

Vote Counting and Recounting: Virginia's Experience

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Thank you for the invitation to share Virginia's experience with our recent statewide recount.

As you know, the Help America Vote Act requires states to adopt uniform and nondiscriminatory standards defining what constitutes a vote on each type of voting system in use in the state. Last December, faced with recounting the closest statewide election in our history, Virginia found that it is equally important to define what counts, and doesn't, in a recount, and clearly spell out the procedures to be used with each system.

Our only previous statewide recount had been in the 1989 election for governor. The difference in that election was just under 7,000 votes out of 1.79 million cast (0.36%). The numbers changed slightly in the recount, but the outcome was the same. In our 2005 election for attorney general, the certified results showed a difference of only 323 votes out of 1.94 million cast (0.016%).

In Virginia, recounts are conducted under the direction of a three-judge court. Only a candidate who has apparently lost by no more than 1% can request a recount. If the margin is one-half of a percent or less, then the state agencies involved, and the respective localities have to pay their own costs in conducting the recount. If the difference is over half-a-percent, the candidate must post a bond of \$10 per precinct and will later be assessed for the government's actual costs. Recounts are not frequent occurrences in Virginia.

After the 2000 presidential election, the Virginia State Board of Elections initiated an ad hoc study of the state's recount laws, drawing on the experience of a bi-partisan group of election officials, party staff/officials and attorneys, all of whom had worked in previous Virginia recounts.

The 2001 General Assembly specified that all marksense and punch card ballots be recounted by running them back through the counters to separate the undervotes and overvotes for individual examination, adopted a "two-corner" chad rule for punch cards that could not be accepted by the tabulator in the recount, and charged the State Board of Elections with promulgating standards for recounts. The legislature also formed their own omnibus study on elections (including every election matter that any member had asked to study that year). Our agency recount study provided recommendations to the General Assembly's study, and to the State Board for consideration in writing the Recount Standards that were adopted in August 2001

The State Board's Recount Standards provided administrative details that were not spelled out in the law, and drew together key Code provisions on the counting of ballots as a convenient reference for judges and others who may not deal with these laws on a regular basis. The

Standards directed that ballots ruled invalid in the election not be counted in a recount, and that matters of voter eligibility were not appropriate for a recount, only a contest.<sup>1</sup>

The State Board directed:

"In recounting the ballots, unless [the recount law] specifically directs otherwise, and to the degree possible, the ballots shall be counted in accordance with the same laws that apply when they are counted at the polls." -- Standards for Recounts of Virginia Elections

The Standards also included instructions on how to count paper ballots as well as any marksense ballots which were being counted by hand. Virginia is a "voter intent" state, but local election officials had never been given instructions from the state, that we could find, to help them know which ballots should count or not count. The Standards included a set of Ballot Examples illustrating each variation. The Board later directed that the Ballot Examples be used whenever ballots are handcounted in an election.

In 2002, our General Assembly clarified the recount laws based on the Board's conclusions in adopting the Standards, and also voted to limit the rerunning of marksense and punch card ballots to situations when "the printout is not clear, or on the request of the court" presiding over the recount. The agency's recount study members had debated requiring that the ballots always be rerun versus never allowing them to be rerun, and had recommended this middle ground. They believed that if a party to a recount made a good argument, then the court would order the ballots rerun. (Attorneys who had served on our study would later represent both sides in the 2005 statewide recount.)

The 2005 statewide recount presented the first major test of these various law changes and of the Recount Standards and the Ballot Examples.

As soon as we realized that a recount was likely, Jean Jensen, the Secretary of the State Board, called a meeting for key agency staff to sit down with both political parties' representatives and the lead attorneys for both candidates. Throughout the process we would be in regular communication. With the exception of Freedom of Information requests filed by only one candidate, information was provided simultaneously to both candidates. We worked to keep the process open and transparent, and keep our staff accessible.

At the preliminary hearing, the presiding judge decided that the Code did not allow him to "go on a fishing expedition" for votes, and turned down the apparently losing candidate's request to rerun all the marksense and punch card ballots through the tabulators so that the overvotes and undervotes could be separated out for handcounting. A later, more limited motion (based on drop-off rates) was also turned down. The judge was obviously frustrated with the "on the request of the court" wording in the recount statute, and wanted more clarity in the law.

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<sup>1</sup> Grounds for a contest of a Virginia election are "(i) objections to the eligibility of the contestee based on specific allegations, (ii) objections to the conduct or results of the election accompanied by specific allegations which, if proven true, would have a probable impact on the outcome of the election, or (iii) both." § 24.2-803, Code of Virginia

In the course of the recount, it was discovered that not all of the marksense machines then in use in Virginia could be reprogrammed to separate out the overvotes and undervotes for a single office. This equipment had been certified before the recount law was changed. The law has since been amended to require ballots to be handcounted in a recount if the tabulator cannot be reprogrammed to meet this requirement.

The recount uncovered other issues. In one locality the wrong pens had accidentally been ordered for some polling places, resulting in over 200 uncounted ballots. The pen issue has been resolved. In another locality, the problem of "unprocessed" ballots was raised; State Board policy will be addressing this issue, requiring these ballots to be rejected (as overvotes already are) so the voter can complete a new ballot if they are voting in person.

