

## A RECOUNT OF THE RECOUNT: *OBENSHAIN V. HERRING*

*The Honorable Beverly Snukals \**  
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On November 25, 2013, following one of the closest races in Virginia history, the Virginia State Board of Elections (the “SBE”) certified Democratic State Senator Mark Herring as the winner of the 2013 race for the office of Attorney General of Virginia by a record few 165 votes, less than one-hundredth of a percent of the votes cast.<sup>1</sup> Two days later, Herring’s opponent, Republican State Senator Mark Obenshain, filed a petition in the Richmond City Circuit Court of Richmond seeking a recount of the election pursuant to Virginia Code section 24.2-801.<sup>2</sup> Within a few short days, each party filed hundreds of pages of pleadings and memoranda. Hearings had to be held and orders had to be endorsed.

In a very short time frame, the judges appointed to oversee the recount heard argument and ruled on the many issues presented.<sup>3</sup> But “most judges involved in a recount are interpreting the re-

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1. Laura Vozzella & Ben Pershing, *Obenshain Concedes Virginia Attorney General’s Race to Herring*, WASH. POST (Dec. 18, 2013), [http://www.washingtonpost.com/local/virginia-politics/obenshain-to-concede-virginia-attorney-generals-race-on-wednesday-in-richmond/2013/12/18/fe85a31c-67e7-11e3-8b5b-a77187b716a3\\_story.html](http://www.washingtonpost.com/local/virginia-politics/obenshain-to-concede-virginia-attorney-generals-race-on-wednesday-in-richmond/2013/12/18/fe85a31c-67e7-11e3-8b5b-a77187b716a3_story.html).

2. See Ben Pershing, *Obenshain Camp Asks for Recount in Va. Attorney General’s Race Against Herring*, WASH. POST (Nov. 27, 2013), [http://www.washingtonpost.com/local/virginia-politics/obenshain-camp-asks-for-recount-in-va-attorney-generals-race-against-herring/2013/11/27/c5e33aa6-577a-11e3-ba82-16ed03681809\\_story.html](http://www.washingtonpost.com/local/virginia-politics/obenshain-camp-asks-for-recount-in-va-attorney-generals-race-against-herring/2013/11/27/c5e33aa6-577a-11e3-ba82-16ed03681809_story.html); see VA. CODE ANN. § 24.2-801 (Repl. Vol. 2011).

3. One of the authors of this article was the Chief Judge of the panel. The Honorable Junius P. Fulton, III, of the Norfolk City Circuit Court and the Honorable Joseph W. Milam, Jr., of the Twenty-Second Judicial Circuit (encompassing the City of Danville and the counties of Franklin and Pittsylvania) completed the Recount Court. Ben Pershing, *Recount Date Set in Tight Va. Race*, WASH. POST, Dec. 5, 2013, at B-01.

count statutes for the first time in their judicial careers.”<sup>4</sup> There have only been two statewide recounts under the modern Virginia recount law.<sup>5</sup> Prior to *Obenshain v. Herring*,<sup>6</sup> the most recent past statewide recount, *Deeds v. McDonnell*, took place in 2005.<sup>7</sup> The parties in *Deeds* focused on issues which have since been resolved by the General Assembly, while other issues that were litigated in *Obenshain* went unaddressed in *Deeds*, providing little precedent for many of the parties’ most litigated issues.<sup>8</sup> Further, results of a recount are not appealable in Virginia,<sup>9</sup> leaving future judges to rely on orders, which often lack the analysis behind a court’s decision usually seen in an appellate opinion. Because of the infrequency of recounts and the lack of judicial institutional knowledge, a plain-English guide is needed to assist judges and attorneys involved in recounts.

The purpose of this essay is to provide such a guide as a resource for future Virginia recounts. Part I outlines the process of a recount and discusses how a recount differs from an election contest. Part I also briefly discusses the history of election recounts in Virginia, highlighting the two most recent state-wide recounts, *Deeds* and *Obenshain*. Part II delves more deeply into the primary issues encountered by the three-judge panel in *Obenshain*, including discovery and access to electoral materials, the roles of those involved directly in the physical recount, and the method of ballot challenges. Finally, Part III discusses how recounts may influence trends in election law and how other seemingly unrelated trends affect recounts themselves. This essay ponders the effect of litigation on the parties’ confidence in the recount process, as well as the effect of recount results on voter confidence in the electoral process.

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4. Kirk T. Schroder, *Election Recounts in Virginia*, 82 VA. NEWS LETTER, no. 1 (Weldon Cooper Ctr. for Pub. Serv.), Feb. 2006, at 4, available at <http://www.coopercenter.org/sites/default/files/autoVANLPubs/Virginia%20News%20Letter%202006%20Vol.%2082%20No.%201.pdf>.

5. See *infra* Part I(A).

6. Recount Procedural Order, *Obenshain v. Herring*, No. CL13-5272 (Va. Cir. Ct. Dec. 10, 2013) (Richmond City) [hereinafter Recount Procedural Order].

7. For a general overview of the parties’ arguments during the *Deeds v. McDonnell* recount, see Schroder, *supra* note 4, at 6–7 (describing the closest election in Virginia’s history).

8. See, e.g., *infra* note 96.

9. VA. CODE ANN. § 24.2-802(H) (Cum. Supp. 2014).

## I. BACKGROUND

A. *The Moving Parts of a Recount*

Before the recount process is detailed from petition to final certification of results, it is important to understand the history of the Virginia statewide recounts and the components of the process, including the people and organizations who carry out the recount, as well as the types of ballots used in Virginia and the way each type of ballot is counted.

The recount statutes have been in a process of evolution for almost forty years. The statutes in their current form were passed in 1979<sup>10</sup> in response to the 1978 gubernatorial race in which former Attorney General Andrew Miller lost by .38% of the votes cast in the United States Senate race to incumbent Senator John W. Warner.<sup>11</sup> The recount statutes in place following the election were so expensive and difficult to navigate that Miller was forced to cancel the recount,<sup>12</sup> and the General Assembly acted in its next session to streamline the process.<sup>13</sup> A decade later, Marshall Coleman and Douglas Wilder tested the recount laws in the 1989 gubernatorial race<sup>14</sup> when Wilder was certified the winner of the election by 6741 votes.<sup>15</sup> The statutes had not been put to the test statewide before, and the SBE and the recount court worried about the virtually unknown potential costs and time needed to implement the recount.<sup>16</sup> These concerns prompted the court to deny Coleman's request for a manual count of paper ballots.<sup>17</sup> Following the 1989 recount, the General Assembly passed

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10. S.B. 738, Va. Gen. Assembly (Reg. Sess. 1979) (enacted as Act of Mar. 20, 1979, ch. 293, 1979 Va. Acts 428).

11. Schroder, *supra* note 4, at 2.

12. *Id.* at 3.

13. *See* S.B. 738.

14. Schroder, *supra* note 4, at 5.

15. Dwayne Yancey, *Douglas Wilder*, ENCYCLOPEDIA VIRGINIA, [http://encyclopediavirginia.org/Wilder\\_Lawrence\\_Douglas\\_1931-#start\\_entry](http://encyclopediavirginia.org/Wilder_Lawrence_Douglas_1931-#start_entry) (last visited Oct. 10, 2014).

