ELECTION LAW WAR GAME

May 16, 2012

Judicial Conference of Virginia
Norfolk, VA

FACTUAL OVERVIEW

Tim Kaine and George Allen are locked in a too-close-to-call election for the U.S. Senate on November 6, 2012, Kaine leading by only 203 votes statewide. In one precinct, it appears that a DRE machine has malfunctioned—registering zero votes in the U.S. Senate race, despite normal vote totals in the U.S. Congressional and Presidential categories. Petitioner Allen asks the court to fully examine the allegedly malfunctioning machine, even though its statutory authority to do so is unclear.

The Senate election between former Senator George Allen and former Governor Tim Kaine is one of the closest in state history—and one that will likely decide the partisan balance of the U.S. Senate. On November 7, after final votes are tallied, absentee and provisional ballots are counted, and the State Board of Elections (SBE) has completed a statewide canvass, (the SBE certifies results from county and city canvass). Kaine leads Allen by a mere 203 vote statewide, a fraction of a percentage of the over 3,800,000 voters who went to the polls on Election Day. This margin is far less than one percent requirement that allows Allen to petition for a recount under VA. CODE § 24.2-800.

After the canvass is completed, the SBE certifies Kaine as the winner. Within hours of the certification, Allen files a recount petition in the Circuit Court of the City of Richmond. Virginia statute requires that such a petition be filed within ten days of the certification of the candidate. VA. CODE § 24.2-801. In this high-stakes election, Allen's campaign was prepared for recount and filed its petition almost immediately. Allen requests, in accordance with the statute, that the ballots be recounted. The Chief Justice of the Virginia Supreme Court appoints two judges who will join the chief judge of the circuit court in which the petition is filed—in this case Richmond—to form the three-judge election court that presides over the recount pursuant to VA. CODE § 24.2-801.

Meanwhile, in the George Wythe precinct of King William County,[1] election officials discover that one DRE (dubbed "Machine 1") produced what appears to be an alarming undervote, as shown by the machine tapes in the King William County canvass; although voters cast 420 and 413 votes in the Presidential and U.S. Congressional races respectively, the machine registered zero votes in the U.S. Senate race for either candidate and 422 undervotes.

	Machine 1			
	Democrat	*Republican*	*undervotes*	**Total**
President	36	384	2	422
U.S. Congress	40	373	9	422
U.S. Senate	0	0	422	422

Race totals from the two other DRE machines operating in the George Wythe district (Machines 2 and 3) produced vote totals for the U.S. Senate proportionate to the U.S. House and Presidential Races totals.

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[1] Counties and precincts are fictional and invented for the purposes of this war game.

| Machine 2 | | | | Machine 3 | | | |
Democrat	Republican	undervotes	**Total**	Democrat	Republican	undervotes	**Total**
55	354	1	410	39	370	3	412
47	351	12	410	34	366	12	412
40	362	8	410	51	348	13	412

The Presidential and U.S. Congressional races produced clear winners in the Commonwealth. The Allen campaign maintains that an accurate vote count from the precinct could impact the outcome of the race.

During the recount process, while paper ballots are recounted by hand, VA. CODE § 24.2-802 provides that DRE ballots be "redetermined." VA. CODE § 24.2-802 describes the redetermination process as follows:

> *For direct recording electronic machines (DREs), the recount officials shall open the envelopes with the printouts and read the results from the printouts. If the printout is not clear, **or on the request of the court**, the recount officials shall rerun the printout from the machine **or examine the counters as appropriate.***

Following this procedure, after recount officials attempted to "redetermine" the DRE ballots in accordance with VA. CODE § 24.2-802, the effort failed to produce a change in the tally from the malfunctioning DRE. The DRE's tally for the U.S. Senate Race remained at zero for each candidate with 422 undervotes registering. After the state-wide hand recount is concluded, Allen narrowed Kaine's lead to only 33 votes.

The Allen campaign requests that, under VA. CODE § 24.2-802, the three-judge panel allow recount officials—with representatives of both parties looking on—to "examine the counters as appropriate." The Allen campaign argues that for the purpose of construing the statute, the word "counters" should be construed to refer broadly to access to the software that operates the malfunctioning DRE machine. Allen argues that it is "appropriate" to allow the campaign access to all records that are helpful or necessary to determine an accurate vote count on the malfunctioning machine. The campaign therefore asks for access to the machine's memory card and software. The Allen campaign has produced expert testimony from a nationally prominent election software technologist, Tyrone T. Tech, stating that such examination could reveal missing votes.

For its part, the Kaine campaign asserts that the scope of Allen's access request is not "appropriate" because the Virginia statute does not contemplate the type of open-ended access the Allen campaign seeks. Citing precedent in other states denying broad access to voting software,[2] Kaine notes that the request is also barred because of proprietary technology agreements associated with the DRE machine in question.[3]

In this case, the court is being asked to resolve a very narrow statutory question. The court must define the scope of VA. CODE § 24.2-802, specifically the nature of the mandate to "examine counters as appropriate" in the context of an apparently malfunctioning DRE machine.

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[2] *See e.g*., Jennings v. Elections Canvassing Commission of the State of Florida, 958 So.2d 1083 (2007)(denying voter motions to compel discovery, including a request to order respondents to disclose voting machine source code in the Florida Thirteenth Congressional District in its November 2006 election).

[3] *See* http://votingmachines.procon.org/view.answers.php?questionID=000273