

Stetson Journal of Advocacy and the Law

The first online law review designed to be read online



12 Stetson J. Advoc. & L. 34 (2025)

Mirage in the Desert: The Legalities of Hand Tabulating Elections in Arizona

William Davis, Esq.

Deputy General Counsel
for the Arizona Secretary of State
Phoenix
Arizona

Mirage in the Desert: The Legalities of Hand Tabulating Elections in Arizona

By William Davis, Esq.¹

12 Stetson J. Advoc. & L. 34 (2025)

“The right of suffrage is a fundamental Article in Republican Constitutions.”²

I. Introduction

34. Throughout the history of the United States and the history of Arizona, the methods used to cast, record, and tabulate ballots have evolved. In the beginning, votes were tabulated by hand via a team of people called an election board. Then, as technology marched forward, governments began to tabulate ballots by machine.³ Until recently, the accuracy of machine tabulators was universally accepted as being more accurate

1 William Davis Esq. is the Deputy General Counsel for the Arizona Secretary of State and a graduate of Stetson University College of Law Class of 2022. This paper is dedicated to the election officials throughout the State of Arizona and with particular dedication to the Mohave County Elections Department and County Attorney’s Office.

2 James Madison, [Note to His Speech on the Right of Suffrage](#) (1821).

3 [ARIZ. REV. STAT. § 12-2991](#) (1913); [ARIZ. REV. STAT. § 22-1240](#) (1932); [ARIZ. REV. STAT. § 16-423](#) (1979).

than manual tabulation — with statements of manipulation largely pushed to the fringes of the political spectrum.⁴ This, however, is no longer the case.⁵

35. The scope of this article is not to review the practicalities of tabulating ballots by hand. To review how to achieve such a feat, the Mohave County Elections Department published the results of an experimental run of tabulating ballots by hand.⁶ The scope will only focus on tabulation as the primary method for counting votes. This article will not dwell on the post-election hand count audit as outlined in Arizona Revised Statute Section 16–602. Additionally, this paper does not discuss special district elections and tabulation as they often have unique rules set in statute. In Arizona, the state delegates to its fifteen counties most functions of conducting, tabulating, and canvassing elections.⁷ The intent of this article is to support ongoing and future litigation on this subject by bringing the necessary historical context on the evolution and current status of manual tabulation in Arizona. It must be noted that the 2023 Election Procedures Manual (E.P.M.) requires machine tabulators for every Arizona election.⁸ The E.P.M., however, is a rule promulgated by the Arizona Secretary of State on advice and consent of the Governor and Attorney General.⁹ As a provision in the E.P.M. cannot go beyond the bounds of statute, this article will lend support to this Section of the E.P.M. in the

4 See generally, Robert Schlesinger, [No, Obama Didn't Win 108 Percent of the Vote in an Ohio County](#), (Nov 20, 2012, 09:00 ET). It must be noted that election administrators, the people who actually work with the machines and understand the system, maintain that machine tabulators are safe, transparent, and secure. Most of the criticism of the machines come from people who do not work in elections administration and often parrot claims of fraud with no basis in reality.

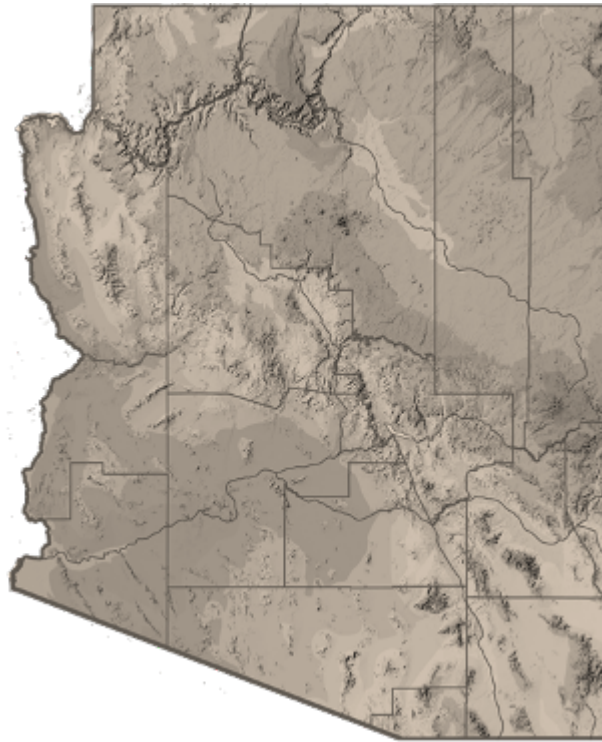
5 [Letter from Sonny Borrelli, Ariz. Senate Majority Leader to Cnty. Bd. of Supervisors](#) (May 22, 2023).

