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# MEMORANDUM

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Date: July 23, 2014

To: Christopher Straub  
Chief Civil Deputy County Attorney

From: C.H. Huckelberry  
County Administrator

A handwritten signature in black ink, appearing to read "CHH", is written over the printed name "C.H. Huckelberry".

Re: **Election Integrity Commission's Proposal to the Board of Supervisors**

Attached is a July 18, 2014 request from the Election Integrity Commission (EIC) and e-mail communication from EIC member Benny White to the Board of Supervisors regarding the post-election audit procedure. The response from Mr. White indicates he believes there are legal issues associated with allowing this process to occur.

I have reviewed the email from Mr. Jurkowitz to Elections Director Brad Nelson, which I have attached, where he says he believes the requested audit procedure is problematic and contrary to the Arizona Secretary of State Election Procedures Manual but concludes it is a policy decision. In light of the memorandum from Mr. White, please ask Mr. Jurkowitz to review this matter again. I believe that handling these ballots in the way requested, prior to certification of the election, is problematic.

As you know, to accomplish what is being requested requires a hand sort of all the ballots cast and an assumption that there will not be human error associated with collection of the ballots. Human error has proven to be predictable and occurs with frequency. Given past results of the hand count audits, ballots counted by individuals have to be recounted multiple times to obtain the same information and count as computer tabulation. It has always been determined that the variance in vote totals between the hand count and computer tabulation has been the result of human error in the hand count, not computer tabulation error. Given the possibility of human error, the potential for a challenge to the results of the Primary Election, and the fact that the ballots would have to be reinserted correctly in the ballot boxes from which they were removed for the count, I believe that to accomplish what has been requested of the Board of Supervisors by the EIC will lead to more questions than answers.

I would appreciate your review of this matter and the recommendation of the County Attorney given the fact that you may be called upon to defend the County in any lawsuit that would result from an election challenge in the upcoming Primary Election.

CHH/anc

Attachments

c: Ellen Wheeler, Assistant County Administrator  
Brad Nelson, Director, Elections Department

# ELECTION INTEGRITY COMMISSION

PIMA COUNTY  ARIZONA



**TO:** Honorable Chair and Members  
Pima County Board of Supervisors

**FROM:** Barbara Tellman, Co-Chair  
Election Integrity Commission

**DATE:** July 18, 2014

**RE:** Recommendation for Early Ballot Sorting by Precinct for  
August 26, 2014 Primary Election as a Feasibility Experiment

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Pima County conducts hand count audits of a prescribed number of randomly chosen ballots after Election Day. Both early ballots and precinct-cast ballots are hand counted but the early ballot audit has a significant shortcoming. This is easiest to understand if we think of the early ballot counting as consisting of three steps:

- 1) scanning of mixed-precinct ballot batches
- 2) sorting and accumulation of batch tallies in election management software
- 3) reporting results

Currently, the early ballot audit checks only step 1, which ensures that the central count scanners are working correctly. But this audit completely ignores steps 2 and 3 and would completely miss any error due to fraud or software bugs that might occur in such data handling. Both of these steps are dependent on the integrity of the election database, which is arguably the most vulnerable part of the system. The hand count audit of the precinct-cast ballots, on the other hand, has a chance of catching errors in all parts of the system.

The majority of the Commission feels that this discrepancy in the integrity of the audit should be fixed and that early ballots should be audited by precinct and counted in the same manner as precinct-cast ballots. Therefore, the Pima County Election Integrity Commission, by a 5-4 vote, requests that the Pima County Board of Supervisors direct the Elections Department to conduct a pilot study during the August 26, 2014 Primary. In this pilot study, early ballots would be scanned as usual. Only ballots scanned prior to 7:00 p.m. on Election Day would be involved. After scanning and after the random selection of precincts for audit, ballots associated with two audit precincts would be found and removed from boxes. These ballots would be hand counted as part of the post-election hand count, and the count compared with the machine count for those precincts as registered by 7:00 p.m. on Election Day.

This pilot study will determine how long it takes to find the required early ballots. The efficiency of the process, as well as maintaining the integrity of the ballots and adherence to Arizona law through the process will be the main factors in determining the feasibility and desirability of sorting early ballots for audit in future elections.

Sincerely,



Barbara Tellman  
Co-Chair, Election Integrity Committee

July 21, 2014

Pima County Board of Supervisors  
130 W. Congress, 5<sup>th</sup> Floor  
Tucson, AZ 85701

**Subject: Election Integrity Commission Recommendation for Post-Election Audit Procedure**

Supervisors,

You will receive a recommendation from the Election Integrity Commission (EIC) to approve an experimental procedure to conduct post-election audits in this year's Primary and General Elections. I strongly urge you to reject that proposal because: (1) it is not authorized in Arizona law, (2) it is preempted by existing election law and (3) it could lead to a recount of the elections and a possible order to conduct new elections.

