial in order to match the driver's license file, felons, death notices, and the Social Security Number files.

- B. Complete residence address.
- C. Date of birth.
- D. Washington state driver's license number, Washington state ID card number, or the last four digits of their Social Security Number.
- E. A signature attesting to the truth of the information provided on the application.
- F. A check or indication in a box confirming the individual is a U.S. citizen.
- G. If the individual does not have a Social Security Number or a driver's license number, he or she must be issued a unique voter registration number.

### **3. Reduce Fraud.**

- A. Change RCW 29A.44.201 to require a voter to show a picture and signature identification (such as a driver's license) to be compared with the signature on the poll register. If the signature or photo does not match, the voter should be given a provisional ballot, with a notation made by the poll worker that identification could not be verified. This ballot should be processed with all other provisional ballots. If a bank can require this type of identification to cash a check, certainly the state can do this to reduce voter fraud.
- B. Motor Voter and Registration at State Agencies (RCW 29A.08.230) needs to be changed to require proof of identification and citizenship prior to registering to vote. The current system provides ample opportunity for fraud because non-citizens are allowed to get driver's licenses and apply for state social services. The state employee receiving the voter information should compare the addresses and signatures on the driver's license or other state record with the applicant's signature on the voter registration form.
- C. Deceased voters: The legislature needs to change RCW 29A.08.510 (effective January 1, 2006) to require:
  - a. Monthly match of death notices against voter tapes as the current law requires, not "periodically" as the new law requires.
  - b. Change "county auditor may also use newspaper obituary articles" to "county auditor must..."
  - c. Registration list maintenance: Use postal service change of address information. (RCW 29A.08.605) Change (1) "The Secretary of State may..." to "The Secretary of State must..."

### **4. Update provisional ballots statute.**

- A. The definition of provisional ballots needs to be added to definitions in RCW 29A.04. No statutory authority currently exists for the definition of provisional voters.

- B. Add a section to RCW 29A.44 to tighten up security at polling places so voters cannot insert provisional ballots directly into a vote-counting device.

**5. Tighten absentee voting requirements. (RCW 29A.40)**

- A. The standards for obtaining an absentee vote are too loose and offer ample opportunity for fraud. Absentee ballots should be limited to those in true need, such as the military, those on overseas business, persons unable to travel, and other special cases. Ongoing absentee ballots (RCW 29A.40.040) should be eliminated.
- B. Change “an auditor may require a person who requests an absentee ballot to identify the date of birth of the voter for whom the ballot is requested” to “an auditor must require a person who requests an absentee ballot to identify the date of birth and either the driver’s license number or the last four digits of the Social Security Number.”
- C. Delete RCW 29A.40.070 (6). Failure to have absentee ballots available and mailed on time should be one of the options for an election contest.
- D. Add to RCW 29A.40.110 a section on processing incoming ballots. The legislature needs to add tightened controls over returned absentee ballots and require an audit trail.
  - a. Add the requirement that all incoming ballots must be tallied and put in a secure container at least daily. Daily counts of the number of returned absentee ballots must be public information.
  - b. Add the requirement that once canvassing begins, a daily total of net absentee ballots must be made public. This would include: Beginning number of absentee ballots; number received in mail that day; number processed that day; number rejected; and the ending balance.

**6. Update canvassing law. (RCW 29A.60)** Add to certification of results (RCW 29A.60.190) that prior to certification, the canvassing board must do a 100% reconciliation of the number of voters vs. the count, and explain any variance.

**7. Require all meetings of the canvassing board be subject to the Open Meetings Act.** That is what RCW 29A.60.140 states. Several years ago, a Thurston County Judge found that Pierce County violated public access to ballot handling when they were discovered remaking ballots at an undisclosed location, a week prior to Election Day for the Sound Transit and Presidential Election of 1996. Pierce County remade more than 28,000 ballots in that election. The ruling against Pierce County was overturned largely due to an amicus brief from the Attorney General’s office stating that Pierce County did not violate the law, because when canvassing is delegated to canvassing board workers, ballot handling, including the remaking and enhancing of ballots, need no longer follow the Open Meetings Act. This is contrary to the legislative intent of RCW 29A.60.140.