16. Jean McNair, *Urgent Coleman Seeks Recount in Virginia Governor's Race*, ASSOC. PRESS (Nov. 27, 1989, 3:23 PM), available at <http://www.apnewsarchive.com/1989/URGENT-Coleman-Seeks-Recount-in-Virginia-Governor-s-Race/id-8e758ca9e748cd20dcef17c7db3d9efa>.

17. Schroder, *supra* note 4, at 5.

a law mandating that paper ballots be recounted by hand.<sup>18</sup> Coleman also raised concerns that ballot scanner machines had not been adequately tested, but the recount court denied Coleman's requests for testing.<sup>19</sup> The General Assembly later addressed this issue as well when it passed laws requiring all ballot scanner machines be tested for accuracy during recounts.<sup>20</sup>

More recently, in 2005, Republican Robert McDonnell was certified as Attorney General of Virginia with 360 votes over Democratic candidate Creigh Deeds.<sup>21</sup> Over one-half million machine-readable ballots had to be recounted, and while McDonnell requested only a review of the machine printouts, Deeds sought to actually rerun the ballots through the machine.<sup>22</sup> The court, again concerned with the sheer number of votes to be rerun and recounted, eventually ordered a manual recount of the machine-readable ballots only in select precincts.<sup>23</sup> The General Assembly soon addressed Deeds' primary objection in 2008 when it changed the law to mandate that all machine-readable ballots be rerun through the ballot scanner machines.<sup>24</sup>

Although some logistics of the process have changed during recent decades, the people responsible for the ultimate certification of election recount results have remained the same. The Virginia Code provides for a three-judge panel (the "Recount Court") to oversee the recount and certify the ultimate recount results.<sup>25</sup> In a statewide recount, the Chief Judge of the Richmond City Circuit Court serves as the Chief Judge of the Recount Court.<sup>26</sup> The Chief Justice of the Supreme Court of Virginia completes the panel by designating two additional judges sitting in other jurisdictions.<sup>27</sup>

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18. See VA. CODE ANN. § 24.2-802(D)(1) (Cum. Supp. 2014); see Schroder, *supra* note 4, at 5.

19. Matthew Purdy, *Accuracy of Computer Voting Questioned*, PHILLY.COM (Dec. 12, 1989), available at [http://articles.philly.com/1989-12-12/news/26155776\\_1\\_mae-churchill-penelope-bonsall-voting-systems](http://articles.philly.com/1989-12-12/news/26155776_1_mae-churchill-penelope-bonsall-voting-systems).

20. VA. CODE ANN. § 24.2-802(D)(3) (Cum. Supp. 2014).

21. Schroder, *supra* note 4, at 6.

22. *Id.*

23. *Id.* at 6–7 (“[The panel] ruled that nine precincts in Gloucester County and one precinct in Lynchburg were to manually hand recount all [machine-readable ballots].”).

24. Act of Mar. 27, 2008, ch. 682, 2008 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 24.2-802 (Cum. Supp. 2008)).

25. VA. CODE ANN. § 24.2-801 (Repl. Vol. 2011).

26. *Id.*

27. *Id.* In *Obenshain*, the presiding Chief Judge of the Richmond City Circuit Court

The Recount Court supervises the recount with broad discretion and may order “all other appropriate measures to ensure the proper conduct of the recount.”<sup>28</sup> The SBE, led by the Secretary of the Board, who is the “chief state election officer” in the Commonwealth,<sup>29</sup> provides constant direction to the Recount Court and was present at all hearings in *Obenshain*. Virginia Code section 24.2-802(A) requires the SBE to promulgate standards by which elections are held and ballots are counted and secured, and to determine “any other matters that will promote a timely and accurate resolution of the recount.”<sup>30</sup> The Recount Court’s orders must be “consistent with [the SBE’s] standards.”<sup>31</sup> Therefore, the standards given by the SBE, which include the *Virginia Election Recount Step-by-Step Instructions* (the “SBE Instructions”) and the *Ballot Examples for Handcounting Paper or Paper-Based Ballots for Virginia Elections or Recounts* (the “Ballot Examples”), are mandatory guides for the Recount Court.<sup>32</sup>

However, not all potential recount issues are addressed in the Virginia Code or the SBE standards. The parties themselves (i.e., the petitioner seeking a recount and the respondent originally certified as the winner of the election) also play major roles in the process. Despite guidance from the Virginia Code and the SBE, the Recount Court hears spirited argument on many issues, most frequently on the reconciliation of the SBE’s guidelines with the legislative intent of the applicable statutes. Finally, although they are not in official attendance in the courtroom, the two major

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recused himself from the case, so the Supreme Court of Virginia appointed another judge from that court. See Ben Pershing, *Judge with Obenshain Family Ties Recuses Self from Recount in Va. Attorney General Race*, WASH. POST (Dec. 2, 2013), [http://www.washingtonpost.com/local/virginia-politics/judge-with-obenshain-family-ties-recuses-self-from-recount-in-va-attorney-general-race/2013/12/02/712b7bba-5b88-11e3-a49b-90a0e156254b\\_story.html](http://www.washingtonpost.com/local/virginia-politics/judge-with-obenshain-family-ties-recuses-self-from-recount-in-va-attorney-general-race/2013/12/02/712b7bba-5b88-11e3-a49b-90a0e156254b_story.html).

28. VA. CODE ANN. § 24.2-802(A), (D) (Cum. Supp. 2014).

29. *Id.* §§ 24.2-404.1, -455(A) (Repl. Vol. 2011 & Cum. Supp. 2013).

30. *Id.* § 24.2-802(A) (Cum. Supp. 2014).

31. *Id.*

32. COMMONWEALTH OF VA. STATE BD. OF ELECTIONS, PUB. DOC. SBE-802-SBS 8/2012, VIRGINIA ELECTION RECOUNTS STEP-BY-STEP INSTRUCTIONS (2012) [hereinafter SBE INSTRUCTIONS], available at <http://www.sbe.virginia.gov/Files/ElectionAdministration/ElectionLaw/Recount%20Step%20by%20Step%202012.pdf>; COMMONWEALTH OF VA. STATE BD. OF ELECTIONS, BALLOT EXAMPLES FOR HANDCOUNTING PAPER OR PAPER-BASED BALLOTS FOR VIRGINIA ELECTIONS OR RECOUNTS (Aug. 20, 2001, rev’d July 1, 2001) [hereinafter SBE BALLOT EXAMPLES], available at <http://www.sbe.virginia.gov/Files/ElectionAdministration/ElectionLaw/ExamplesforHandcounting.pdf>.

political parties have a presence in the recount procedure. This is particularly evident in the personnel chosen as recount coordinators and officials.<sup>33</sup>

There are three ways to vote in Virginia: on a paper ballot counted by hand;<sup>34</sup> through a machine-readable ballot run through a ballot scanner machine (known as “optical scan tabulators” until 2014);<sup>35</sup> and via computerized touch-screen on a direct recording electronic machine (“DRE”).<sup>36</sup> The recount process recalculates each type of ballot differently.