The recommendation is to conduct an audit where all of the ballots from randomly selected precincts will be extracted from tabulated Early Ballots and the votes marked on those ballots will be compared to the official canvass results for those ballots. The proposal is to conduct this experiment at some point between the completion of the hand audit required by A.R.S. § 16-602 on Saturday following the election and the canvass by the Board of Supervisors on the following Tuesday.

**No Legal Authority for Experimental Audits**

Pima County conducts its elections under the authority of the Arizona Constitution, Title 16 of the Arizona Revised Statutes and the Secretary of State Election Procedures Manual. Pima County does not have a separate Election Code. There is no provision in any of the authorizing law for an experimental audit. Audits of election results are specifically addressed in A.R.S. § 16-602 and the Election Procedures Manual which provide detailed instructions for exactly how to conduct a post-election audit of both the ballots cast in the polling place on election day and early ballots cast by mail. The described audits are mandatory. There is no suggestion in the statute or the manual that counties are free to develop their own audit procedures either to replace the mandatory audits or to develop alternative experimental methods of auditing election results.

A.R.S. § 16-191 provides that the provisions of Title 16 apply to all elections in the state. This includes the provisions of the hand audits described in A.R.S. § 16-602 and the exclusion of any locally developed experimental methods of conducting post-election audits.

**Proposed Experimental Audit is Preempted by State Law**

Preemption is a legal doctrine that holds that laws enacted by federal or state government will preempt contradictory or conflicting laws enacted by lesser jurisdictions where the conflicting law is expressly preempted by the higher jurisdiction or where it is evident that the higher jurisdiction intended to "occupy the field." In this case, the Arizona legislature has occupied the field of post-election audits by enacting A.R.S. § 16-602. Arizona has a general election law which applies to all counties. The reason for this is that many officers and representatives elected by the voters of the state are from jurisdictions that cross county lines. For this reason, it would violate uniformity of election laws for each county to enact its own election laws and to develop its own election procedures.

**Possibility of a Recount Resulting from Experimental Audit**

The post-election audit procedures contained in A.R.S. § 16-602 and the expansion of instructions for these audits in the Elections Procedures Manual are extremely detailed. The objective of these audits is to ascertain that the machines used in

the elections accurately count the votes marked on the ballots and that the reported results are correct. In the event a difference greater than the designated margin is discovered between the announced electronic tabulation results and the hand audit results, the hand audit results become the official count. That change of results could become the basis for a recount of the ballots under A.R.S. 16-641. Under A.R.S. § 16-662, this recount could lead to an action in Superior Court ordering a recount of the entire election.

None of these provisions are included in the proposal for the experimental audit. So the question arises, what happens if the experimental audit shows a discrepancy? What actions should be taken? There are no answers to these questions because the experimental audit is not authorized by law. The discrepancy might be caused by human error, i.e., the auditors failed to locate and audit every ballot that was cast or they might evaluate the vote marks differently from the tabulation equipment.

#### **Proposed Experimental Audit Method Difficult or Impossible to Execute**

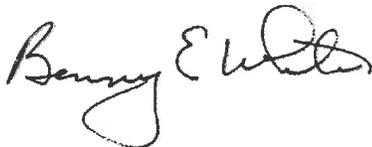
The proposal is to conduct an audit of the early ballots from the selected precincts rather than by batches of early ballots as required by law. To conduct this audit the election staff will need to open sealed boxes of tabulated ballots and extract the ballots for the selected precincts. It is estimated this will take 10 to 12 people two days to accomplish as they will need to go through about 100 to 200 boxes of 500 to 1000 ballots each to locate these ballots. I am very doubtful this can be completed with 100% accuracy. Currently we have no records of which particular ballots are in any box. We only know the number of ballots in the box. Removal of these ballots from the sealed boxes will disrupt the custodial accounting records that are required by law. Once the audit is completed it will be necessary to reinsert the extracted ballots back into the correct boxes (1) to reestablish the custodial record and (2) to minimize the disruption of evidence that may be required in the event of an election contest. It has been proposed that the Recorder can generate a record of the precincts that are included in each batch of ballots transferred from the Recorder to the Elections Department. That may be technically possible but we don't currently have that capability. In addition, ballots that must be duplicated or that have write-in votes are removed from their original batches. There has been no coordination with the Recorder to support this proposal.