- 8. Clarify the law for recounts. (RCW 29A.64)** The legislature needs to make it clear that there will be no more canvassing or recanvassing during a recount. A recount, by statute, is the process of retabulating ballots and producing amended election returns based on that retabulation.
- 9. Vigorously prosecute vote fraud and update crimes and penalties law. (RCW 29.84)** The legislature needs to add penalties for the failure of election officials to properly conduct their duties.
- 10. Change the law to require reviews of every county's election departments every four years.** Election law prior to the 2003 legislative changes (RCW 29.69.070) required the Secretary of State to conduct reviews of county election activities every four years. The new law has no set period to conduct these reviews. EFF recommends the four-year review of counties be reinstated and that it be conducted by an independent entity such as the State Auditor.
- 11. Require all computer systems to meet federal certification.** If banks and stock brokers can operate secure computer systems, the state should be able to do it, too. Any stockholder, who votes their proxy on-line or by using an electronic voting service, has confidence that their vote will be accurately counted.
- 12. The legislature needs to clarify the following:**
  - A. Article VI, Section 1A of the State Constitution appears to contradict Article VI, Sec. 1. What does it mean?
  - B. The second sentence of RCW 29A.04.031 needs to be clarified. The way it reads currently, an un-registered absentee voter could walk into an auditor's office after the election and demand the vote be counted.
  - C. When a canvassing board holds that the signature on the ballot is not the same as the signature on file, but they do not call it a fraudulent ballot, have they disenfranchised legal voters? If it is fraud, should they refer it to the County Prosecutor? Voters should be informed if their ballot is rejected and why.

## Appendix A

### **Analysis of Relevant Post-Election Court Rulings**

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#### **November 12 King County Superior Court Ruling**

Superior Court Judge Dean Lum ignored state and federal law and the state constitution when he allowed Democrat party workers to get a list of the names of 929 provisional ballots whose ballots had been rejected because their signatures on file did not match those on the voters' registration forms.<sup>103 104</sup> Federal law requires that when a provisional ballot is completed, the county elections officials give the voter written instructions on how they can verify if the provisional ballot is counted.

Over a weekend, Democrats visited those provisional ballots. If any of the individuals said they voted for Rossi, they were told to have a nice day. If they said they voted for Gregoire, they were asked if they wanted to make their ballot valid. Signed affidavits from more than 400 of those voters were gathered asking that their rejected ballots be counted! Only the Gregoire ballots were turned in and counted.

Belatedly, the Republican Party got involved in the same process, and they did the same thing. Of course, they only collected signatures from individuals who said they voted for Rossi. Actions by both parties, though illegal, were sanctioned by Judge Lum.<sup>105</sup>

#### **December 14 Supreme Court Decision**

On December 14, the state Democrat Central Committee petitioned the state Supreme Court to allow each county to recanvass previously rejected ballots (under RCW 29A.04.139). The Supreme Court held that under Washington law, "ballots are to be 'retabulated' only if they have been previously counted or tallied, subject to the provisions of RCW 29A.60.210." The court rejected the position of the State Democrat Central Committee that recanvassing of ballots was required under any applicable Washington state statute.<sup>106</sup>

#### **December 17 Pierce County Court Decision**

Despite the Supreme Court decision, the King County Canvassing Board voted 2-1 to canvass previously rejected votes. These included 520 ballots they had already canvassed and rejected. On December 15, the King County Elections Department raised this total to 573 ballots—ballots whose signatures had already been checked twice and rejected.

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<sup>103</sup> Ervin, Keith, and Susan Gilmore. "Governor's Race: Judge rules for Dems on rejected ballots." *Seattle Times* 12 Nov. 2004.

<sup>104</sup> Article 6, Section 6 of the Washington State Constitution: "All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot."

<sup>105</sup> RCW 29A.04.230

<sup>106</sup> Postman, David. "Democrats Lawsuit Unanimously Rejected by the state Supreme Court." *Seattle Times* 14 Dec. 2004.