Paper ballots are the traditional ballots with a list of candidate names and a “target area” for the voter to mark, usually a box to check or “X” or a space to fill in.<sup>37</sup> Some precincts use paper ballots for all voters, while other precincts utilize such ballots only for military or general absentee voters.<sup>38</sup> Paper ballots are recounted by hand.<sup>39</sup> All properly marked ballots are counted as a vote for the correct candidate.<sup>40</sup> No ballot is counted unless the writing or remarks on the ballot clearly indicate support for only one candidate and cannot be interpreted as a possible vote for any other candidate.<sup>41</sup> Ballots are set aside if they are not clearly marked for any candidate for an office (“an undervote”),<sup>42</sup> are po-

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33. See *infra* notes 110–17 and accompanying text.

34. For changes to the semantics surrounding paper ballots, see Act of Apr. 4, 2014, ch. 576, 2014 Va. Acts \_\_\_ (codified as amended in scattered sections of VA. CODE ANN. §§ 24.2-101 to -802 (Cum. Supp. 2014)).

35. *Id.* (codified as amended at VA. CODE ANN. § 24.2-802(D)(3) (Cum. Supp. 2014)).

36. A direct recording election machine was occasionally called a “direct electronic voting device” until 2014. *Id.* (codified as amended at VA. CODE ANN. §§ 24.2-101, -801.1, -802(B), (C) (Cum. Supp. 2014)).

37. See SBE BALLOT EXAMPLES, *supra* note 32, at 1a.

38. See VA. CODE ANN. § 24.2-646.1 (Repl. Vol. 2011) (listing permitted uses of paper ballots).

39. *Id.* § 24.2-802(D)(1) (Cum. Supp. 2014); see also Recount Procedural Order, *supra* note 6, at 17–18.

40. See SBE BALLOT EXAMPLES, *supra* note 32, at 1b.

41. See *id.* at 10.

42. An “undervote” is defined as “a ballot on which a voter casts a vote for a lesser number of candidates or positions than the number for which he was lawfully entitled to vote.” VA. CODE ANN. § 24.2-802(I) (Cum. Supp. 2014). Usually either a voter did not vote at all for a candidate, or the voter’s attempt to vote for a candidate was unsuccessful, for example, by marking in an invalid area. See, e.g., SBE BALLOT EXAMPLES, *supra* note 32, at 11. For example, in *Obenshain*, the Recount Court examined ballots in which marks were made completely outside the target area for a candidate and had to interpret, based on the SBE Ballot Examples, whether the voter clearly intended to vote for a candidate or whether the mark was errant.

tentially marked for more than one candidate for an office (an “overvote”),<sup>43</sup> or are challenged by the recount official counting the ballots.<sup>44</sup>

Machine-readable ballots that run through a ballot scanner machine have an oval to fill in or an unfinished arrow to complete.<sup>45</sup> The ballot scanner machines are first reprogrammed to count only the office challenged in the recount.<sup>46</sup> Twenty-four test ballots are run through the machines to ensure their accuracy.<sup>47</sup> These test ballots include ballots with appropriately denoted votes for each candidate as well as ballots with intentional errors.<sup>48</sup> The machine-readable ballots counted in the election are then re-run through the machine.<sup>49</sup> All ballots which appear to be undervotes or overvotes, or which include a write-in candidate are set aside to be counted by hand in the same manner as the traditional paper ballots.<sup>50</sup>

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43. An “overvote” is defined as “a ballot on which a voter casts a vote for a greater number of candidates or positions than the number for which he was lawfully entitled to vote . . .” VA. CODE ANN. § 24.2-802(I) (Cum. Supp. 2014). Voters might submit an overvote if the voter selects more than one candidate for an office, or votes for a candidate in the target area and also writes in the same or any other name in the write-in area. *See, e.g.*, SBE BALLOT EXAMPLES, *supra* note 32, at 3. For example, in *Obenshain*, the Recount Court examined a number of ballots in which a voter checked the box for “Mark Herring” but also wrote “Mark Herring” in the write-in candidate space. This would be considered an overvote according to the SBE Ballot Examples.

44. VA. CODE ANN. §§ 24.2-802(C), (D)(3) (Cum. Supp. 2014) (describing the procedure for determining recount officials).

45. SBE BALLOT EXAMPLES, *supra* note 32, at 1a; COMMONWEALTH OF VA. STATE BD. OF ELECTIONS, PUB. DOC. SB 1340 7/2011, GRE BOOK CHAPTER 20, VOTING EQUIPMENT 2 (July 2013) [hereinafter GRE BOOK], *available at* [http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\132\GDoc\\_SBE\\_5293\\_v1.pdf](http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\132\GDoc_SBE_5293_v1.pdf).

46. VA. CODE ANN. § 24.2-802(D)(3) (Cum. Supp. 2014).

47. Recount Procedural Order, *supra* note 6, at 14.

48. For example, in *Obenshain*, five test ballots were marked correctly for Herring; four for Obenshain; three for a “John Doe” write-in candidate; two marked for both Obenshain and Herring (overvote); two for Herring and a Doe write-in (overvote); two for Obenshain and a Doe write-in (overvote); two unmarked at all (undervote); two marked for the Republican candidates in the Governor and Lieutenant Governor positions but unmarked for Attorney General (undervote); and two marked for the Democratic candidates in the Governor and Lieutenant Governor positions but unmarked for Attorney General (undervote). *Id.* at 14–15. Under this test, the machine should read five valid ballots for Herring and four valid ballots for Obenshain, and should return the remainder of the ballots as overvotes or undervotes.

49. VA. CODE ANN. § 24.2-802(D)(3) (Cum. Supp. 2014).

50. *Id.*; SBE BALLOT EXAMPLES, *supra* note 32, at 1a (noting procedure for counting traditional paper ballots).

DREs do not use or read any physical paper ballots. The voter touches the screen on the DRE to mark his or her vote, and the machine records the vote electronically.<sup>51</sup> DREs also do not produce any individual paper ballots, only a printout of the total results.<sup>52</sup> The DRE votes can only be “recounted” by reexamining the printout of the results.<sup>53</sup> If the printout is unclear or cannot be found, another printout is generated from the machine.<sup>54</sup> Although DREs arguably provide the most efficient voting method, critics of the machines protest the potential for error and lack of a paper trail to address those errors.<sup>55</sup> Initial investment in DREs means that they remain common throughout Virginia, but as machines age and localities acquire enough funding to purchase alternate voting machines, DREs become less prevalent.<sup>56</sup>

### B. *The Recount Procedure*

At its most basic, an election recount is just what it professes to be: a simple recounting of the ballots cast and counted in an election.<sup>57</sup> Recounts examine many aspects of voter ballots, but statutorily they must ignore other issues. A recount cannot address: “(a) any absentee ballots or provisional ballots sought to be cast but ruled invalid and not cast in the election, (b) ballots cast only for administrative or test purposes and voided by the officers of election, or (c) ballots spoiled by a voter and replaced with a new ballot,” or any ballots called into question due to the “eligibility of any voter to have voted.”<sup>58</sup> The invalidity of a vote is instead an issue for an election contest,<sup>59</sup> although the line between a contest

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51. SBE INSTRUCTIONS, *supra* note 32, at 24.

52. *Id.* at 14.

53. VA. CODE ANN. § 24.2-802(D)(2) (Cum. Supp. 2014); *see* Recount Procedural Order, *supra* note 6, at 19.

54. VA. CODE ANN. § 24.2-802(D)(2) (Cum. Supp. 2014).

55. *See, e.g.*, Schroder, *supra* note 4, at 4.

