AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
AUGUST 8-9, 2016

RESOLUTION

RESOLVED, That the American Bar Association urges state and territorial election administrators and officials, to ensure the adoption and implementation, as soon as practicable, of statewide or territorial standards that provide clear criteria for determining what constitutes a valid vote when a hand count is required of paper and optical scan ballots.

FURTHER RESOLVED, That the American Bar Association encourages election officials in those jurisdictions that use “voter intent” standards to determine the outcome of a ballot, ensure adoption of explanatory rules, regulations and/or policies that clarify such standards as soon as practicable.
REPORT

I. INTRODUCTION

This resolution urges adoption of counting standards for paper and optical scan ballots when it is necessary to hand count them consistent with the American Bar Association’s (ABA) mission and goal to “advance the rule of law at home and throughout the world.” A clear statement from the ABA on the issue of statewide ballot-counting standards is needed in order to ensure that 16 years after Bush v. Gore such standards are in place as soon as practicable.

The ABA recognizes that few states and territories, hereafter states, have clear statewide or territorial (statewide) standards in law or regulation, and that a few states have nothing in law. Only a hand-full of states have pre-determined standards governing how a ballot will be hand counted in the event of a recount or contest. A significant number of states have an unclear standard that may be interpreted differently across the state for ballots with the same marks. These states generally rely on the “voter’s intent” -- without more -- as the standard to be used to hand count ballots. This standard is not compatible with a clear, statewide standard for counting optical scan or other ballots in situations requiring a hand count. The ABA urges states with a general “voter intent” standard, as well as those states without any statewide standard in place, to adopt laws and regulations consistent with this resolution. The adoption and consistent enforcement of uniform standards will promote fair and transparent elections and avoid the arbitrary interpretation of ballots during a formal canvass, recount or contest of an election.

II. BRIEF HISTORY OF THE NEED FOR STATEWIDE BALLOT_COUNTING STANDARDS

In Bush v. Gore, 531 US 98 (2000), decided December 11, 2000, the Supreme Court, by a 7-2 decision, held that standard-less manual recounts violate the Fourteenth Amendment’s Equal Protection Clause. As one commentator describes the case:

Noting that the Equal Protection clause guarantees individuals that their ballots cannot be devalued by "later arbitrary and disparate treatment," the per curiam opinion held 7-2 that the Florida Supreme Court's scheme for recounting ballots was unconstitutional. Even if the recount was fair in theory, it was unfair in practice. The record suggested that different standards were applied from ballot to ballot, precinct to precinct, and county to county.1

The Help America Vote Act of 2002 (HAVA) was passed in 2002 in response to the 2000 presidential elections. HAVA was to assist with improving voting systems and voter access. It

established minimum election administration standards for states and units of local government with responsibility for the administration of federal elections.

Among other state mandates, HAVA required that states develop uniform definitions of what constitutes a vote in Section 301(a)(6) of the Act:

Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.\(^2\)

Despite the Supreme Court’s decision in \textit{Bush v. Gore}, and the mandate in HAVA, many states have failed to address this constitutional equal protection concern. Pre-existing uniform statewide standards not only promote fair and transparent elections, and avoid arbitrary interpretation of ballots once an election is finished and decisions about counting can be influenced by knowing who will benefit given a certain interpretation, but they are mandated by federal law, and the US Constitution.

This resolution does not take a position on individual state “voter intent” laws, rather it urges them to implement rules, regulations and policies that clarify such standards prior to the general election. Voter intent is one common ballot-counting standard found in many state laws, but there are states with other standards for ballot counting, such as those that require all ballots to conform to the directions on the ballot and be read by voting machines, and other states that have statewide direct record electronic (DRE) equipment and, therefore, have not felt the need for statewide paper ballot counting standards. Any statewide standard that is clear and ensures that all voters who mark their ballot in the same manner are counted (or not) to ensure equal protection is the focus of this resolution.

States such as Oregon, Washington and Colorado have virtually all voters in the state vote-by-mail, which usually means a paper ballot. Additionally, voters may vote by paper when being assisted at “curb-side” stations. Other voters may vote by mail under the Uniform Overseas Assistance Voting Act (UOCAVA) which means that all states will have at least some hand-count ballots.

Some states suggest that a voter’s intent should be readily ascertainable from ballots that are marked and cast in compliance with the applicable balloting instructions. A non-conforming ballot, (i.e., one that is marked in a manner that disregards the balloting instructions and prevents the ballot from being tabulated by mechanical means) may not be counted. If the ballot is non-conforming due to a voter’s choice in how it is marked, this is clear policy. Even in such states, however, some consideration needs be given to ballots that cannot be machine-read due to situations not caused by the voter, such as ballots damaged in transit through the US mail, or ballots that are damaged once in custody of local election officials. Additionally, is the marking \textit{through} a name by “X” or a line indicative of an intent to support, or an intent not to support the candidate whose name has been so marked under statewide standards? Or, are comments, whether positive or negative, that are written on a ballot on or near a slate of candidates, a

\(^2\) HAVA, HR 3295, Section 301(a)(6).
specific candidate or text of a referendum to be regarded in determining the intent of the voter if
such comments appear to clearly indicate intent? In such situations, guidance on how to handle
ballots when they cannot be counted by voting equipment must be clear if the right to equal
protection is to be given meaning. The confusion is evident by recalling the media events
following the November 2000 Florida presidential vote.