6 See [Mohave Cnty. Election Dept., 2024 Ballot Hand Tally Analysis](#), (2023).

7 See [ARIZ. REV. STAT. § 16–602](#) *et. seq.*

8 [Ariz. Election Proc. Manual](#), Ch 10 § 1 (2023).

9 [ARIZ. REV. STAT. § 16–452](#) (2024).



event of litigation.¹⁰

II. History of Hand Tabulation in Arizona Election Law

A. The Territorial Era 1863–1912

36. The Arizona Territory came into existence in 1863, and around a half-century later, in 1912, Arizona became the 48th State. Throughout this time, Arizona needed a way to tabulate the votes that its citizens cast. The chosen method was hand tabulation. The territory and early state chose hand tabulation as the preferred method for one simple reason, it was the only method available to them. Due to there only being a single method to count votes, the statutes at the time simply order the counties to “canvass” or “count” the votes in a certain way.¹¹ In 1888, counting or canvassing would happen as soon as the polls closed. The election judges took the ballots out of the boxes and counted the number of ballots against the number of names who voted. This was to ensure the two numbers matched.¹² If the numbers did not match, an election judge

¹⁰ *McKenna v. Soto*, 481 P3d 695, 699 (Ariz. 2021).

¹¹ Manner of Conducting Elections, Gen. Election L. Ariz. Terr., ch. 12, § 1703–04 (1888) [hereinafter 1888 Election L.] (In this era, the term canvass and count were used together to mean tabulate, today canvass is used to mean certify).

¹² 1888 Election L., ch. 12, § 1698–99 (1888 are the earliest set of Arizona elections laws viewable on the Arizona Memory Project).

would randomly destroy ballots until the numbers did match.¹³ Ballots being counted were called out by the tally board and the vote was recorded. The tally board then placed the counted ballots on a string so that the public may inspect them.¹⁴ This process was unchanged throughout the territorial period.¹⁵

B. Early Statehood 1912–1978

37. In the early days of the state, election tabulation procedure largely remained unchanged from that of the territory.¹⁶ The first large change to tabulation procedure came in 1927 when the legislature authorized the experimental use of voting machines in elections.¹⁷ In 1927, the laws relating to counting ballots remained the same, however, the inclusion of voting machines allowed for ballots to be voted faster.

38. Via the newly passed Senate Bill 30, local governments could now test voting machines in experimental use.¹⁸ This experimental use did not alter the ballot tabulation method, although the authorizing statute allowed for experimental use of voting machines that could tabulate ballots.¹⁹ S.B. 30 allowed for the voting machines to count the votes as well as act as a function for an elector to vote on, such as a lever machine. Section 20 of S.B. 30 detailed how election officials and election judges secured the voting machines and read the number of votes cast for each candidate and other races.²⁰ Similar to the Territorial Period, in the early days of statehood, the method used to tabulate ballots remained relatively steady from its first inception.²¹ These provisions are the seeds of the modern day Section relating to how voting equipment is used and tested.²²

13 1888 Election L., [ch. 12, § 1701](#).

14 1888 Election L., [ch. 12 § 1703–1706](#).

15 Reg. & Election L. Terr. Ariz., ch. 10, §§ 2387–88 (1901) [hereinafter 1901 Election L.]; Reg. & Election L. of Ariz., ch 10, §§ 2387–88 (1910) [Hereinafter 1910 Election Laws].

16 See generally [ARIZ. REV. STAT. § 12–2986 et. seq.](#) (1913); [ARIZ. REV. STAT. § 12–2986 et. seq.](#) (1916); [ARIZ. REV. STAT. § 22–1255 et seq.](#) (1937).

