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Recount: A Tale of Kentucky's Gubernatorial Election

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Recount: A Tale of Kentucky's Gubernatorial Election

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As the election returns rolled in for Kentucky's state constitutional offices on November 5, all eyes quickly turned to the results of the gubernatorial contest. By night's end, with the unofficial votes almost fully tallied, the Democratic challenger Andy Beshear led Republican incumbent Matt Bevin by just 5082 votes[1]

(applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn1)—a margin of just 0.36 percent. However, around 10:00pm when Bevin took the stage at the Galt House in Louisville, he somewhat surprisingly informed the audience that he would not be conceding due to unspecified "irregularities" and said that the result would be subject to "well-established" laws and procedures.[2] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn2) And while he has since conceded,[3] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn3) the world of Kentucky politics was in temporary upheaval when State Senate President Robert Stivers suggested that Bevin may invoke a provision of the state constitution[4]

(applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn4) that would allow the state legislature to decide the winner of the election.[5] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn5)

That provision and the state laws passed under it essentially give the state legislature unfettered discretion to choose the winner of an election when a losing candidate contests the result, with no requirements that there be actual proof of any fraud, misconduct, or "irregularities." These comments and the extremely small margin separating the two candidates led many to ask: what is the procedure for challenging and checking the results of a gubernatorial election?

In Kentucky, the most basic, and typically the first, step to ensure accurate vote totals is a *re canvass*. Most people are familiar with a recount, a procedure where ballots are hand checked for accuracy and authenticity, which is distinct from a *re canvass*, where vote totals are essentially just being double checked to make sure the math adds up. The procedures for a *re canvass* are laid out in state statutes, which give a statewide candidate one week after election day to make a written request for a *re canvass* to the Secretary of State.[6] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn6) If such a request is made, the *re canvass* must take place on the Thursday following the deadline to make the request.[7]

(applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn7) During a *re canvass*, each political party and the media is permitted to have a representative present while each county board of elections double checks their vote tallies.[8] (applewebdata://6D8CE2C9-5400-4D32-B179-

29DEFF1510B7#_edn8) Once the vote totals are confirmed, they are sent to the State Board of Elections and thereafter considered the official returns for the election.[9] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn9) Recanvasses seldom change the outcome of an election, and often only yield “very modest revisions.”[10] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn10)

So, what if a candidate is still not happy with the results of an election after the recanvass? In many cases, the next step would be a *recount*, in which individual ballots are each counted again to ensure their integrity and accuracy. Many states permit candidates to request a recount if the vote margin is small enough, but in Kentucky there is no threshold—any candidate entitled to request a recount may do so regardless of how many votes they lost by.[11] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn11) To request a recount, the candidate must file a petition in Circuit Court within ten days of the election, and once certain procedural requirements are satisfied, the court will take possession of all the relevant “voting machines, ballots, boxes, and [] papers” and conduct the recount.[12] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn12)

However, in Kentucky, while most general election candidates can request a recount, candidates for governor, lieutenant governor, and the state legislature cannot.[13] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn13) For those candidates, the only recourse after a recanvass is an *election contest*. This is the procedure that left many uneasy after Kentucky’s gubernatorial contest. Not only does Kentucky’s election contest procedure allow the state legislature to choose the winner of an election regardless of who received the most votes—which understandably caused alarm, since the Kentucky legislature is controlled by a Republican supermajority and Republican state legislatures elsewhere have shown a brazen willingness to undermine rule of law[14] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn14)—but the state also has an unpleasant history with election contests. The last time a gubernatorial election was contested in the legislature, the governor was assassinated and the state nearly fell into a state of civil war.[15] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn15)

An election contest is authorized in section 90 of the Kentucky Constitution, which simply states that “[c]ontested elections for Governor and Lieutenant Governor shall be determined by both Houses of the General Assembly, according to such regulations as may be established by law.”[16] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn16) After the State Board of Elections has given final action to the results, state law gives candidates on a gubernatorial ticket thirty days to file a written notice of contest.[17] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn17) Once the contest has been initiated, the General Assembly selects eleven members to be on a board (three from the Senate and eight from the House of Representatives) by randomly drawing names of members from a box.[18] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn18) That board then gathers evidence, hears testimony, and makes findings.[19] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn19) After its investigation, the board’s decision is reported to a joint session of both chambers, where a final vote is taken to determine whether to accept the board’s recommendation.[20] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn20)

While certain procedural requirements are spelled out in state statute, the legislature appears to have broad discretion on whether to uphold or overturn the results of a gubernatorial election. The legislature is not required to justify their decision, and there is no requirement for sufficiency of evidence, no burden of proof on the candidate contesting the election, and no judicial review of the result of an election contest.[21] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn21) In the wake of this year’s election, many were fearful that Bevin would contest the election under spurious claims of voter fraud, which have become concerningly common across the country,[22] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_edn22) and the legislature would be free to declare him the winner—even if there were no legitimate grounds for doing so.

