

Election Transparency In Monterey County California: A Recipe For Court Action

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This report has been prepared for and in cooperation with:

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Introduction

The June 3rd 2008 election in Monterey County was, in general, an utter failure of election transparency. It was impossible for any observer whether county staff or independent observer to confirm that the election's outcome was proper. There are inadequate controls against both malicious tampering and accidental glitches.

The collapse of transparency was deliberate and systematic, and violated state laws, the certification rules promoted by the California Secretary of State's office and democratic principles in general.

Should these local policies against transparent elections be allowed to stand, elections will remain at risk in this county. Worse, should this elections agency be allowed to get away with observation barriers to the degree documented herein, a precedent will be set allowing other elections offices across the state to misbehave in the same fashion.

Thus, what happens here in Monterey as a result of this election will affect the security of the November general election and all subsequent elections.

¹ Mr. March is a member of the Board of Directors of Black Box Voting Inc, which covered travel costs. BBV approved of this operation but it was managed locally by Monterey County election integrity activists.

Blow-By-Blow Report

Local citizens involved with SAVElections Monterey County (Valerie Lane and Brian Rothenberger) were subjected to harassment and verbal abuse during previous elections. On May 27th 2008 the abuse was ratcheted up – Mr. Rothenberger was first accused of moving a table that was blocking the observation window when in fact one of the staff had done so at Brian's request², and then Brian was falsely accused of pushing an elections official. Note that while they did make this claim and had the Salinas PD escort Mr. Rothenberger out of the building, they did not charge him with anything, likely because of the videotape recording in that location.

Note that Mr. Rothenberger is a very qualified computer tech local to Monterey who has been helping out the Green Party and SAVElections. He has been pointing out technical deficiencies in this elections agency and has consistently been branded a “troublemaker” by the county elections office. *The pattern I saw is that any technically qualified person who looks at that agency will be vilified by them.*

Ms. Lane contacted the Pima County Democratic Party asking for their advice on election observation. The Pima County Dems party chair (Vince Rabago) put them in touch with me, and the Executive Director of Black Box Voting soon agreed to pay for my plane ticket out to Monterey to bolster the observation process.

We first visited the elections office late Friday May 30th and had a brief and cordial visit. We understood that they were in a busy period, we briefly looked over the elections office and introduced ourselves to Joe Ripley. We introduced me along with my background and the purpose of my visit to Monterey County.

On Saturday May 31st we presented letters from the Monterey Green Party declaring myself and Mr. Rothenberger credentialed election observers pursuant to Election Code 15004 to Linda Tulett (Registrar of Voters, head elections official):

15004. (a) Each qualified political party may employ, and may have present at the central counting place or places, not more than two representatives to check and review the preparation and operation of the tabulating devices, their programming and testing, and have the representatives in attendance at any or all phases of the election.

(b) Any bona fide association of citizens or a media organization may employ, and may have present at the central counting place or places, not more than two representatives to check and review the preparation and operation of the tabulating devices, their programming and testing, and have the representatives in attendance at any or all phases of the election.

(c) The county **elections** official may limit the total number of representatives employed pursuant to subdivision (b) in attendance to no more than 10 by a manner in which each interested bona fide association of citizens or media organization has an equal opportunity to participate. Any representatives employed and in attendance pursuant to subdivision (a) shall not be subject to the limit specified in this subdivision.

We also reviewed the county's locally created “observation policy manual” which had no mention of 15004-type observation. The other item of interest was a “no cameras” policy for all observers. A

2 Brian had simply asked if it was possible for the table to be moved; the staffer then moved it.

stated reason was given in the observation policy manual: cameras were banned “for the privacy of staff and voters”. There were no voters allowed anywhere near the central tabulator room, and the area within and around the room was covered by county-owned video cameras which produced video that is accessible via public records, making any expectation of privacy anywhere near those machines something of a joke.

Mr. Valenzuela (assistant Registrar of Voters) noted during our conversation that he had read my report on the election conduct and process in Maricopa County AZ. We discussed how both Maricopa and Monterey are Sequoia customers who use the BPS (Ballot Preparation System³) software in-house. The report he referred to can be seen at:

<http://www.bbvdocs.org/sequoia/Maricopa-County-Elections-Report.pdf>

I made Ms. Tulett aware that I wanted to check to make sure the systems used certified voting system components in a legal, certified configuration. She stated that she would have to study Election Code 15004 and consult with counsel on it. We⁴ agreed that was reasonable and departed.