56. *See* Joel Schectman, *Virginia Voting Machines Have ‘Vulnerability’ to Wireless Sabotage*, CIO J. (Sept. 26, 2012), <http://blogs.wsj.com/cio/2012/09/26/virginia-voting-machines-have-vulnerability-to-wireless-sabotage/> (noting that Virginia election officials are balancing the need to phase out old electronic voting systems with the need to save money). *See generally infra* Part III.

57. GRE BOOK, *supra* note 45, at 3–4.

58. VA. CODE ANN. § 24.2-802(B) (Cum. Supp. 2014).

59. *See id.* §§ 24.2-803 to -814 (Repl. Vol. 2011 & Cum. Supp. 2014) (explaining the procedure for raising an election contest).

and a recount can be confusing.<sup>60</sup> A contest may only be filed where an unsuccessful candidate raises “(i) objections to the eligibility of the contestee based on specific allegations, (ii) objections to the conduct or results of the election . . . , or (iii) both.”<sup>61</sup>

To initiate a recount, the certified losing candidate must file a petition for recount within ten days from the day the SBE certifies the results of the election.<sup>62</sup> Statewide election recounts are filed in the Richmond City Circuit Court.<sup>63</sup> Recounts for any other office are filed in the circuit court of the city or county in which the candidate being challenged resides.<sup>64</sup> Within seven calendar days of this filing, a preliminary hearing must be held to dispose of motions and establish rules of procedure.<sup>65</sup>

At the preliminary hearing—which may or may not be presided over by the entire panel<sup>66</sup>—the Chief Judge must “review all security measures taken for all ballots and voting devices and direct, as [s]he deems necessary, all appropriate measures to ensure proper security to conduct the recount.”<sup>67</sup> The Recount Court in *Obenshain* required the clerk of each court to “certify in writing to [the Recount] Court (i) the security measures taken by the clerk following the election through the date of [the Preliminary Order] and (ii) the security measures taken pursuant to [the Preliminary Order].”<sup>68</sup> These security measures are more fully addressed in the SBE Instructions, which provide that the clerk of each jurisdiction is responsible for the security of the ballots and must certify to the Recount Court that the proper measures have been taken.<sup>69</sup> The Recount Court may also dispose of any motions and

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60. See *infra* notes 104–08.

61. VA. CODE ANN. § 24.2-803(B) (Repl. Vol. 2011 & Cum. Supp. 2014). These challenges must be based on “specific allegations.” *Id.*

62. *Id.* § 24.2-801 (Cum. Supp. 2014).

63. *Id.*

64. *Id.*

65. *Id.* § 24.2-802(B) (Cum. Supp. 2014).

66. All decisions at the preliminary hearing are subject to review by the full court. *Id.*

67. *Id.*

68. Recount Preliminary Order at 2, *Obenshain v. Herring*, No. CL13-5272 (Va. Cir. Ct. Dec. 5, 2013) (Richmond City) [hereinafter Recount Preliminary Order].

69. SBE INSTRUCTIONS, *supra* note 32, at 8, 32–33. It will be clear throughout this essay that the limited Virginia Code sections and regulations on recount procedure were only a starting point for the Recount Court’s decisions in *Obenshain*. The Recount Court relied heavily on the guidance of the SBE Instructions and the Ballot Examples, as well as the orders issued by the *Deeds* recount court. Commonly, the Recount Court allowed the

fix other procedures at the preliminary hearing.<sup>70</sup> In *Obenshain*, the Recount Court focused on the most urgent matters in the preliminary stage; the Preliminary Order set security procedures to be followed by the registrars and clerks of court, confirmed the date, time, and place of the local recounts, and allowed the parties preliminary access to election results from the registrars and clerks of court in each locality.<sup>71</sup> Following the preliminary hearing, the Recount Court allowed the parties to fully brief the most contested issues before the full panel convened for argument.<sup>72</sup>

The next step, the procedural hearing, requires the entire three-judge panel.<sup>73</sup> At this hearing, the Recount Court must dispose of all motions, fix all rules of procedure with finality, and “call for the advice and cooperation of the State Board or any local electoral board,” which has not only the authority but the “duty” to assist the Recount Court.<sup>74</sup> The Recount Court has great discretion to fix procedures that shall provide for the “accurate determination of votes” in the election,<sup>75</sup> “resolve disputes over the application of the [SBE] standards,”<sup>76</sup> and, broadly, “direct all other appropriate measures to ensure the proper conduct of the recount.”<sup>77</sup>

The Recount Court is statutorily required to “supervise” the recount itself, and the Virginia Code and the SBE Instructions give the Recount Court great discretion in the particulars of its supervision.<sup>78</sup> The recount takes place in every precinct in the Commonwealth over the course of multiple days.<sup>79</sup> The Recount Court

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parties to argue on an issue, and then sought direct advice in court from the Secretary of the SBE.

70. VA. CODE ANN. 24.2-802(B) (Cum. Supp. 2014).

71. Recount Preliminary Order, *supra* note 68, at 2–4.

72. *See infra* Part II (discussing the primary issues raised in *Obenshain*).

73. *See* SBE INSTRUCTIONS, *supra* note 32, at 9.

74. VA. CODE ANN. § 24.2-802(B) (Cum. Supp. 2014). The Recount Court relied heavily on the SBE’s guidance not only at the procedural hearing but throughout the entire recount process.

75. *Id.* § 24.2-802(A) (Cum. Supp. 2014).

76. *Id.*

77. *Id.*

78. *See id.* § 24.2-802(D) (Cum. Supp. 2014).

79. The timing of the precinct-based recounts was an issue in *Obenshain*. Upon the advice of the SBE, the cities of Alexandria and Chesapeake, and Fairfax County began the recount at 7:00 a.m. on December 16, 2013, a day earlier than the rest of the state because of the volume of ballots to be recounted. The remainder of the state began at 7:00 a.m. on

could remain in session throughout the entire time, or the panel could convene only at the end of the process to hear argument on the final contested ballots.<sup>80</sup> The Recount Court in *Obenshain* decided that the Chief Judge would be available in her chambers during the course of the actual recount, and the remaining judges would join her on the final day to address challenged ballots.<sup>81</sup>

As the recount progresses, each precinct's recount results, with the challenged ballots in a separate envelope, are transferred by police escort to Richmond, where SBE representatives and the parties' attorneys await.<sup>82</sup> These individuals work to resolve as many ballot challenges as possible.<sup>83</sup> The unresolved challenged ballots are sent to the Recount Court for review.<sup>84</sup> In the courtroom, the Recount Court examines the challenged ballots using the SBE Ballot Examples and hears argument by both parties as to each ballot. The Recount Court ultimately rules on "the validity of all questioned ballots and votes."<sup>85</sup> In *Obenshain*, as challenged ballots were tabulated, the lead for Herring grew, and Obenshain ultimately withdrew his challenges to the remaining ballots.<sup>86</sup> Late in the evening on December 18, 2013, the Recount Court certified Mark Herring as the next Attorney General of the Commonwealth of Virginia by a slim margin of 907 votes.<sup>87</sup>

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December 17. The tabulation of the total votes by the SBE was to begin at 7:00 a.m. on December 18, although some precincts still had not transported their results to Richmond by that time. See Ben Pershing, *Virginia Attorney General Recount to Start Monday*, WASH. POST (Dec. 15, 2013), [http://www.washingtonpost.com/local/virginia-politics/virginia-attorney-general-recount-gets-underway/2013/12/15/7f569da8-6373-11e3-91b3-f2bb96304e34\\_story.html](http://www.washingtonpost.com/local/virginia-politics/virginia-attorney-general-recount-gets-underway/2013/12/15/7f569da8-6373-11e3-91b3-f2bb96304e34_story.html).