17 [Ariz. Sess. L.](#), 95–96. (1927) [hereinafter [S.B. 30](#) (1927)].

18 [S.B. 30 § 3](#) (1927).

19 [Election L. Ariz. 1913](#) amend. 1927 Title 12, ch. 10, §§ 5–6; [S.B. 30 § 3](#).

20 [S.B. 30 § 20](#) (1927).

21 Compare, [ARIZ. REV. STAT § 12–2986 et. seq.](#) (1913) with [ARIZ. REV. STAT. § 55–701 et. seq.](#) (1954).

22 See generally [ARIZ. REV. STAT. § 16–441](#) (2024) *et seq.*

III. Evolution of Hand Tabulation in Arizona Law

A. Applicable Law

39. The entirety of Title 16 of the Arizona Revised Statutes is dedicated to the conduct of elections.²³ Chapter 4 Article 4 concerns voting equipment and Chapter 4 Article 10 concerns the tally and returns of election results.²⁴ From the beginning of the State of Arizona to today, only a handful of statutes have governed the way that ballots are tabulated. Many of the statutes have their roots at the start of Arizona elections and are carried forward to the present day or were eventually repealed. The current-day iterations of some sections of law look nearly identical to their earlier versions while others bear no resemblance to their early cousins. This interesting trend shows how parts of elections are dynamic while others are static.

B. A.R.S. § 16–442 Approval of Voting Equipment

40. Arizona Revised Statute Section 16–442 governs the adoption of voting equipment generally.²⁵ The first iteration of this statute came up in the 1927 legislative session with Senate Bill 30.²⁶ S.B. 30’s Section on voting machines authorized counties, cities, towns, and villages to adopt voting machines. In the bill, voting machines counted as a machine that could cast, register, record, and count ballots.²⁷ The bill sets out construction requirements of the voting machines, including the need to vote straight ticket and ensuring ballot secrecy.²⁸

41. In 1954, Arizona Revised Statutes 55–802 and 55–803 acted in a similar capacity to their early-statehood counter parts in S.B. 30.²⁹ Section 55–802 specifies what the requirements are for voting machines generally, whereas Section 55–803 lays out that a polity may adopt a voting machine for experimental use without its use becoming finalized.³⁰

42. In 1979, the legislature re-codified the two sections of 55–802 and 55–803 into one section, now known as 16–442. By and large, the text did not change, however,

23 See generally [ARIZ. REV. STAT. § 16–101](#) *et. seq.*

24 See generally [ARIZ. REV. STAT § 16–441](#) *et. seq.*, [ARIZ. REV. STAT § 16–602](#) *et. seq.*

25 [ARIZ. REV. STAT. § 16–442](#) (2024).

26 [S.B. 30](#) (1927).

27 [S.B. 30 § 3](#) (1927).

28 [S.B. 30 § 17](#) (1927).

29 Compare [ARIZ. REV. STAT. §§ 55–801–02](#) (1954), with [ARIZ. REV. STAT. § 16–442](#) (2024).

30 [ARIZ. REV. STAT. §§ 55–803](#) (1954).

the legislature added a new Section. This Section tasked the Secretary of State to appoint a bipartisan committee of qualified experts to review and approve potential voting machines from a technical and mechanical standpoint.³¹

43. 2003 saw the last major amendment to this Section. That year, the legislature approved Senate Bill 1075 following the enactment of the Help America Vote Act (HAVA).³² Pertinent to voting machines and their use, the bill removed “counties” from the list of political subdivisions that had the option of experimental use.³³

44. Today, Section 16–442 covers the process that the Secretary of State must undergo to have a new type of voting machine approved for use in Arizona, and authorizes cities, towns, and agricultural districts to select machines for their experimental use.³⁴

C. A.R.S. § 16–443 Authorization to Use Voting Machines During Elections

45. Counties only have the powers expressly granted to them via statute.³⁵ This principle dictates that in order for counties to use electronic tabulation machines, the county must first receive approval in statute. This statute gives such approval. Similar to Section 16–442, Section 16–443 also originates in S.B. 30.³⁶ This Section’s prose has remained steady for nearly a century.³⁷ The function of this statute is simple, to give the expressed authorization that local governments require before proceeding.