While ultimately the election was not contested and we appear to once again be headed toward a peaceful transition of power, this year’s election is a powerful reminder of the fragility of democracy and the power public officials can have over the public’s faith in elections. That power must be exercised responsibly, and officials should be careful not to undermine our electoral system with unfounded claims of voter fraud. And if they continue to do so, more responsible and patriotic public officials would do well to strengthen democratic safeguards—perhaps by requiring claims of “irregularities” and fraud to be proven by real, objective standards of evidence before permitting legislatures to thwart the will of the people and overturn an election.

[1] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref1) Veronica Rocha & Fernando Alfonso III, *Election Day in Kentucky, Mississippi and Virginia*, CNN Politics (last updated Nov. 6, 2019, 12:04pm), <http://cnn.com/politics/live-news/2019-election-results-kentucky-mississippi-virginia/index.html>. The final margin after the recanvass showed Beshear up 5136 votes over Bevin. Adam Levy & Kate Sullivan, *Republican Matt Bevin Concedes Defeat in Kentucky Governor’s Race*, CNN Politics (Nov. 14, 2019), <https://www.cnn.com/2019/11/14/politics/kentucky-governor-recanvas-begins/index.html>.

[2] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref2) Steve Brusk, Adam Levy, & Caroline Kelly, *Bevin Campaign Formally Asks for a Recanvass in Kentucky*, CNN Politics (last updated Nov. 6, 2019, 6:47pm), <https://www.cnn.com/2019/11/06/politics/bevin-recanvass-kentucky/index.html>.

[3] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref3) Steven Shepard, *Matt Bevin Concedes Kentucky Governor’s Race*, Politico (Nov. 14, 2019), <https://www.politico.com/news/2019/11/14/matt-bevin-concedes-kentucky-governor-070975>.

- [4] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref4) Ky. Const. § 90 (Contest of election of Governor, Lieutenant Governor, or General Assembly member).
- [5] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref5) Phillip M. Bailey & Joe Sonka, *Beshear vs. Bevin: Kentucky Governor's Race Could Be Decided by State Legislature*, USA Today (Nov. 7, 2019), <https://www.msn.com/en-us/news/elections-2020/beshear-vs-bevin-kentucky-governors-race-could-be-decided-by-state-legislature/ar-AAJXgkl>.
- [6] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref6) Ky. Rev. Stat. Ann § 117.305(1) (LexisNexis 2019).
- [7] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref7) *Id.* (“[T]he county election board shall assemble at 9 a.m. on the Thursday following the filing deadline to request a recanvass”).
- [8] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref8) *Id.*
- [9] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref9) *Id.*
- [10] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref10) Rick Pojas & Patrick J. Lyons, *How Kentucky Will Decide Who Won the Governor's Race*, N.Y. Times (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/us/kentucky-governor-election.html> (quoting Professor Joshua A. Douglas, “In every instance, the vote totals change by a very small amount.”).
- [11] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref11) Ky. Rev. Stat. Ann § 120.185(1) (LexisNexis 2019).
- [12] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref12) *Id.*
- [13] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref13) *Id.* (Providing that a recount is only available to candidates to which KRS 120.155 applies, which specifically states that it does not apply to candidates for governor, lieutenant governor, or member of the General Assembly).
- [14] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref14) See, e.g., Ari Melber, *What Happens When Losers of Elections Won't Relinquish Power?*, The Washington Post (Dec. 6, 2018), <https://www.washingtonpost.com/outlook/2018/12/06/what-it-means-democracy-if-losers-elections-dont-relinquish-power/> (describing actions taken by the Wisconsin's republican state legislature to strip the governor of power after a democrat beat a republican incumbent).
- [15] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref15) Ian Shapira, *The Last Time Kentucky Fought Over a Gubernatorial Election, The Governor Got Killed*, The Washington Post (Nov. 10, 2019) <https://www.washingtonpost.com/history/2019/11/10/last-time-kentucky-fought-over-gubernatorial-election-governor-got-killed/>.
- [16] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref16) Ky. Const. § 90.
- [17] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref17) Ky. Rev. Stat. Ann § 120.195(1)-(2) (LexisNexis 2019).
- [18] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref18) Ky. Rev. Stat. Ann § 120.205(1) (LexisNexis 2019).
- [19] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref19) Ky. Rev. Stat. Ann § 120.185 (LexisNexis 2019).
- [20] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref20) Ky. Rev. Stat. Ann § 120.185(5) (LexisNexis 2019).
- [21] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref21) *Taylor v. Beckham*, 56 S.W. 17 (Ky. 1900) (holding that the General Assembly has exclusive power to pass on sufficiency of evidence, and that courts will not inquire on whether the ultimate decision of the Assembly is correct.).

[22] (applewebdata://6D8CE2C9-5400-4D32-B179-29DEFF1510B7#_ednref22) See, e.g., Chris Cillizza, *Debunking Donald Trump's Latest Voter Fraud Claim About New Hampshire*, CNN Politics (Aug. 16, 2019) <https://www.cnn.com/2019/08/16/politics/donald-trump-new-hampshire-vote->

fraud/index.html; German Lopez, *Trump's Voter Fraud Commission, Explained*, Vox (Jan. 3, 2018), <https://www.vox.com/policy-and-politics/2017/6/30/15900478/trump-voter-fraud-suppression-commission>.

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