80. SBE INSTRUCTIONS, *supra* note 32, at 33. Because the Recount Court is appointed and must serve in a matter of days, judges will naturally have regular dockets which must shift to accommodate the recount proceedings.

81. See *infra* notes 106–10 (describing the recount process in greater detail).

82. Recount Procedural Order, *supra* note 6, at 12.

83. All challenged ballots are first addressed by an SBE staff member at the recount. SBE INSTRUCTIONS, *supra* note 32, at 35. Each challenged ballot is examined by the party representative(s) for both sides. *Id.* at 36. If the representatives cannot agree, the ballot is examined by the floor attorney(s) for each side. *Id.* If the floor attorneys do not agree, the ballot is examined by the appeals team. *Id.* at 34, 37. The appeals team will make a recommendation to the Recount Court regarding each unclear ballot. *Id.* at 34. The parties then have an opportunity to argue their interpretation of the challenged ballot. *Id.*

84. *Id.*

85. VA. CODE ANN. § 24.2-802(D) (Cum. Supp. 2014).

86. See Vozella & Pershing, *supra* note 1.

87. *Id.*

## II. *OBENSHAIN V. HERRING*

The *Obenshain* Recount Court saw a number of unique issues litigated vigorously over the course of two short weeks. Like the memoranda submitted by counsel and the transcripts of their oral argument, this article could extend hundreds of pages discussing each issue. However, it will focus most particularly on two primary topics: (1) the discovery, access, and use of election materials, and (2) the ballot challenge process, including who is authorized to conduct challenges and the standard by which ballots may be challenged.

### A. *Discovery, Access, and Use of Election Materials*

The discovery of election materials was fiercely debated in *Obenshain*. Obenshain requested access to many election materials, not only those related to an election recount, but also those expressly excluded in a recount, such as absentee votes and records regarding the eligibility of provisional voters. Herring and some commentators opined that Obenshain sought to use the recount proceeding not only as a recount alone, but also as preparation for a possible contest.<sup>88</sup> Whether the statute intended or allowed this was the issue.

The Virginia Code clearly provides that “the eligibility of any voter to have voted shall not be an issue in a recount.”<sup>89</sup> But immediately following this well-defined line between a recount and a contest, the statute continues, “[c]ommencing upon the filing of the recount, nothing shall prevent the discovery or disclosure of any evidence that could be used pursuant to § 24.2-803 in contesting the results of an election.”<sup>90</sup> Thus, while the statute seeks to differentiate the types of ballots discoverable in a recount and a contest, the Recount Court cannot *prevent* discovery of evidence for a contest during a recount.<sup>91</sup>

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88. See, e.g., Markus Schmidt, *Obenshain Lawyer Raises Possibility of Contesting AG Race*, RICH. TIMES-DISPATCH (Dec. 10, 2013), [http://www.timesdispatch.com/news/obensha-in-lawyer-raises-possible-contest-in-general-assembly/article\\_a9df09d8-6126-11e3-b4af-001a4bcf6878.html](http://www.timesdispatch.com/news/obensha-in-lawyer-raises-possible-contest-in-general-assembly/article_a9df09d8-6126-11e3-b4af-001a4bcf6878.html).

89. VA. CODE ANN. § 24.2-802(B) (Cum. Supp. 2014).

90. *Id.*

91. See *id.*

Herring argued the statute cited above applied only when a recount and contest were filed simultaneously. Practical concerns were evident; a recount must proceed with great speed. The election occurred on November 5, 2013. On November 25, the election was certified by the SBE.<sup>92</sup> Obenshain filed his recount petition on November 27, the day before Thanksgiving.<sup>93</sup> The ultimate winner was to be sworn in on January 11, 2014.<sup>94</sup> A mere thirty-four business days, including four state-wide holidays, separated certification and swearing in. Herring argued that disclosures of materials unrelated to a recount in such a short time would unreasonably burden localities, some of whom were in the midst of conducting their own local recounts.<sup>95</sup> Finally, he also pointed out that the Recount Court in *Deeds* excluded these materials in their preliminary and procedural orders.<sup>96</sup>

Matters were further complicated because some materials were under seal and others were not. Virginia Code section 24.2-668 requires the clerk of the court to retain all ballots, pollbooks, and “other elections materials” under seal until the time has passed for a recount.<sup>97</sup> The Virginia Code does not identify whether or when election materials should be unsealed, only that their disclosure cannot be prevented. The Virginia Code allows the parties access to election materials for examination purposes at this

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92. Petition for Recount at 2, *Obenshain v. Herring*, CL13-5272 (Va. Cir. Ct. Nov. 27, 2013) (Richmond City) [hereinafter *Petition for Recount*].

93. *Id.*

94. Elizabeth Titus, *Virginia AG Race: ‘Anybody’s Guess,’* POLITICO (Nov. 13, 2013), <http://www.politico.com/story/2013/11/virginia-attorney-general-results-mark-herring-mark-obenshain-99847.html>.

95. See *Petition for Recount*, *supra* note 92, at 21. Although Herring did not mention costs, the Recount Court did notice that conflating a contest and recount could prove complicated in the end when distributing costs because costs of a recount and a contest are borne in different ways. Here, because the margin between the candidates was so slim (.007%), the cost would be borne by the precincts, not Obenshain, regardless of the ultimate winner. VA. CODE ANN. § 24.2-802(E) (Repl. Vol. 2011 & Cum. Supp. 2014). However, in a contest, the margin is not relevant: a petitioner who loses a contest bears the costs. *Id.* at § 24.2-811. For example, if Obenshain filed a recount and lost, and then filed a contest and lost, the localities would bear the costs of the recount but Obenshain would be responsible for the costs of the contest. Would the contest costs include the discovery of materials unrelated to a recount but related to a contest even before a contest was filed? Fortunately, the Recount Court did not have to answer that question in this case.

96. It was, however, represented to the Recount Court that the parties in *Deeds* did not take issue with the disclosure of materials, which would explain its absence in the *Deeds* orders.