46. In 1927 the statute read “[t]he governing body of any county, city, town, or village may adopt for use at elections any kind of voting machine meeting with the requirements of Section 2; and thereupon such voting machine may be used at any or all, elections held therein or any part thereof, for voting, registering and counting votes cast at such elections.”³⁸

47. By 1954, the text became “[a]t all state, county, city and township elections and primary elections, ballots or votes may be cast, registered, recorded, control by means of voting machines, as hereinafter provided, except such questions voted on at, such election unsuitable to such machines.”³⁹

31 1979 Ariz. Sess. L. 845.

32 Ariz. H.B. Summary, 2003 Reg. Sess. S.B. 1075.

33 2003 Ariz. Sess. Law., ch 260, § 9. See ARIZ. REV. STAT. 16–442(E).

34 ARIZ. REV. STAT. § 16–442 (2024).

35 *Mohave Cnty. v. Mohave-Kingman Est., Inc.*, 586 P2d 978, 981 (Ariz. 1978).

36 S.B. 30 § 1 (1927).

37 Compare S.B. 30 § 1 (1927), with ARIZ. REV. STAT. § 16–443 (2024).

38 S.B. 30 § 1 (1927).

39 ARIZ. REV. STAT. § 55–801 (1954).

48. In 1979, the legislature then changed the text of the statute, now renamed 16–442, to “[a]t all state, county, city or town elections, agricultural improvement district elections and primary elections, ballots or votes may be cast, recorded and counted by voting or marking devices and vote tabulating devices as provided in this article.”⁴⁰ This remains the text of this Section. Importantly, it remains the only Section relating to tabulation machines that directly references counties.⁴¹

49. The evolution of the Section shows the legislature’s willingness to expand the use of voting machines and machine tabulators to other politics such as special taxing districts.

D. A.R.S. § 16–452 the Election Procedures Manual

50. Section 16–452 provides the Secretary of State with the authority to promulgate a rule dedicated to achieving the maximum degree of accuracy in elections.⁴² The E.P.M. is the collective name for these rules. It elaborates on the procedures contemplated by statute, including sections from voter registration to campaign finance. The E.P.M. opines on statutes that contain open language or that are ambiguous in order to provide election officials guidance, uniformity, and clarity when conducting an election. This mission follows the directive issued by Section 16–452.⁴³

E. A.R.S. § 16–602 Removal of Ballots from Ballot Boxes, Disposition of Ballots Folded Together or Excessive Ballots, and Hand Count Audit

51. The evolution of Section 16–602 also supports the contention that hand tabulation is no longer lawful in Arizona. Today, Section 16–602 covers the hand count audit following the use of machine tabulators. The general purpose of this Section is not to replicate the results of the election by hand, rather it is to check the machines for anomalies.⁴⁴ The origins of this Section remain in the title “[r]emoval of ballots from ballot boxes...” The legislature removed such provisions in 2008.⁴⁵ The current Section 16–602(A) effectively does what the initial language provided, to compare the list of voters against the votes tabulated to ensure the numbers are the same.⁴⁶ What would

40 1979 Ariz. Sess. L. 845.

41 ARIZ. REV. STAT. § 16–442 (2024).

42 ARIZ. REV. STAT. § 16–452 (2024).

43 Ariz. Election Proc. Manual (2023); ARIZ. REV. STAT. § 16–452 (2024).

44 ARIZ. REV. STAT. § 16–602(B) (2024).

45 2009 Ariz. Sess. L., ch. 114, § 5.

46 ARIZ. REV. STAT. § 16–602(A).

become Section 16–602 changed fundamentally in 2006 with the creation of the hand count audit.⁴⁷ Today, Section 16–602 directs that “[f]or each countywide primary, special, general and presidential preference election, the county officer in charge of the election shall conduct a hand count at one or more secure facilities.”⁴⁸

F. A.R.S. § 16–601, A.R.S. § 16–604, and A.R.S. § 16–605 Manual Tabulation and Return

52. In 2018 the Arizona Legislature passed a “clean up bill” to repeal certain Sections which were no longer in use.⁴⁹ This bill, House Bill 1437, repealed inter alia Sections A.R.S. §§ 16–601, 16–604, and 16–605. Collectively, these Sections, along with an earlier version of Section 16–602, provided the procedure for opening and tabulating votes on election day.⁵⁰