There are states that have state law indicating that ballots are to be counted if the voter’s
intent is clear and that have gone on to further set out statewide guidance as to what that policy
means. Virginia, for example, developed such a document in 2001, and has subsequently
amended it several times, to incorporate new examples. It is now entitled, “Ballot Examples -
Hand Counting Printed Ballots for Virginia Elections or Recounts,” available at
http://elections.virginia.gov/Files/ElectionAdministration/ElectionLaw/ExamplesforHandcountin
g.pdf. This guidance document uses pictorial examples of marked ballots based on actual
examples election officials have seen, and indicates which kinds of markings should be counted,
and which cannot be counted, in conformity with state law. Oklahoma’s current procedure for
hand-counting ballots is located in Section 230:45-5-12 in the Oklahoma Administrative Code,
online at www.sos.ok.gov/oar. The rules for counting, which contain descriptions of valid and
invalid markings, are located in 230:45-5-19. Colorado addresses the issues through the
Colorado Secretary of State Election Rules [8 CCR 1505-1],
http://www.sos.state.co.us/pubs/rule_making/CurrentRules/8CCR1505-1Elections.html in Rule
18. Uniform Ballot Counting Standards. These examples demonstrate appropriate ways in which
several states have addressed the issue. As stated above, however, the majority of states do not
have clear pre-determined standards. Illustrating the importance and ease of understanding rules
that are in place, the following select examples from Virginia and Colorado are provided below:
Virginia:

4) If a write-in candidate is a party to the recount, a vote shall be counted for the write-in candidate if his name is written on the ballot under that office, even if the write-in square, oval or arrow is not marked, and provided that no other candidate is marked for that office.

Votes to be counted:

4 (continued) A write-in vote for a candidate whose name appears on the ballot for the same office may not be counted.

Votes may not be counted:
Colorado:

Colorado Election Rules 18.6.4 Write-in votes
(a) If a voter designates a vote for a named candidate on the ballot and writes in the name of the same candidate in the write-in area, the vote must be counted.
(b) If a voter designates a named candidate on the ballot and writes in the name of a different candidate in the write-in area, it must be considered an overvote for that office if the number of chosen candidates exceeds the number permitted to be voted for in that office and no vote may be counted.
(c) During any recount of votes, if the number of undervotes in that race could change the outcome if attributed to a legally qualified write-in candidate, votes for that candidate must be counted whether or not the target area designating the selection of a write-in candidate has been marked, provided that the number of candidates chosen does not exceed the number permitted in that office.

III. NUMEROUS AMERICAN BAR ASSOCIATION RESOLUTIONS AND POLICIES SUPPORT ELECTION ADMINISTRATION ISSUES

The ABA has a long history in providing insight and advice on matters pertaining to the administration of elections. The promotion of statewide ballot counting standards is an extension of these efforts by the ABA.

In 1989, the ABA adopted the Ballot Integrity Standards Applying to Election Officials (Standards). The Standards addressed proposed rules and guidelines for voter registration, absentee voting, Election Day officials, ballot integrity, and guidelines for poll watchers. The Standards encouraged bar associations to encourage attorneys to serve as election officials, and
for bar associations to assign attorneys to assist with programs that ensure the integrity of the election process.

Because of the widely reported issues in the 2000 presidential elections, the ABA adopted the Election Administration Guidelines in August 2001 (the 2001 Guidelines). The 2001 Guidelines addressed voting education and rights, voter registration, ballot integrity and post-election issues.

In August 2005, the American Bar Association adopted the Election Administration Guidelines and Commentary resolution to supplant the Standards and the 2001 Guidelines (Current Guidelines). The Current Guidelines were updated again in 2008 and 2009 to respond to problems that emerged in administration of subsequent elections. The ABA has recommended that all election officials ensure the integrity of the election process through the adoption, use, and enforcement of the Current Guidelines. Further, the ABA urges federal, state, local and territorial government provide adequate funding to ensure the integrity and efficiency of the electoral process.

In addition to the ABA’s support for election administration in general, the ABA has adopted a number of resolutions that pertain to voting rights for several specific groups of people, such as in 1992 for people living in U.S. territories to be able to vote in national elections, in 1993 to ensure the participation of homeless persons in elections, and in 2007 to improve the administration of elections to facilitate voting for people with disabilities.

Further, the ABA has addressed ballot integrity not just in both the Standards and the Current Guidelines, but also in resolutions regarding use of provisional ballots. Beginning in 1974, and subsequently, the ABA adopted resolutions regarding voter registration, improved opportunities to vote, and to support voter education.