97. VA. CODE ANN. § 24.2-668 (Repl. Vol. 2011).

stage but does not address copies.<sup>98</sup> At the preliminary hearing, Obenshain asked that the Recount Court order all election materials be unsealed and copies made of various election materials, including pollbooks. Herring also worried that the expense and inconvenience potentially caused by parties seeking to examine and copy election materials would greatly burden registrars and clerks of court.<sup>99</sup>

The Recount Court held that the language of the statute expressly required the parties have access to all pollbooks and election materials for examination purposes pursuant to Virginia Code section 24.2-8.02(B), regardless of whether a contest had been filed.<sup>100</sup> The Recount Court also noted section 24.2-8.02(B) further prohibited it from preventing the “discovery or disclosure” of election materials related to a contest.<sup>101</sup> In its Procedural Order, the Recount Court granted the parties access to absentee votes, notes on the eligibility of voters, and incident reports from the election officers, among other materials.<sup>102</sup> The Recount Court found that while the Virginia Code did not mandate copies be made available to the parties, it did not forbid copies. The Recount Court ordered copies of pollbooks to be made, at a party’s request and expense, including electronic copies if the pollbooks were electronic.<sup>103</sup>

Because a recount petition must be filed no later than ten days following the SBE’s certification of results,<sup>104</sup> while a contest may be filed up to thirty days after the certification,<sup>105</sup> it is logical that

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98. *Id.* § 24.2-802(B) (Repl. Vol. 2011 & Cum. Supp. 2014). This statute was added by the legislature in 2001, after concerns over the confusion of handling absentee ballots at an early stage were raised in the General Assembly. H.B. 1843, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 641, 2001 Va. Acts 781) (codified as amended at VA. CODE ANN. § 24.2-802); see Christopher R. Nolen, *Annual Survey of Virginia Law: Election Law*, 35 U. RICH. L. REV. 575, 577–78 (2001) (explaining the chief judge’s discretionary power to permit viewing of absentee ballots for examination purposes at the preliminary hearing).

99. Memorandum in Response to Petitioner’s Memorandum in Support of Petition for Recount at 8–9, *Obenshain v. Herring*, No. CL13-5272 (Va. Cir. Ct. Dec. 3, 2013) (Richmond City) [hereinafter Respondent’s Memorandum in Response].

100. Recount Procedural Order, *supra* note 6, at 3–4.

101. VA. CODE ANN. § 24.2-802(B) (Cum. Supp. 2014).

102. Recount Procedural Order, *supra* note 6, at 3–4.

103. *Id.* at 4.

104. VA. CODE ANN. § 24.2-801 (Repl. Vol. 2011).

105. *Id.* § 24.2-803(B) (Cum. Supp. 2014).

a recount is often filed first. This approach is further supported by the requirements for the respective petitions. A contest must be filed with “specific allegations” of the ineligibility of the certified winner, the conduct or results of the election, or both.<sup>106</sup> A recount petition, on the other hand, need only request a recount of the votes; it requires no allegation of wrongdoing.<sup>107</sup> Further, though the information and evidence needed in a recount and a contest may overlap, they are not identical. The parties may then file the arguably simpler recount petition and use this proceeding to gather evidence of possible grounds for a contest. Obenshain ultimately elected not to pursue a contest.<sup>108</sup> Whether this decision was due to the evidence gathered through the recount discovery will likely be known only by the parties.

### B. *Ballot Challenges: Officials, Observers, and the Standard to Challenge*

Perhaps the most hotly debated issues in *Obenshain* involved ballot challenges: the standard by which a ballot may be challenged, the roles of election recount observers and officials, and the authority to challenge ballots. The logistics of physically recounting and challenging ballots are somewhat complicated. After the DRE printouts are verified, the ballot-scanner machines are tested, and the machine-readable ballots are rescanned through the machines, the only ballots left to physically count by hand are the paper ballots and the machine-readable ballots set aside as improperly marked.<sup>109</sup> These paper ballots and the machine-readable ballots are counted by hand by a team of recount officials.<sup>110</sup> Recount officials are selected from the pool of the officers of election from each precinct in equal number by political party.<sup>111</sup> In *Obenshain*, as in *Deeds*, each “team” of recount officials was comprised of one Democrat and one Republican.<sup>112</sup> The chairperson and secretary of each local electoral board, together with

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106. *Id.*

107. *Id.* § 24.2-801 (Cum. Supp. 2014).

108. *See Vozzella & Pershing, supra* note 1.

109. *See* SBE INSTRUCTIONS, *supra* note 32, at 24–28; *see* GRE BOOK, *supra* note 45, at 3–4. *See generally supra* notes 34–50 and accompanying text.

110. SBE INSTRUCTIONS, *supra* note 32, at 24, 26.

111. VA. CODE ANN. § 24.2-802(C) (Cum. Supp. 2014).

112. Recount Procedural Order, *supra* note 6, at 8–9.

the recount coordinators, oversee each precincts' teams.<sup>113</sup> The team of two recount officials counts the ballots in accordance with the SBE Instructions and Ballot Examples.<sup>114</sup> One official counts the ballots while the other closely observes, and then the other counts while the first official closely observes.<sup>115</sup> As the officials count the ballots, they set aside ballots they wish to challenge.<sup>116</sup> Each party to the recount suit is entitled by statute to appoint a "representative observer" to observe this count.<sup>117</sup>

A complication arises during this process, however, because there is little guidance on the standard by which a ballot may be challenged. The statute only requires "[t]he written statement of any one recount official challenging a ballot" to consider a ballot officially challenged.<sup>118</sup> The SBE Instructions provide that if the recount officials do not agree on how or whether to count a ballot, at least one of them must officially challenge the ballot by completing a form entitled "Statement of Recount Official—Challenged Ballot."<sup>119</sup> The form requires the reasons for the challenge and the signature of the official.<sup>120</sup> It is then attached to the ballot itself and both are set aside as challenged.<sup>121</sup> But, as pointed out by Obenshain, neither the statutes nor the SBE Instructions indicate *how doubtful* a ballot must be in order for a recount official to challenge its validity.<sup>122</sup>

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113. *Id.* at 6. All local electoral boards are composed of three members, two of whom represent the political party of the current Virginia Governor. VA. CODE ANN. § 24.2-106 (Repl. Vol. 2011). The positions include a chairperson, a secretary, and a general board member. *Id.* Usually, the chairperson and the secretary represent different political parties, but this is not always the case. *Id.* The Recount Procedural Order further provided that if both the chairperson and secretary were Republicans, Obenshain was to designate one of the two to serve with the Democratic board member from that jurisdiction. Recount Procedural Order, *supra* note 6, at 6.

114. SBE BALLOT EXAMPLES, *supra* note 32, at 7.

115. *Id.* at 25.

116. See VA. CODE ANN. § 24.2-802(D) (Cum. Supp. 2014).

117. *Id.* § 24.2-802(C) (Cum. Supp. 2014).

118. *Id.* § 24.2-802(D) (Cum. Supp. 2014).

119. SBE BALLOT EXAMPLES, *supra* note 32, at 25.

120. *Id.*

121. *Id.*

122. Memorandum in Support of Petition for Recount at 8, *Obenshain v. Herring*, No. CL13-5272 (Va. Cir. Ct. Nov. 27, 2013) (Richmond City) [hereinafter *Petitioner's Memorandum in Support*].

Obenshain argued that officials should be required to challenge a ballot if they were “in doubt” as to how the ballot should be counted.<sup>123</sup> He argued such a standard would promote uniformity, while Herring countered that Obenshain’s standard would instead invite officials to turn away from the instructions and toward subjectivity.<sup>124</sup> Herring pointed out that the standard was not Virginia law or suggested by the SBE. He also argued that the standard could drastically increase the number of challenged ballots.<sup>125</sup>

Another variable yet untested was the sheer number of machine-readable ballots. Legislation sponsored by Creigh Deeds, the losing party in the previous statewide election recount, mandated that all such ballots be checked by rescanning the ballots through the machines instead of merely examining the printout of the results, possibly increasing the number of challenged ballots by a significant amount.<sup>126</sup> As discussed, the recount process must be swift. The recount began in select larger precincts on December 16, began in all other precincts on December 17, and the Recount Court convened on December 18 to address final motions and challenged ballots, dangerously close to statewide holidays and quickly approaching January 11, 2014, the date the new Attorney General was to take his oath of office.<sup>127</sup> Concerned about the possibility of large numbers of ballots and the looming January 11 deadline, the Recount Court included language similar to that in the SBE Instructions, and ruled that a ballot would be challenged only if the recount officials could not agree or deter-

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123. Obenshain originally argued for a ballot challenge standard of “any doubt,” but conceded this was too nebulous, arguing instead for the standard of “in doubt.”