53. Section 16–601 ordered that as soon as the polls close and the final ballot is placed in the ballot box, the tally board shall begin to tabulate the ballots.⁵¹ The earliest versions of Section 16–602 provided for how election staff were to remove the ballots from the ballot box. This Section evolved over time to become the hand count audit but retains its origins in its title.⁵²

54. Section 16–604 was the Section that authorized a manual tabulation of ballots.⁵³ It proscribed the procedures the tally board would use to record the votes using the tally sheet provided in Section 16–517.

A. The election board or the tally board shall, after complying with § 16–602 (removal of the ballots from the ballot box), count the number of votes cast for each person voted for, and for and against each proposed constitutional amendment and initiated or referred measure on the ballot.

B. Each clerk shall write on a tally list the titles of the offices to be filled, and underneath each title the names of the persons voted for to fill the office, and the number as given on the ballot of each proposed constitutional

47 2006 [Ariz. Sess. L., ch 394, § 5](#).

48 [ARIZ. REV. STAT. § 16–602\(B\)](#) (2024).

49 2018 [Ariz. S.B. No. 1437](#), Ariz. Fifty-Third Legis. - Second Reg. Sess. Fact Sheet (Apr. 5, 2018.) Jud. Comm.

50 [ARIZ. REV. STAT. § 2986–92](#) (1913); [ARIZ. REV. STAT. §§ 16–601–05](#) (2017).

51 [ARIZ. REV. STAT. § 16–601](#)(2017). (H.B. 1437 removed most mentions of the tally board from Title 16 including from § 16–531 which designated the composition at a tally, and other election boards. See [ARIZ. REV. STATE. § 16–531 \(D\), \(F\)](#) (2017).

52 See [ARIZ. REV. STAT. § 16–602](#) (1979); [§ 16–602](#) (2003); [§ 16–602](#) (2009).

53 [ARIZ. REV. STAT. § 16–604](#) (2017).

amendment and initiated or referred measure, and keep in the squares and lines opposite the names and numbers, respectively, the number of votes by tallies as the votes are read aloud.⁵⁴

55. Whilst short, this Section was the procedure for tabulating ballots by hand. The tally board would count and record in the appropriate place a tally for the candidate, measure, or amendment proposed for that election.⁵⁵ Some may argue that this Section is intended for the antiquated ballot lever machines, however, a review of Section 16–606 shows that that Section, not this one, covers the use of lever voting machines.⁵⁶

56. Section 16–605 covered handling ballots after counting. The tally board would place the ballots on string for the public to review. Once the election was complete the ballots would come down and be tied tightly with the same string used to display them.⁵⁷

G. A.R.S. §§ 16–621, 16–622 Counting and Canvass

57. Section 16–621 covers the proceedings at the counting center.⁵⁸ This Section sets out how a central counting location shall operate and places the authority over the counting center with the boards of supervisors or the officer in charge of elections. Paragraph C of Section 16–621 states that if using tabulation equipment, the officer in charge of elections may count the ballots manually. The officer must follow the provisions for counting paper ballots.⁵⁹ This language comes from the original version of the 16–621 in the election laws of 1966.⁶⁰ At the time of the passage of then-Section 16–1033, Sections 16–601, 604, and 605 were still in force.⁶¹ As stated, in 2018 the Legislature repealed those Sections in H.B. 1437.

58. Section 16–622 covers the canvass of the election. The board of supervisors certifies the unofficial results printed by the machine tabulation equipment.⁶² This section has largely remained the same since the reorganization of Title 16 in 1979.⁶³ The origin

54 [Section 16–604](#) (2017) (parentheses added). The recorded votes were kept on a tally list, which is still in statute as [A.R.S. § 16–517](#).

55 [§ 16–604](#) (2017).

56 [§ 16–606](#) (2017).

57 [§ 16–605](#) (2017).

58 [ARIZ. REV. STAT. § 16–621](#) (2024).

59 [§ 16–621\(C\)](#).