On Monday June 2nd around 8:30am we arrived and spoke to Linda again. She noted that she had not yet talked to counsel and would be meeting with them later that day around 4:00pm, which we again accepted as reasonable. We dropped off the public records request reproduced as appendix A of this document, discussing it with her briefly (noting that most of it asks for items which either didn't exist yet or couldn't legally be released yet). Linda stated that the afternoon of the day of the election would be a somewhat slow period for her office; we agreed on a time somewhere between 2:00pm and 3:00pm for the EC15004 system inspection.

I stated at that time that with mutual cooperation, the EC15004 exam process should take no more than 15 minutes. My stated goal with her was to ensure that the central tabulator room voting systems were of a legal and certified type and in a certified configuration⁵.

Also on Monday we examined the central tabulator room through the “observation window”. We noted a number of problems: network cables inter-connecting the voting systems are allowed, but these ran through the floorboards out of sight and could have been split off and diverted. In this fashion the “who is winning and losing” data from before the election (based on the mail-in vote) could have been stolen⁶ or the databases could be back-door-tampered by other machines. Worse, a huge wiring cluster in the corner of the same room acted as the central Internet gateway for that building's regular office computers; it would have been easy to cross-wire the voting systems to the Internet through the Cisco router built into that wiring stack.

We asked permission to photograph the room as it was empty and “personal privacy” wasn't a factor. This request was denied, meaning their “personal privacy” excuse on photography was fraudulent.

On the day of the election (Tuesday 6/3/08) we arrived at the elections office at 2:15pm. Present were

³ Sequoia has used several variants of this name for this uncertified product in different jurisdictions.

⁴ Present were myself, Valerie Lane and Brian Rothenberger.

⁵ This would be a very “light” reading of what's possible under EC15004. Voting systems are subject to certification rules under both Federal and state rules; in short form, this means “use what's approved and tested”, “don't add anything not approved (especially if the addition has security implications)” and “don't network the voting systems to uncertified systems, the county's Local Area Network and above all, don't cross-wire the stuff to the Internet”.

⁶ This has been extensively documented in Pima County AZ, where audit logs showed such data theft as regular events from 2004 (primary) through 2006.

myself, Ms. Lane, Mr. George Riley, an official with the Monterey County Green Party and Jeanne Turner of SAVElections.

Ms. Tulett met us at the front counter and presented her “plan” for observation: she would allow us to confirm the version numbers and timestamps of the Sequoia voting system software, period. She claimed that her county attorneys had determined that the Sequoia software fit the description of “device” in EC15004. I replied that the term “device” should refer to the entire computer that the software was running on, and that in order for that software to be certified under California's rules, the rest of the software and hardware environment had to be of the certified type – and that I should be allowed to confirm this.

She disagreed.

We went back to the central tabulator observation window and reviewed the Sequoia version number info. I then asked that they show what programs were loaded into the machine either by reviewing the list of programs available in the operating system menus or under the “add/remove programs” function listing all loaded programs.

Ms. Tulett refused this request at first, and then agreed to consult with her counsel on this point. We agreed this was reasonable; according to Ms. Tulett her attorney was expected any moment. She said that since nothing was going on in the room at that time, no observation was needed and we were required to wait out in the lobby.

From the lobby, we could see the front door of the central tabulator room “sideways”, but we could not see into the room. The room was also accessible from the rear (through the warehouse).

After about an hour and a half, Ms. Lane, Mr. Riley and I agreed that matters had become boring. We decided to propose giving Ms. Tulett my cell phone number and ask her to call me when she had counsel available so that we could come to some mutual understanding of what EC15004 was all about and what the examination would consist of. Meanwhile we'd go scope out some precincts.

We proposed this plan to Joe Ripley, one of the mid-level staffers. He agreed this was reasonable, and set off to find Ms. Tulett to discuss this with her.

However, rather than going to Ms. Tulett's office, he went straight back into the central tabulator area and entered the sealed room.

