

Common Cause Rhode Island
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November 14, 2014

Rhode Island Board of Elections
50 Branch Ave
Providence, RI 02906

Dear Members of the Board of Elections:

We write today with serious concerns about the proposed recount procedures for the November 4, 2014 elections being considered today by the Board. These proposed procedures were posted only about 48 hours before this meeting.

As you know, unlike virtually every other major state agency, the Board of Elections is not subject to the rule-making provisions of the Administrative Procedures Act. That law, recognizing the critical impact that state agency policies can have on affected individuals, generally requires weeks, not a couple days, of public notice for administrative rule making. Our groups believe rushing these particular procedures through on such short notice immediately prior to the recounts is a recipe for confusion and conflict, and only highlights once again why the Board should be subject to the APA's rule-making requirements

Beyond the hasty process being used to promulgate these procedures, we also have concerns about their substance. The proposed rules lack clarity because of the omission of any definitions. For instance, it is not clear who is allowed to represent a candidate at the recount, or what the "set-up stations" consist of. As worded, the first sentence of the procedure doesn't even make grammatical sense.

Even more disconcerting, the method by which the Board will determine "voter intent" is not clearly articulated. What candidates may request a determination of the Board? What standard will the Board apply for determining intent? Is the "vote of the Board" by simple majority? None of these questions are answered by these proposed rules. All of these ambiguities undermine the goal of a transparent and predictable process that is necessary to ensure the integrity of the process.

It is also unclear how this procedure fits in (or is intended to fit in) with the Board's "Rules and Regulations Relating to Recounts" that were adopted in "voluntary"

compliance with the APA back in July 2010. Regardless, those “rules” demonstrate the completely ad hoc and arbitrary nature of the Board’s process.

Rather than actually delineate the policies and procedures to be used for recounts, the 2010 “rule” merely calls upon the Board to establish those policies and procedures. In other words, the rule calls upon the Board to adopt rules. As if that weren’t unhelpful enough, the “rule” goes on to allow the Board to ignore the rules altogether “at its sole discretion” anyway.

In short, critical procedures regarding the counting of election ballots are left to the complete whim of the Board, without any of the safeguards the APA provides. To have the state agency that gets to decide winners and losers of democratic elections immune from the transparency the APA offers is, as today’s “rule-making” highlights, unfathomable.

After the recounts have concluded, we urge the Board to propose a thorough set of procedures for recounts after providing sufficient notice to the public in order to maximize public input in the process. More importantly, we urge the Board to formally support amending the Administrative Procedures Act in the 2015 session of the General Assembly to repeal the Board’s current rule-making exemption.

Sincerely,

John Marion
Common Cause Rhode Island

Steven Brown
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