60 [L. 1966, ch. 92, § 1](#) (formerly [ARIZ. REV. STAT. § 16–1033](#)).

61 See generally, [L. 2018, ch 261, § 37](#), (in force as [ARIZ. REV. STAT. § 16–941–945](#)).

62 [ARIZ. REV. STAT. § 16–622\(A\)](#) (2024).

63 1979 [Ariz. Sess. L. 882](#).

the wording appears to come from S.B. 30 in 1927 which where voting machines were used, the machine would print off the number of votes for each candidate or other race. In the event of an error, there was a provision to-recanvass the election.⁶⁴ These Sections remained in Arizona law through at least 1954 until reorganized and removed in 1979.⁶⁵

IV. Counties are Creatures of Statute

59. The only powers possessed by boards of supervisors are those expressly conferred by statute or necessarily implied therefrom.⁶⁶ This principle of established law is the backbone of county level law making. In Arizona, counties are the political subdivision necessary to carry out the administration of state government.⁶⁷ Any act that a county takes without statutory authorization is “wholly void.”⁶⁸ Counties are not free to trail blaze new ground in areas that they are not already authorized to do. Broadly, this is to prevent one county from setting state policy, a job reserved for the legislature.⁶⁹ This caselaw is the purpose for Section 16–443, it gives expressed authorization for counties and other polities to use voting machines at elections. Counties could not use voting machines without this statute.⁷⁰

60. Recently, a growing movement of local and national “election integrity” groups go county-to-county to persuade the boards of supervisors to implement inter alia a full, manual tabulation of future elections.⁷¹ In 2023 at the Court of Appeals, Cochise County made the argument that it could strike out on its own in election law under A.R.S. § 11–251(3). The Court rejected this argument saying that a Section 11–251(3) only applies if there is no statutory scheme for the county to follow. The Court stated that Title 16 of the Arizona Revised Statutes lays out a detailed statutory scheme for the hand count audit, thus, counties may not use Section 11–215(3) to chart their own course.⁷²

64 S.B. 30 § 21, 24 (1927).

65 ARIZ. REV. STAT. § 55–816; 1979 Ariz. Sess. L. 882.

66 *Santa Cruz Cnty. v. Barnes*, 76 P. 621, 622 (Ariz. 1904); see also *Mohave-Kingman Est.*, 586 P2d at 981; *Hancock v. McCarroll*, 937 P2d 682, 688 (Ariz. Ct. App. 1996); *Ariz. Pub. Integrity All. v. Fontes*, 475 P3d 303, 307 (Ariz. 2020).

67 *Hunt v. Mohave Cnty.*, 162 P. 600, 602 (Ariz. 1917).

68 *Mohave-Kingman Est.*, 586 P2d at 981.

69 See *Assoc. Dairy Prod. Co. v. Page*, 206 P2d 1041, 1043 (Ariz. 1949).

70 ARIZ. REV. STAT. § 16–443 (2024).

71 See Mark Cook, *Hand Count Road Show*; Rachel Leingang, et al., *Backed By Mike Lindell And Mysterious Benefactors, The Push To Hand-Count Ballots Picks Up Speed*, VOTEBEAT, April 7, 2013.

72 *Ariz. All. for Ret. Am., Inc. v. Crosby*, 537 P3d 818, 822 (Ariz. Ct. App. 2023).

61. The law constrains counties to the limits of what the state government delegated to them as political subdivisions and they may not make policy which is in contradiction to the statutes passed by the legislature.

V. Bringing it Together

62. It is a fundamental part of Arizona county-level government that a county may not act without express or reasonably implied statutory authority. A county acting beyond that limitation causes the act passed to become void.⁷³ If the legislature repeals a law, then it is repealing the authorization for a political subdivision to act under that authority. Since the formation of the Territory of Arizona, tally boards counted ballots by hand as that was the only method available. In 1927, the Arizona State Legislature passed S.B. 30 which authorized voting machines.⁷⁴ Following the inception of the machines, tally boards could still tabulate the ballots manually, following the procedure under Section 16–601 through 16–605.