Alarmed, I asked myself what Ms. Tulett might be doing in there, and didn't like the answers I was coming up with. I quickly looked around for Frank Foley - he is that office's best computer technician and his cubicle seat is very visible. He was nowhere to be seen.

Mr. Ripley came out and said something regarding Ms. Tulett's availability – I don't know exactly what. Masking my anxiety as best I could, I politely asked Mr. Ripley permission to come back and look into the central tabulator room. He delayed for a moment, went back over there, opened the door, told us that nobody was in there right now, and I said “right, but I just want to look for a second”. He shrugged and led us back there to the viewing area⁷.

⁷ By their rules, we were always under escort when anywhere behind the front counter, including looking into the central tabulator observation window.

What I had noticed was that one of the secondary monitors showing observers what was going on had something on it – an open MS-Windows program of some sort. I couldn't tell more than that from 40 feet away. As George and I got closer, it was obviously the Microsoft Windows “Add/Remove Programs” function.

I asked George if he saw it too - “yep”. At this point I was beyond “angry”. I am sure I said something to the effect of “those bastards have kept us cooling our heels out there while they snuck in the back of the room and tampered with exactly what we had made a request to see, out of our sight”. I will confess here and now to using at least some profanity...but not without cause.

I then pulled out my cell phone, turned on its two-megapixel camera function and photographed the “add/remove programs” screen – unfortunately that picture didn't come out.

Mr. Ripley and Mr. Valenzuela went simultaneously ballistic. Mr. Valenzuela demanded my phone; I flatly refused. He then ordered me out of the building – I refused this as well, in both cases firmly and politely. Mr. Valenzuela then told me police were being called and threatened me with arrest.

They also asked the other three members of our party to leave, as “nothing was going on” - they consistently claimed that observation was only allowed whenever THEY determined that there was something to observe. I reminded them that they had now been caught going in and out the back way and tampering with the system; they shrugged that off and again told everybody to leave.

I told Ms. Lane and Ms. Turner that they didn't need to risk arrest, but also asked George to stay as a witness if he felt he could do so. All present were deeply troubled but to his credit and my eternal thanks, Mr. George Riley agreed to stay.

At this point, both private security guards were ordered to watch us along with at least one other staffer. At approximately 15 minute intervals Mr. Ripley would come out and order us to leave yet again. I would refuse; George Riley said that as a Green Party official who helped convince me to come out from Arizona he felt a duty to at least observe what happened to me.

During the wait for the deputies, I called my attorney in Arizona (Bill Risner) and gave him a blow-by-blow account of events to that point. Staff and renta-cops harassed me over my phone use; I replied that I'd been threatened with arrest and that we were past a “normal rules” situation.

After some unknown time (well over an hour), sheriff's deputies finally arrived. I was able to observe them near Ms. Tulett's office; one was on the phone for at least five minutes. Ms. Lane informed me later that county attorney Blankenship had arrived but through the back door and went directly to Ms. Tulett's office.

After at least fifteen minutes of this “high level huddle”, Ms. Tulett and the rest of her upper staff came over to us and agreed to show us what software was loaded on the machines. They never responded clearly to questions as to whether or not we were still threatened with arrest, but it was clear that was off the table. Mr. Blankenship left the building without talking to any member of our team or answering any legal challenges. Valerie Lane and Jeanne Turner rejoined us. Claudio Valenzuela and Frank Foley went into the room to type in commands; Linda Tulett was at the door passing instructions from me to Mr. Valenzuela and Mr. Foley⁸.

⁸ Linda Tulett's actual words were “we have agreed to do your test”.

Examining the installed software was an annoying process as Mr. Valenzuela pretended not to know how to run MS-Windows. We got past that and established that Microsoft Access 2003 (and the rest of the MS-Office 2003 suite) were present on the “Tally1” and “Tally2” systems.

I then asked that an additional command be typed into the command line window:

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ping www.google.com
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This would have established whether or not they had cross-connected their systems to the Internet in less than 20 seconds⁹. All elections staff categorically refused to do this; Mr. Valenzuela and Mr. Foley walked out of the room to the back and Ms. Tulett declared all “testing” done, noting that this whole process had already taken hours. I asked her whose fault she thought that was. She asked me why I was accusing her of misconduct, I asked her why she was sneaking around her own building like a cat burglar.