These 573 ballots were not kept in securely in a sealed container, but were stored in open trays in an open area. On at least one occasion, the rejected ballots were removed from the fenced, locked area and kept overnight in an open area in open trays. Ballots were transferred on or about December 13, to the King County Administrative Building without any observers or a Deputy Sheriff in violation of state law.<sup>107</sup>

The Washington State Republican Party took issue with this and filed a complaint in Pierce County. Pierce County Judge Stephanie Arend issued a temporary restraining order on King County to prevent them from canvassing the 573 previously rejected and canvassed ballots. She concluded that the law does not permit recanvassing of previously uncounted ballots.<sup>108</sup>

### **Second Supreme Court ruling**

Judge Arend's decision was appealed to the Supreme Court. The Court ruled that the Superior Court erred in granting a temporary restraining order, and that the King County Canvassing Board had properly concluded that it had the authority to recanvass the 573 ballots in question. The court determined that ballots that had never been canvassed could be recanvassed, that ballots never first counted could be recounted, thus rendering their December 14th decision meaningless. To make their new decision, the court had to take a section of the canvassing statute (RCW 29A.60.210) and insert it into the recount section of the law (RCW 29A.64). This decision appears to violate the 1995 Supreme Court decision in *Becker v. Pierce County* in which the Supreme Court held that "the legislature rather than the Supreme Court is primarily responsible for deciding public policies governing election procedures."<sup>109</sup>

The justices had very little time to decide this case, so they appeared to rely heavily on the information and debate delivered by the opposing attorneys. The attorney for the Secretary of State argued the case based on the old canvassing/recanvassing laws—the ones that had been changed by the 2003 Legislature and that went into effect on July 1, 2004. The specific change put a time limit on canvassing/recanvassing.<sup>110</sup> The Secretary of State claimed that county canvassing boards had a legal safety value to recanvass and correct any errors. **There is no such safety value in state law.** The law is specifically set up so that any errors detected will go before a court where the rules of evidence will apply instead of going before a partisan county canvassing board.<sup>111</sup>

In fact, in the first Supreme Court case, Justice Ireland read the law in question (RCW 29A.60.210) and said, in effect, that recanvassing was over. Justice Anderson emphasized the finality of the RCW in his decision. "‘Recount’ means the process of retabulating ballots and producing amended returns..."<sup>112</sup> The justice noted that "the procedure for recounts is set forth in RCW 29A.041, and starts with the canvassing board opening ‘the sealed containers

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<sup>107</sup> Complaint for Declaratory & Injunctive Relief. Davis Wright Tremaine.

<sup>108</sup> RCW29A.60.210 and RCW 29A.64.

<sup>109</sup> *Becker v. Pierce County*. 1995.

<sup>110</sup> RCW29A.60.210

<sup>111</sup> RCW 29A.68.011

<sup>112</sup> RCW 29A.04.139

containing the ballots to be recounted.”<sup>113</sup> Justice Anderson said, “Thus, under Washington’s statutory scheme, ballots are to be ‘retabulated’ only if they have been previously counted or tallied, subject to the provisions of RCW 29A.60.210.”

The court ignored this same analysis in its second decision. It appears the confusion came when the attorney arguing for the Secretary of State used the outdated law. In effect, the court ruled that ballots that had not been canvassed or counted could be recanvassed and become part of the recount. This violates existing law.

The legal authority for counting (or canvassing), and the legal authority for canvassing boards to canvass or recanvass ends when the Secretary of State certifies the election results.<sup>114</sup> That happened on November 17. The legislature deliberately chose not to include any canvassing/recanvassing activities in the recount statute.<sup>115</sup> The Supreme Court decision appears to violate the 1973 Supreme Court decision in *Knowles v. Holly* where the court rules that “courts may not read into statutes language omitted through oversight by the legislature” and “it is presumed that the legislature does not enact unnecessary or meaningless statutes.” This was a critical change made in the 2003 election reform bill passed by the legislature. Unfortunately none of the attorneys asserted the revision in law to the courts, and the Supreme Court showed no awareness of the reorganization and recodification.

We believe the confusion on the part of the Supreme Court occurred because the Secretary of State failed to update the rules to reflect the changes. For their part, the court failed to look at the plain language of the statute.

After the court decision, King County recanvassed 735 ballots rather than the 573 in the court’s order! Furthermore, the equal protection guaranteed under the U.S. and Washington state Constitutions was compromised by the court, since 38 out of the 39 counties had already completed the recount and certification of the election. Thus, different standards were used in different counties. In addition, not all of these ballots had been properly secured.