63. In 2018 the Legislature passed S.B. 1437, this bill inter alia, removed unused Sections from Title 16, including Section 16–604. The fact sheet for the bill stated that its purpose was to “[m]ake changes to election procedures related to methods of casting votes with equipment no longer in use.”⁷⁵ The fact sheet does not mention the impact of repealing Section 16–604. In committee, the legislature did not discuss the impact of repealing this Section. It is clear from the language of the statute that this is the Section telling the tally board how to tabulate ballots.⁷⁶ The bill also removes tally boards entirely from Title 16, which are an essential element to Section 16–604.⁷⁷

64. Proponents of hand tabulation may point to Section 16–621(C), the *AARA v. Crosby* case, and Section 16–443’s use of the word “may.” *AARA v. Crosby* does pose a challenge as a key element of the case revolved around whether the interpretation of Section 16–602 would render part of it superfluous.⁷⁸ The main argument being that the legislature is assumed to know what it is and is not repealing and one should not rely on mistake of bill craft when interpreting statutes. Thus, the legislature intentionally did not change “may” to “shall” in Section 16–443 and left paragraph C in place in Section 16–621. Due to that choice a county may opt out of machines entirely, when impractical. Opponents

⁷³ *Hancock*, 937 P2d at 688; *Mohave-Kingman Est.*, 586 P2d at 981.

⁷⁴ S.B. 30 (1927).

⁷⁵ 2018 *ARIZ. S.B. No. 1437*, Ariz. Fifty-Third Legis. - Second Reg. Sess. Fact Sheet (Apr. 5, 2018.) Jud. Comm.

⁷⁶ *ARIZ. REV. STAT. § 16–604* (2017).

⁷⁷ See S.B. 1437, Fifty-Third Legis. - Second Reg. Sess. (Ariz. 2018); *ARIZ. REV. STAT. § 16–604* (2017).

⁷⁸ *Crosby*, 537 P3d at 821–22.

of hand tabulation may retort that Section 16–602 seems to make hand tabulation unlawful in and of itself. The center of this argument is on the purpose of Section 16–602 which is to provide a check on the machine tabulator and to check for anomalies in the final number by surveying a random sampling of votes.⁷⁹

65. Ahead of the 2024 election cycle and following Mohave County’s decision to not hand tabulate ballots in November of 2023, hand tabulation proponents sued the Arizona Attorney General, asking for a declaratory judgment to determine if inter alia Sections 16–442, 443, 621, 663 allow for hand tabulation of elections in Arizona.⁸⁰

66. Separately, proponents of hand tabulation may attempt a compromise. In Mohave County, in both attempts to vote to approve hand tabulation, the proponents floated a compromise which would have some votes counted by hand and others counted via machine tabulators.⁸¹ This compromise, however, is vulnerable to the backbone of why hand tabulation is likely unlawful in Arizona except where impracticable. Nothing in statute states that such a division may take place. If such permission does not exist in statute, then counties must assume it is unlawful.⁸²

67. Incidentally, *AARA v. Crosby* may also have the rebuttal to this argument in that, similar to 16–602, a robust scheme exists with tabulation both in statute and in the E.P.M.⁸³ In a way, the “may” in 16–443 is a light switch that is not connected to anything anymore. Pre–2018, there was a procedure in place as an alternative to machine tabulation.⁸⁴ The purpose of the statute remains, to authorize counties and other polities to use voting tabulation and other election devices.⁸⁵ Due to the requirement that counties have statutory authorization, Section 16–443 is essential, not detrimental to the use of machine tabulators in Arizona. Relevant to any reliance on Section 16–602, throughout Title 16 and even in Section 16–602 itself, included by past legislatures is a phrase similar to “where machine tabulators are used” or “on machine tabulators,” these phrases tell a story from the legislature of yesteryears, before the repeal of Section 16–604. They are the magic words to trigger the use of those statutes, as using the statutes without a machine tabulator does not make sense. In the same vein that a litigator must consider that the legislature acts intentionally when leaving those words in, one must assume the legislature intentionally omits words from the statute as it does in Section 16–602.

79 See [ARIZ. REV. STAT. § 16–602 \(B\)\(1\), \(C\), \(D\)](#).

80 *Ron Gould v. Kris Mayes*, [CV2024–000815](#), Compl. ¶¶ A–D.