124. Compare Petitioner’s Memorandum in Support, *supra* note 122, at 8 (“In the interest of uniformity, Obenshain will ask that, if there is *any doubt* about how a ballot should be counted, the ballot should be sent to the Court . . .”), with Respondent’s Memorandum in Response, *supra* note 99, at 6, (“The ‘any doubt’ standard would invite [the recount officials] to turn away from these clear instructions and toward their own subjective opinions.”).

125. Recount Procedural Order, *supra* note 6, at 18; see Respondent’s Memorandum in Response, *supra* note 99, at 5–6.

126. Elizabeth Titus, *Mark Obenshain to Request Recount in Virginia Attorney General Race*, POLITICO (Nov. 26, 2013), <http://www.politico.com/story/2013/11/mark-obenshain-mark-herring-virginia-attorney-general-race-recount-100407.html>; see also *supra* note 24.

127. See *supra* notes 79–81 and accompanying text; Titus, *supra* note 94.

mine how or whether to count a ballot and one of them officially challenged the ballot, leaving out any standard involving doubt.<sup>128</sup>

The next issue was the role of the recount observers in this ballot challenge process, or, rather, whether they had a role at all. The Virginia Code allows each party to appoint one representative observer for each team of recount officials.<sup>129</sup> This observer is to have an unobstructed view of the recount officials' work.<sup>130</sup> The Virginia Code says nothing more of the observers' abilities or responsibilities. The SBE Instructions provide that the observers "may stand behind or sit to the outside of the Recount Officials as they work and may only watch and take notes."<sup>131</sup> They may not "handle ballots, election materials or recount materials . . ." and if they have questions, they must direct them to the supervising Recount Coordinator.<sup>132</sup> They are not to disturb the recount officials.<sup>133</sup> The roles of the recount official and the recount observer are clearly distinct: only the recount official physically counts and challenges ballots.<sup>134</sup>

The Virginia Code and the SBE Instructions are clear that only recount officials may actually challenge ballots; however, as Obenshain pointed out, whether a recount observer may *suggest* a challenge is unclear.<sup>135</sup> An observer may ask questions of the recount coordinator and the coordinator "may offer advice to the Recount Officials."<sup>136</sup> In a "question" to the coordinator, may the observer suggest that the officials miscounted a ballot to the recount coordinator? If the observer is able to indirectly suggest challenges, why not allow them to directly suggest challenges? To address these issues, the Recount Court examined the distinctions between the recount officials and observers. First, the officials (and coordinators) were trained by the SBE to properly count and identify ballots.<sup>137</sup> In contrast, while the observers may

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128. See SBE BALLET EXAMPLES, *supra* note 32, at 25.

129. VA. CODE ANN. § 24.2-802(C) (Repl. Vol. 2011).

130. *Id.*

131. SBE BALLET EXAMPLES, *supra* note 32, at 12.

132. *Id.*

133. *Id.*

134. *Id.* at 25.

135. See Petition for Recount, *supra* note 92, at 3; Petitioner's Memorandum in Support, *supra* note 122, at 2.

136. SBE BALLET EXAMPLES, *supra* note 32, at 12.

137. Recount Procedural Order, *supra* note 6, at 9. In fact, the parties to the suit, the

have been trained, their training came from the parties themselves, not the unbiased state agency.<sup>138</sup> Officials and coordinators were sworn officers of the court for the recount proceeding, requiring them to uphold a high standard of ethical behavior.<sup>139</sup> Observers took no oath to uphold the integrity of the proceedings and could foreseeably exhibit biases in favor of their party. The Recount Court envisioned a scene in which the team counting thousands of ballots suffered frequent interruptions by the parties' direct representatives in disagreement with interpretations of a ballot, and ruled that observers could only observe the officials, take notes, and ask questions only to the recount coordinators.<sup>140</sup> Observers were strictly forbidden to suggest or instruct that a ballot be challenged.<sup>141</sup> Despite concerns over potential chaos, the recount and the challenge process ran smoothly.

### III. THOUGHTS FOR FUTURE RECOUNTS

The unique circumstances of recounts—their relative infrequency and the inability to appeal the results—often result in statutes and regulations that are more reactive than proactive. This was seen in changes following the Coleman recount that led to recounting paper ballots by hand.<sup>142</sup> Changes following the political fallout of *Bush v. Gore*<sup>143</sup> led to greater involvement of and guidance by the SBE.<sup>144</sup> *Deeds v. McDonnell* resulted in increased reruns of machine-readable ballots and a greater possibility for hand-counts of these ballots.<sup>145</sup>

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political parties, and representatives thereof, were strictly forbidden to offer any training to recount officials or coordinators in any fashion, allowing only the SBE to train the people in these roles.

138. *Id.* at 11.

139. *Id.* at 9.

140. *Id.* at 10. There was concern by the parties and the Recount Court that observers could ultimately couch a suggested challenge, prohibited by the Recount Court, in the form of a question to the coordinator, allowed by law. However, there were no problems with this in reality, or at least, none reported to the Recount Court. *See infra* Part II.

141. Recount Procedural Order, *supra* note 6, at 10.

142. *See* Christopher R. Nolen & Jeff Palmore, *Annual Survey of Virginia Law: Election Law and Government Ethics*, 46 U. RICH. L. REV. 119, 129 (2011).

143. 531 U.S. 98 (2000).

144. *See* Nolen, *supra* note 98, at 576–79 (discussing the legislative reactions in the Virginia General Assembly to various problems encountered in *Bush v. Gore*).

145. *See* Nolen & Palmore, *supra* note 142, at 129; Nolen & Palmore, *supra* note 23.

One area unanticipated by the General Assembly or past recounts was the ever-changing communication technology and its impact on the public's interest in the process. The parties themselves naturally sought as much access to the process as possible. They suggested the parties and recount observers should be able to carry smart phones and tablets at all times throughout the recount, including the actual handcounting itself. Yet with greater access comes a concern for voter privacy, and the Recount Court prohibited all video and photographic coverage by any persons in the rooms in which the recount took place, and allowed only still photography in the courtroom. Communications can also raise disturbances during the physical recounting process, and the Recount Court allowed observers to communicate with their respective parties only via email or text message—not by video or phone call—and only in such a way that would not disrupt or interfere with the recount.<sup>146</sup> Future Recount Courts are likely to address issues like this and more as technology advances and the public's desire for immediate information increases.

Changes in technology also mean changes in the types of machines used to cast or compile ballots. Commentators note that Virginia has a “love-hate” relationship with DREs.<sup>147</sup> Before 2007, many Virginia precincts invested heavily in DREs.<sup>148</sup> The use of such machines is logical: touchscreens are easy to use and there are no stacks of paper to move from place to place. However, recounts throughout history made clear the desire of voters to have a paper trail to check results.<sup>149</sup> It was, perhaps, a recount that prompted the General Assembly to prohibit additional purchases of DREs in 2007, after voters realized the lack of paper ballots to physically re-count made the process perhaps less reliable.<sup>150</sup> Efficiency cannot be held above voter confidence in the election process.