#### **Ballot Secrecy Will Be Compromised**

The Recorder currently generates a list of voter names from the affidavit envelopes when they transfer a batch of ballots to the election department. This list does not include the precinct for the voter. However, we have numerous precincts (approximately 50% for Libertarian voters) where less than 10 voters of that party reside in a precinct. Where we pull one or two ballots for a minor party voter from a precinct, audit those ballots and provide a public report, it will be a matter of public record as to how that voter marked their ballot, thereby violating the secrecy of the ballot.

For these and numerous other reasons I strongly urge you to reject the recommendation from the EIC that you authorize an experimental post-election audit method for the Primary and General elections of 2014.

Respectfully submitted,



Benny E. White  
Republican Representative, Election Integrity Commission

**Deborah Haro**

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**From:** Ellen Wheeler  
**Sent:** Monday, July 21, 2014 3:21 PM  
**To:** Chuck Huckelberry  
**Subject:** FW: Attorney Client privilege - Election Integrity Committee request of the BOS

FYI

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**From:** Daniel Jurkowitz [mailto:Daniel.Jurkowitz@pcao.pima.gov]  
**Sent:** Monday, July 21, 2014 3:19 PM  
**To:** Ellen Wheeler  
**Subject:** FW: Attorney Client privilege - Election Integrity Committee request of the BOS

Here you go.  
Dan

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Daniel Jurkowitz, Supervising Attorney  
Tax, Bankruptcy & Elections Unit  
32 N. Stone #2100  
Tucson, AZ 85701  
(520) 740-5750

-----Original Message-----

**From:** Daniel Jurkowitz [Daniel.Jurkowitz@pcao.pima.gov]  
**Received:** Tuesday, 15 Jul 2014, 4:35pm  
**To:** 'Brad Nelson' [Brad.Nelson@pima.gov]  
**CC:** Mary Martinson [Mary.Martinson@pima.gov]  
**Subject:** Attorney Client privilege - Election Integrity Committee request of the BOS

Brad,  
A.R.S. § 16-602(F) provides for an early ballot audit without specifying the exact procedure. The Arizona Secretary of State, however, has provided an incredibly detailed procedure to complete this audit. ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 205-211 (June 2014). While a previous version of the Election Procedures Manual did direct counties to "...presort the early ballot returns by precincts or by legislative districts prior to tabulation," ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 194 (Oct. 2011), the current version provides only that a batch of early ballots be audited for each tabulation machine used. ARIZONA SECRETARY OF STATE ELECTION PROCEDURES MANUAL 206 (June 2014). The Manual especially provides "The batches used for the early ballot audit do not rely at all on the precincts/polling locations selected for the precinct hand count." *Id.* at 208. This added explanatory statement indicates an intent directly in opposition to the proposed action of the Election Integrity Commission. However, there is no prohibition against sorting early ballots by precinct, so it's unlikely that this would result in criminal liability for violating the provisions of the Election Procedures Manual. A.R.S. § 16-452(C). Essentially, this is a policy decision that you or the Board might make.  
Dan

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Daniel Jurkowitz, Supervising Attorney  
Tax, Bankruptcy and Elections Unit  
Pima County Attorney's Office Civil Division  
32 N. Stone #2100  
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(520) 740-5750

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**From:** Brad Nelson [mailto:Brad.Nelson@pima.gov]  
**Sent:** Monday, July 14, 2014 11:17 AM  
**To:** Daniel Jurkowitz  
**Cc:** Mary Martinson  
**Subject:** Attorney Client privilege - Election Integrity Committee request of the BOS

Dan – During a recent meeting of the Election Integrity Committee a motion was passed to ask the BOS to conduct an experiment with the ballots from the 2014 primary election. The gist of the motion was that prior to the canvass, randomly selected precinct ballots would be pulled from all the early ballots that had been tabulated by Election Day.

Dan, as you may recall the early ballots are not tabulated/stored in precinct order. The request if granted by the BOS, would mean that we would have to go through most (perhaps all) of the counted early ballots in an attempt to find all the randomly selected precinct ballots.

To me this is a bad idea on so many different levels. But I thought you should know.

Assuming the Integrity Committee gets its ducks in a row, the item is to be on the BOS agenda for the August 5th meeting.

NOTE – I will be out of the office from July 17 through July 28 on a belated honeymoon. It's not likely that I will be checking emails often. Mary Martinson is up to speed on this matter if you have any questions during my absence.

Regards,

Brad Nelson  
Election Director  
Pima County AZ  
520.724.6830

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