81 Mohave Cnty. Bd. of Supervisors, *Board of Supervisors Special Meeting* (Aug. 1, 2023); Mohave Cnty. Bd. of Supervisors, *Board of Supervisors Meeting* (Nov. 20, 2023).

82 See *Hancock*, [937 P2d at 688](#); *Mohave-Kingman Est.*, [586 P2d at 981](#).

83 *Crosby*, [537 P3d at 822](#).

84 See generally [ARIZ. REV. STAT. § 16–601 et. seq.](#)

85 [ARIZ. REV. STAT. § 16–443](#) (2024).

68. Section 16–621, which is still in force, does have a provision for manual tabulation if computer tabulation becomes “impracticable.” The statute does not define impracticable.⁸⁶ Merriam-Webster defines it as “incapable of being performed or accomplished by the means employed or at command.”⁸⁷ Black’s Law Dictionary similarly states that impracticability means “a fact or circumstance that excuses a party from performing because (though possible) it would cause extreme and unreasonable difficulty.”⁸⁸ In Arizona, most cases covering the meaning of the word relate to service of process, however, one definition is enlightening. The Arizona Court of Appeals stated that “[i]mpracticable does not mean impossible, but rather that [it] would be ‘extremely difficult or inconvenient.’”⁸⁹ This Section is negated in practice as counties have contingency plans for tabulating ballots should their machines fail.⁹⁰ Further, the machines today come with dedicated professionals who may service the machine for a failure. While a delay in tabulation is possible, the increased access to dedicated repair professionals as well as the use of other county machines raises the bar for impracticable. Even if there was a scenario where a counties tabulator failed and could not be repaired, the E.P.M. requires counties to develop a contingency plan to tabulate their ballots elsewhere.⁹¹

69. Finally, Section 16–622 may offer the most conclusive argument that manual tabulation is not legal in Arizona. The official canvass, which being the official number used by the Secretary of State and the boards of supervisors to certify the election states that vote tabulating equipment shall print off the unofficial results for certification. The number printed by the election vote tabulation devices constitutes the official canvass.⁹²

70. Ultimately, Section 16–604 was the statute that implemented manual tabulation. The Arizona Secretary of State could still promulgate procedures for emergency manual tabulation if Section 16–621(C) via the E.P.M. becomes necessary, but the legislature repealed the statutory option. Any determination by the officer in charge of elections that machine tabulation is impracticable will certainly be the subject of litigation. Such a finding is very fact specific and likely requires a judicial finding that the other options to use machine tabulators are indeed impracticable. Additionally, the official canvassed used by the government to certify the election requires vote tabulating equipment. Leaving only the hand count audit to count ballots by hand but *AARA v. Crosby* decision limits such an option to the statutory conditions of Section 16–602.

86 ARIZ. REV. STAT. § 16–621(C).

87 Impracticable, MERRIAM WEBSTER DICTIONARY.

88 Impracticability, BLACK’S LAW DICTIONARY (7th ed. 1999).

89 *Bank of New York Mellon v. Dodev*, 433 P3d 549, 558 (Ariz. Ct. App. 2018) (quoting *Blair v. Burgener*, 245 P3d 898, 903 (Ariz. Ct. App. 2010)).

90 These are agreements between counties to use another’s tabulation equipment in the event of failure.

91 Ariz. Election Proc. Manual at 106.

92 ARIZ. REV. STAT. § 16–622(A) (2024).

VI. Conclusion

71. Manual tabulation without a change to the procedures as enacted through legislation and promulgated in the E.P.M. is unlawful in Arizona. The evolution of election laws from 1888 to 2024 tracks the march of technology as it does time. The century-old line of case law directs that counties may not act in a way that is outside the scope of the authority expressly granted via statute. While some statutes seem to conflict with each other, such as the word “may” in Section 16–443 and in Section 16–662 that the number from the machine tabulator is the number used for the official canvass, it will inevitably fall to the courts to reconcile the differences in statute or to the legislature to remove the conflicting sections. Nevertheless, the arc of the statutes and case law points to the conclusion that unless impracticable under 16–621(C) and then unless given a procedure, it is unlawful for counties to hand tabulate ballots for an election in Arizona.