IV. CONCLUSION

The statewide ballot counting laws or regulations urged by this Resolution for adoption by states and territories as soon as practicable will continue to advance the rule of law and ensure greater clarity in election results.

Respectfully Submitted,

John Hardin Young, Chair
Standing Committee on Election Law
August 2016
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Election Law

Submitted By: John Hardin Young, Chair, Standing Committee on Election Law

1. **Summary of Resolution(s).**

   The proposed resolution urges the American Bar Association to call on state and territorial election officials to ensure that state-wide and territorial-wide ballot counting guidance is in place as soon as practicable.

2. **Approval by Submitting Entity.**

   The Standing Committee on Election Law approved this recommendation and resolution at its Spring Business Meeting on April 22, 2016.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

   No.

4. **What existing Association policies are relevant to this resolution and how would they be affected by its adoption?**

   In 1989, the ABA adopted the *Ballot Integrity Standards Applying to Election Officials (Standards)*, which addressed proposed rules and guidelines for voter registration, absentee voting, Election Day officials and ballot integrity along with guidelines for poll watchers. The ABA adopted *Election Administration Guidelines* in August 2001 (the 2001 Guidelines), which address voting education and rights, voter registration, ballot integrity and post-election issues. In August 2005, the Association adopted the *Election Administration Guidelines and Commentary* resolution to supplant the Standards and the 2001 Guidelines (Current Guidelines). The Current Guidelines were updated again in 2008 and 2009 to respond to problems that emerged in administration of subsequent elections. The ABA has adopted a number of resolutions that support voting rights of those in U.S. territories to vote in national elections (adopted in 1992); urge more participation of homeless persons (adopted in 1993); encourage better minority groups voting representation by U.S. government reauthorization of the Voting Rights Act (adopted in 2005); and urge government improvement of the administration of elections to facilitate voting for people with disabilities (adopted in 2007). In August 2003, the *Model Statutory Language on Provisional Balloting and Commentary* was adopted to protect ballot integrity. In August 1974, the ABA adopted a resolution on voter registration by mail. In 1990, noting a continued reduction in voter participation in elections, the ABA adopted a resolution to: support efforts to increase voter registration through state and local agencies, to make voting easy and convenient, and to support voter education. In August 1999, the ABA adopted a resolution opposing legislation that would repeal the National Voter Registration Act. In August 2010, the Association
adopted policy urging states, localities, and territories to review their election systems and recent experiences of election delays, if any, in light of available data and scholarship, including the Standing Committee on Election Law's Report on Election Delays in 2012. The resolution also encouraged the enactment of appropriate legislation or administrative rules to address the causes and potential remedies for election delays, including but not limited to technological improvements to provide statewide database access in real time to all polling places; as well as urging the enforcement of the deadline for the creation of statewide databases imposed by the Help America Vote Act (“HAVA”) and compliance with the deadline. In 2011, the ABA adopted a resolution to support efforts to improve voter registration. The resolution focused on measures to ensure accuracy of voter registration rolls and streamline the procedures by which changes to voter registration rolls are made. In 2015, the ABA adopted a resolution which urged adoption and/or implementation of policies designed to achieve a thirty-minute maximum per voter wait time at the polls. Finally, in 2015, the ABA adopted a resolution which urged adoption of rules, regulations and policies that expressly permit the direct observation of the election process by OSCE observers; and encouraged election officials to welcome OSCE observation.

The proposed report and resolution would complement and expand the above listed Association policy.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation. (If applicable)

None applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If the proposed report and resolution is approved by the House of Delegates, the Association will be able to: 1) in the immediate term encourage chief state election officials to adopt and implement policies, rules or regulations, as they have authority to do so, to clarify voter intent standards as soon as practicable, and 2) to encourage election administrators, officials, and legislators at the state and territorial levels to adopt and implement policies that work toward statutory recognition of voter intent standards. With the Association’s support, policy-makers can be reminded of the importance of uniform, statewide ballot counting law or other guidance to ensure equal protection for all voters.

8. Cost to the Association. (Both direct and indirect costs)

None.
9. Disclosure of Interest. (If applicable)

None applicable.

10. Referrals

This recommendation and resolution has been referred to the following entities:

Section of Administrative Law and Regulatory Practice
Section of Civil Rights and Social Justice
Section of State and Local Government Law

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The proposed resolution would have the American Bar Association urge state and territorial election officials to ensure that uniform, state-wide or territorial-wide ballot counting guidance is in place as soon as practicable.

2. Summary of the Issue that the Resolution Addresses

The proposed resolution seeks to provide a remedy to the failure of many states to comply with U.S. Supreme Court directive and federal law regarding voter intent. Such non-compliance will mean that if election contests in the 2016 general election are close and fall within the margin of requiring a recount there will be a failure to comply with the Equal Protection provisions of the U.S. Constitution.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed policy position will encourage the adoption of uniform, statewide ballot counting standards as a measure of ensuring compliance with Equal Protection provisions in our nation’s electoral process.

4. Summary of Minority Views

No minority views have been identified in opposition.