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<sup>113</sup> RCW 29A.60.110

<sup>114</sup> RCW 29A.60

<sup>115</sup> RCW 29A.64

## Appendix B

### Election Timeline

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**November 2:** Election Day. Gregoire leads by 7,000 votes with about 88% of the votes counted.

**November 6:** Gregoire's lead narrows to less than 4,000 votes.

**November 9:** Rossi leads by 2,123 votes.

**November 10:** Rossi leads by 3,492 votes

**November 12:** King County reports it has 11,000 provisional and absentee ballots still to count.

**November 12:** King County Superior Court Judge Lam allows Democrat Party officials to obtain the names and addresses of 929 individuals who had cast provisional ballots, but had mismatching or missing signatures. Democrat workers contact these individuals. If they had voted for Gregoire, the Democrat officials obtain a signature, and the vote was counted. Republicans belatedly employ the same tactic to selectively gathering signatures to validate provisional ballots. The result is a net gain of 400 votes for Gregoire. Rossi's lead falls to 261 votes.

**November 15:** King County announces it has 21,000 provisional and absentee ballots still to count—10,000 more than when they closed their doors the previous Friday, Nov. 12. They blame faulty estimates. This netted another 2,000 votes for Gregoire and Rossi's lead fell to less than 1,000 votes.<sup>116</sup>

**November 17:** King County certifies its election returns. During the recount, they add 1,000 votes that were not in the original count.

**November 17:** The Secretary of State certifies election results with Rossi winning by 261 votes. Then the Secretary of State orders a machine recount.

**November 30:** The canvassing and recanvassing machine recount conclude. Rossi is certified as governor-elect by 42 votes.

**December 6:** The Secretary of State orders a manual recount in accordance with RCW 29A.64.011.

**December 13:** King County announces they found 561 absentee ballots that were "mistakenly rejected" because the signature on the ballot envelope did not match the voter registration records. The ballots were found by County Election Director Bill Huennekens who went on a

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<sup>116</sup> Ervin, Keith, and Ralph Thomas. "More ballots found in King County; Gregoire edges ahead." *Seattle Times* 16 Nov. 2004.

hunt for ballots, with no observers present. These ballots had been stored in unsealed trays outside a locked cage in the county's absentee-ballot warehouse.

**December 14:** King County announces they found 22 additional "uncounted" ballots that apparently were left in the bottom of King County voting machines by election workers. 20 are absentee ballots and two are provisional ballots.

**December 14:** Washington Supreme Court rules the ballots cannot be re-tabulated unless they have been tabulated in the first place. They reject the Democrat request that every canvassing board in the state recanvass the ballots.

**December 15:** King County acknowledges that they had sent letters in August to 101 voters out of the 573 newly discovered ballots asking for updated signatures. None responded.

**December 15:** The King County Canvassing Board in a 2-1 partisan vote decides to recanvass the 573 votes, even though the votes had never been canvassed to begin with.

**December 16:** In the King County partial manual recount, Dino Rossi gained 15 votes. King County changed recount procedures to refer more ballots to canvassing boards for final review.

**December 17:** Pierce County Superior Court Judge Stephanie Arend issues a retaining order prohibiting King County from counting the 573 votes. The judge rules that ballots should be included in a recount only if they had been included in the previous count. The Democrats and Secretary of State appeal this decision to the State Supreme Court.

**December 17:** King County elections officials announce they have discovered another 162 "uncounted" ballots in a warehouse.

**December 17—**Rossi leads by 49 votes with 38 of the 39 counties having finished the manual recount. Only King County remains.

**December 22:** Washington State Supreme Court overrules Superior Court Judge Arend and says King County can recanvass the 573 disputed ballots.

**December 23:** The King County Canvassing Board rejects the 20 absentee ballots that were left behind in voting machines because there was no proof they had been placed there before the polls closed, but they counted the two provisional votes.

**December 23:** King County finishes the manual recount except for disputed ballots that are involved in the Supreme Court decision. Gregoire leads by 10 votes. The Supreme Court gives the green light to recanvass 573 disputed ballots. King County recanvasses 735 ballots, and Gregoire's lead increases to 130 votes.

**December 30:** Secretary of State Reed certifies Gregoire as winner with a lead of 129 votes.