The discussion petered out at that point and we left the building. Please note that at no time was there any report back from attorney Blankenship as to what Election Code 15004 is all about.

I returned later that evening as the post-polls-close started back up after 8:00pm. I was allowed in as an observer. That evening I spent some time educating the rest of the election integrity people on problems within the room and transparency issues in general, which led to verbal harassment by elections staff.

The elections staff was highly secretive in the operation of the election. Two points stand out:

a) Information was transferred from machine to machine on USB memory sticks. This was not a transparent process. At one point the memory stick (a very small one of yellow translucent plastic) was carried out of the room in Mr. Foley's closed fist while he attempted to conceal his having done so. Questions about whether the memory stick was being carried in or out were ignored. Only by carefully observing Mr. Foley hands could I tell that it was being transported.

b) The first set of printouts of the elections results based on the pre-scanned mail-in votes (just before 9:30pm) failed for some reason. Copies of these “aborted” sheets were carried away from the observers over 60 feet away to Mr. Tulett's office, where a heated discussion ensued away from observers. My attempts to watch this by prairie-dogging my head over the cubicle were met by harassment by staff. A second set of results printouts were made and again carried over there; this time we saw a “thumbs up” and those results were released. What was different is impossible to say. The memory card was also carried over there during this time; that may have been harmless (uploading results to the Internet?) or malicious (altering vote totals reporting on the memory card). My point isn't to accuse them of tampering without having any evidence of same; I do accuse them of running an illegally secretive process.

Legal Consequences And Violations - Suggested Causes Of Action

1) This department violated Election Code 15004 in at least two ways: they did not allow even minimal testing, and they attempted to subvert the sketchy testing they did finally allow by sneaking into the room and messing with the exact data we were lawfully asking about. If allowed across the state, this behavior will destroy EC15004 as a check and balance.

⁹ The “ping” command takes less than 10 seconds to run.

2) Threatening us with arrest was a violation of our civil rights, and put us in fear of arrest for well over an hour. It was a detestable act. Had the threats been successful, election oversight under EC15004 would have been thwarted completely.

3) The “no cameras” policy is being applied unequally in violation of our 14th Amendment rights. See also the June 5th Monterey Herald newspaper which printed pictures of their staff happily working away on the election. Apparently non-technical photography of people's faces is fine, technical photography of illegal computer configurations is “evil”? This is also a further violation of both the EC15004 technical observation rules and the general citizen observation of the vote-tally rules.

4) While EC15004 observation is subverted and denied, regular “citizen observation” of the counting of the vote is also systematically subverted. Critical functions happen on election night deliberately away from observers (at Linda Tulett's office) and rather than being openly carried, memory cards are carried around in closed fists by people with closed mouths.

5) The presence of MS-Access on these systems is an open-and-shut certification violation. This county has a copy of the Sequoia “BPS” software to prepare their own ballot layouts. BPS writes it's data in MS-Access format. MS-Access could easily be used by hand to subvert any possible audit controls and basically take over the election. MS-Access is widely understood to be a “burglary tool for elections” and has no business being anywhere near a live voting system, period.

6) Finally, there is very likely going to be a public records fight, on two issues: what we get access to, and when we get it.

Our records request was made “pursuant to the California Public Records Act and Election Code 15004”. There is a conflict between the public records laws and the election code: under the public records laws the county has the ability to “stall” for a considerable period. Following the 2008 Presidential Primary election, members of SAVElections received some data, but most of it not until two months post-election.

Under the election codes, once the election becomes official (after the canvass) a five-day window opens up in which candidates can declare challenges and/or file for recounts. To do so intelligently, they need the public records relating to the election at the START of the five-day challenge window. That means audit logs, windows event log, directory listings and the raw electronic files generated by the county from the Sequoia BPS and WinEDS programs. Without such access, the age of electronic voting renders the five-day-challenge rule a useless taunting waste of the democratic process.

Setting that issue aside, this agency's dead-set stance against transparency in every other respect is likely to translate to “pulling public records will be like pulling teeth from a drunk warthog – with rusty tweezers”. We can't sue for wrongful denial until we're denied of course, but we could get an injunction against delays that would render the five-day challenge window meaningless and combine it with the rest of the causes of action listed.

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