The authors question, without opinion, the effect of recounts on voter confidence in the election process. The most recent

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146. Recount Procedural Order, *supra* note 6, at 12.

147. See Christopher R. Nolen, *Annual Survey of Virginia Law: Election Law*, 44 U. RICH. L. REV. 403, 413 (2009).

148. See Schroder, *supra* note 4, at 4.

149. See *id.* at 4–5; see also Edward B. Foley, *The Future of Bush v. Gore*, 68 OHIO ST. L. REV. 925, 976–77 (2007).

150. VA. CODE ANN. § 24.2-626 (Repl. Vol. 2011).

statewide recounts, *Obenshain v. Herring*<sup>151</sup> and *McDonnell v. Deeds*,<sup>152</sup> affirmed the original results of their respective elections. Similarly, in the past decade at least five other recounts protesting an election for the General Assembly or the United States Congress also affirmed the election's original results.<sup>153</sup> The only recount found for a state or federal office which overturned its election's original results was filed by James Scott, who overcame an election defeat in the 1991 race in the 53rd House of Delegates district to beat his opponent David Sanders by a single vote.<sup>154</sup> Does the fact that recounts usually affirm the original election results inspire Virginia voters to be more confident that the election officials got it right the first time? Are recounts a good way to reassure voters and to provide peace of mind in the outcome?<sup>155</sup> Or do recounts just frustrate voters by using state funds in a likely futile attempt to change the results?<sup>156</sup>

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151. Herring was certified the winner of the election by 165 votes. Interestingly, his lead grew to 907 following the recount. *Vozzella & Pershing*, *supra* note 1.

152. McDonnell was certified the winner of the election by 323 votes. The recount added 37 votes to McDonnell's lead. Carol Morello, *McDonnell Clinches Attorney General Race*, WASH. POST, Dec. 22, 2005, at B-01.

153. Delegate Lynwood Lewis increased his lead of nine votes to eleven votes over Wayne Coleman in the 2013 Virginia Senate race in the 6th District. Jim Nolan, *Win Gives Democrats Edge in Virginia Senate*, RICH. TIMES-DISPATCH, Jan. 28, 2014, at National Political News. Also in 2013, Delegate Thomas Rust maintained his lead over Jennifer Boysko in the 86th District's House of Representatives race, although his lead decreased from fifty-four votes to thirty-two. Antonio Olivo, *Del. Rust Clings to Victory in Recount*, WASH. POST, Dec. 19, 2003, at B-05. In 2009, Ron Villanueva remained the winner in the 21st District House of Representatives race over Bobby Mathieson when the recount added two votes to his sixteen-vote margin of victory. Deirdre Fernandes, *Villanueva Winner of 21st District Seat In Va. Beach Recount*, VIRGINIAN-PILOT (Dec. 15, 2009), <http://hamptonroads.com/2009/12/villanueva-winner-21st-district-seat-va-beach-recount>. Tom Perriello's victory of 745 votes decreased slightly to 727 over Virgil Goode, Jr. in the 5th District of the U.S. House of Representatives in 2008. Brian McNeill, *Recount Confirms Perriello Win*, DAILY PROGRESS (Jan. 24, 2013) [http://www.dailyprogress.com/news/recount-confirms-perriello-win/article\\_57796211-1df3-5c5c-986b-af937057ab93.html?mode=jqm](http://www.dailyprogress.com/news/recount-confirms-perriello-win/article_57796211-1df3-5c5c-986b-af937057ab93.html?mode=jqm). In 2007, Ken Cuccinelli's ninety-two-vote lead increased to 101 votes over Janet Oleszek in the state senate race for the 37th District. Chris L. Jenkins, *Cuccinelli Keeps Va. Senate Seat in Recount*, WASH. POST, Dec. 20, 2007, at B-01.

154. Larry O'Dell, *Recount Loser Takes Case to Court*, FREE LANCE-STAR, Feb. 18, 1992, at C7, available at <http://news.google.com/newspapers?nid=1298&dat=19920218&id=FABOAAAIBA&sjid=5osDAAAIBA&pg=4575,3199214>.

155. See, e.g., Bob Kemper, *Recount to be Sure, GOP Says*, DAILY PRESS (Nov. 11, 1989), [http://articles.dailypress.com/1989-11-11/news/8911110131\\_1\\_recount-republican-j-marshall-coleman-democrat-l-douglas-wilder](http://articles.dailypress.com/1989-11-11/news/8911110131_1_recount-republican-j-marshall-coleman-democrat-l-douglas-wilder) (noting that a recount might not change the outcome but it will offer peace of mind).

156. The state bears the costs of recounts if the challenger lost by more than 0.5%. VA. CODE ANN. § 24.2-802(E), (F) (Repl. Vol. 2011).

The parties' confidence in the particulars of the recount process is also interesting to examine. From the filing of the *Obenshain* Recount Petition to the final certification of results, the parties argued vehemently for various issues as discussed above.<sup>157</sup> Yet ultimately, many of the concerns raised by the parties never materialized, or at least were never brought to the attention of the Recount Court. Herring protested Obenshain's ability to discover materials unrelated to a recount but related to a contest, yet Obenshain ultimately chose not to file a contest.<sup>158</sup> Herring opined that recount observers, given the opportunity to ask questions of recount coordinators, would interrupt the proceedings and overstep their boundaries, yet there were no reports of overstepping recount observers.<sup>159</sup> The parties worried that the legislation passed since the last statewide recount, mandating that all machine-readable ballots be rerun through the ballot scanner machines, would increase the challenged ballots to potentially hundreds.<sup>160</sup> Ultimately, fewer than 120 challenged ballots made their way to the Recount Court, and they were broken into roughly fifteen categories, making oral argument relatively painless.<sup>161</sup>

As recounts progress, new problems are identified and litigated, and many of them are later resolved by statute, regulation, or SBE guidelines. In many ways, recounts provide an opportunity to bring issues to light that legislators have yet to address. The election and recount processes are not perfect by any means, and future judges and attorneys will have much to learn (and debate) on these issues. But continued election recount experiences increases knowledge of the process by the bench and the bar, and with it, hopefully a greater confidence by the electorate in the larger electoral system.

## CONCLUSION

While this essay cannot encompass every issue litigated in *Obenshain v. Herring*, it offers a perspective by the Recount

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157. See *supra* Part II.

158. See *supra* Part II(A).

159. See *supra* Part II(B).

160. Titus, *supra* note 94 ("The recount would involve re-running an estimated 712,000 paper ballots through optical scan tabulation machines . . . 100 times more ballots recounted this year than in 2005.").

161. Vozzella & Pershing, *supra* note 1.

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Court on some of the issues that arose and those which may surface in the future. Each year, statutes and regulations necessarily adapt in an attempt to stay abreast of the constantly changing technology and the ebbs and flows of voter and party confidence in the electoral processes. The authors hope this essay serves as an introductory, plain-English guide to the recount process and provides insight that a chaotic three weeks will result in a logical process and a reliable result.