The recount was conducted on December 20 and 21, following numerous court hearings and several versions of the Procedural Order. The last procedural hearing on the recount was actually held on the day before the recount began, when the Court ordered the ballots handcounted in 9 precincts of two localities (the precincts brought to the court's attention with the wrong pens and the "unprocessed" ballots). In one additional precinct in another locality, on the day of the recount, the decision was made to run punch card ballots through the tabulator when the printout could not be found.

The shifting procedural orders presented problems for everyone involved in the recount. Programming costs and time were also problematic. Because election officials on the day of the recount could decide that rerunning certain ballots was necessary ("if the printout is unclear"), all the localities with marksense and punch card ballots had to have reprogrammed and retested units available to handle any or all of these precincts. (The program cards from the election were still under seal because the deadline for bringing a contest is after the conclusion of the recount.) The time that some vendors required for the reprogramming became an issue. The next time a recount is filed, we may not wait for the procedural order to have the localities begin making arrangement for the extra memory cards.

Another complicating issue was the variety of voting equipment in use in the state. SBE certifies the equipment, but the 134 localities then pick from that list. With the notable exception of the HAVA funding, voting equipment in Virginia has been purchased with local dollars. With a combination of old equipment, replacement equipment, and DREs added for accessibility in precincts with another main system, our staff was hard pressed to write the instructions for every piece of equipment and combination.<sup>2</sup> The lesson for the next time is not to wait for the recount to update all our necessary instructions and forms. This will also allow us time for appropriate training on these instructions, and to improve communication and coordination with local officials on the recount process.

But, all said, the process went remarkably well, and that is due largely to our dedicated 134 local General Registrars, their 3-member local Electoral Boards, and our professional State Board staff.

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<sup>2</sup> Our certified systems as of November 2005 included 3 punch card systems, 6 mechanical lever systems, 7 marksense tabulator systems and 8 direct recording electronic (DRE) systems.

The first day of the recount was conducted entirely in the localities, beginning at 9:00 AM. In each locality, two members of the Electoral Board (one Democrat and one Republican) served as the local Recount Coordinators. Recount Officials had been selected by parties to the recount from among the election officials who worked at the November election. The two campaigns could also send a designated observer for each recount team. Since this was a court proceeding, the local Clerk of Court oversaw the operations and handled communications with the Clerk and the Court in Richmond.

Except for the 10 precincts (discussed above) that had to be hand counted or rerun, the process was straight-forward. Sealed envelopes for the other 2,572 precincts (including central absentee precincts) were opened, printouts from election night were examined, ballots that had been handcounted originally were handcounted again, and the results were written on forms for transmittal to Richmond. If the two recount officials did not agree on how a ballot should be counted, it was set aside with a note from the officials about why they disagreed. As each locality finished, the State Police were notified to pick up the sealed results and these challenged ballots and deliver them to their regional headquarters. When all the localities in the region were in, another State Police Officer took them on the next leg. Although the furthest part of the state is a 6 1/2 hour drive from Richmond, all the documents were locked in the Clerk's Office at the Richmond Courthouse by midnight.

The next day, the Richmond phase of the recount began at 8:00 AM. At each of six tables, the SBE staff member opened the envelope and read the results to a contracted accountant while observers from both campaigns watched. When any question arose, attorneys from both sides would come over. The finished tally sheets were sent to the compilation table (similarly staffed), and a staff member took the finished envelope and brought over the next locality. Most of the issues were resolved quickly, but those that couldn't be were sent to a separate room where eventually three teams of SBE staff and attorneys from both sides, overseen by the Clerk's staff and State Board members or senior staff, discussed and resolved the most difficult cases.

Overall, the mistakes we identified in the process were human mistakes -- numbers transposed or entered in the wrong boxes, one valid absentee ballot sealed and sent to the Clerk's office by weary officials on election night before it was counted, instructions that were not followed properly, etc.. These are issues we'll be addressing in our annual training for registrars and electoral board members, and expect them to address when they train their officers of election.

One Electoral Board Secretary realized shortly after their recount that they had used the wrong form for the recount results; everyone was called back in, 100% showed, and the correct form was completed and sent to Richmond. Another locality later claimed not to have received the orders, instructions or forms (all sent by e-mail or put on the secure website), never called SBE or anyone else to ask, and then just sent all their pollbooks, ballots, etc. to Richmond. When the error was discovered on the second day of the recount, attorneys for both candidates reached agreement that they and SBE staff would do the recount for the locality with the materials provided (instead of requiring all the locality's recount officials to come to Richmond). The process took about two hours. (The State Board meeting in January, with that Registrar and his Electoral Board, took longer.)

The recount was concluded at about 9 PM on the second day. The outcome did not change. The original winner picked up a net gain of 37 votes (36 of them from the nine precincts that were

handcounted). The losing candidate did not choose to contest the election. He is still in the General Assembly, and sits on the Senate Privileges and Elections committee. At this year's Session, he (and others) attempted to amend the recount laws to require that marksense ballots always be run back through the tabulator, but the bill did not pass. Other bills passed requiring that candidate representatives at recounts be given an unobstructed view of the proceedings, and specifically allowing representatives at more points in the election process, but also prohibiting these representatives from interfering with the proceedings. Another bill will require the localities to provide explanations whenever their unofficial or official results change after they are originally posted to the SBE website. The explanations will also go on our website.

Thank you for allowing me to share these observations from Virginia's recent experience with recount laws and recounts. I would be happy to answer any questions.