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SENATE BILL NO. 35

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Privileges and Elections
on February 5, 2008)

(Patron Prior to Substitute—Senator Deeds)

A *BILL to amend and reenact § 24.2-802 of the Code of Virginia, relating to elections; recount procedures.*

Be it enacted by the General Assembly of Virginia:

1. That § 24.2-802 of the Code of Virginia is amended and reenacted as follows:

§ 24.2-802. Procedure for recount.

A. The State Board of Elections shall promulgate standards for (i) the proper handling and security of voting and counting devices, ballots, and other materials required for a recount, (ii) accurate determination of votes based upon objective evidence and taking into account the counting device and form of ballots approved for use in the Commonwealth, and (iii) any other matters that will promote a timely and accurate resolution of the recount. The chief judge of the circuit court or the full recount court may, consistent with State Board of Elections standards, resolve disputes over the application of the standards and direct all other appropriate measures to ensure the proper conduct of the recount.

The recount procedures to be followed throughout the election district shall be as uniform as practicable, taking into account the types of ballots and voting devices in use in the election district.

In preparation for the recount, the clerks of the circuit courts shall (a) secure all paper ballots and other election materials in sealed boxes; (b) place all of the sealed boxes in a vault or room not open to the public or to anyone other than the clerk and his staff; (c) cause such vault or room to be securely locked except when access is necessary for the clerk and his staff; and (d) certify that these security measures have been taken in whatever form is deemed appropriate by the chief judge.

B. Within seven calendar days of the filing of the petition for a recount of any election other than an election for presidential electors, or within five calendar days of the filing of a petition for a recount of an election for presidential electors, the chief judge of the circuit court shall call a preliminary hearing at which (i) motions may be disposed of and (ii) the rules of procedure may be fixed, both subject to review by the full court. As part of the preliminary hearing, the chief judge may permit the petitioner and his counsel, together with each other party and his counsel and at least two members of the electoral board and the custodians, to examine any direct electronic voting device of the type that prints returns when the print-out sheets are not clearly legible. The petitioner and his counsel and each other party and their counsel under supervision of the electoral board and its agents shall also have access to pollbooks and other materials used in the election for examination purposes, provided that individual ballots cast in the election shall not be examined at the preliminary hearing. The chief judge during the preliminary hearing shall review all security measures taken for all ballots and voting devices and direct, as he deems necessary, all appropriate measures to ensure proper security to conduct the recount.

The chief judge, subject to review by the full court, may set the place or places for the recount and may order the delivery of election materials to a central location and the transportation of voting devices to a central location in each county or city under appropriate safeguards.

After the full court is appointed under § 24.2-801 or § 24.2-801.1, it shall call a hearing at which all motions shall be disposed of and the rules of procedure shall be fixed finally. The court shall call for the advice and cooperation of the State Board or any local electoral board, as appropriate, and such boards shall have the duty and authority to assist the court. The court shall fix procedures that shall provide for the accurate determination of votes in the election.

The determination of the votes in a recount shall be based on votes cast in the election and shall not take into account (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.

The eligibility of any voter to have voted shall not be an issue in a recount. Commencing 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.

C. The court shall permit each candidate, or petitioner and governing body or chief executive officer, to select an equal number of the officers of election to be recount officials and to count ballots, or in the case of direct electronic voting devices to redetermine the vote. The number shall be fixed by the court and be sufficient to conduct the recount within a reasonable period. The court may permit each party to the recount to submit a list of alternate officials in the number the court directs. There shall be at least one team of recount officials to recount paper ballots and to redetermine the vote cast on direct electronic devices of the type that prints returns for the election district at large in which the recount is

60 being held. There shall be at least one team from each locality using electronic counting devices to
61 insert the ballots into one or more counting devices. The counting devices shall be programmed to count
62 only votes cast for parties to the recount or for or against the question in a referendum recount. Each
63 team shall be composed of one representative of each party.

64 The court may provide that if, at the time of the recount, any recount official fails to appear, the
65 remaining recount officials present shall appoint substitute recount officials who shall possess the same
66 qualifications as the recount officials for whom they substitute. The court may select pairs of recount
67 coordinators to serve for each county or city in the election district who shall be members of the county
68 or city electoral board and represent different political parties. The court shall have authority to summon
69 such officials and coordinators. On the request of any party to the recount, the court shall allow that
70 party to appoint one representative observer for each team of recount officials. The representative
71 observers shall have an unobstructed view of the work of the recount officials. The expenses of its
72 representatives shall be borne by each party.

73 D. The court (i) shall supervise the recount and (ii) may require delivery of any or all pollbooks used
74 and any or all ballots cast at the election, or may assume supervision thereof through the recount
75 coordinators and officials.

76 The redetermination of the vote in a recount shall be conducted as follows:

77 1. For paper ballots, the recount officials shall hand count the ballots using the standards
78 promulgated by the State Board pursuant to subsection A.

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

83 3. For optical scan tabulators, the recount officials shall ~~first examine the printout to redetermine the~~
84 ~~vote. Only if the printout is not clear, or on the request of the court, the recount officials shall rerun all~~
85 ~~the ballots through a tabulator programmed to count only the votes for the office or issue in question in~~
86 ~~the recount and to set aside all ballots containing write-in votes, overvotes, and undervotes. The ballots~~
87 ~~that are set aside, any ballots not accepted by the tabulator, and any ballots for which a tabulator could~~
88 ~~not be programmed to meet the programming requirements of this subdivision, shall be hand counted~~
89 ~~using the standards promulgated by the State Board pursuant to subsection A. Prior to running the~~
90 ~~ballots through the tabulator, the recount officials shall ensure that logic and accuracy tests have been~~
91 ~~successfully performed on each tabulator after the tabulator has been programmed. The result~~
92 ~~calculated for ballots accepted by the tabulator during the recount shall be considered the correct~~
93 ~~determination for those ballots unless the court finds sufficient cause to rule otherwise.~~

94 There shall be only one redetermination of the vote in each precinct.

95 At the conclusion of the recount of each precinct, the recount officials shall write down the number
96 of valid ballots cast, this number being obtained from the ballots cast in the precinct, or from the ballots
97 cast as shown on the statement of results if the ballots cannot be found, for each of the two candidates
98 or for and against the question. They shall submit the ballots or the statement of results used, as to the
99 validity of which questions exist, to the court. The written statement of any one recount official
100 challenging a ballot shall be sufficient to require its submission to the court. If, on all direct electronic
101 voting devices, the number of persons voting in the election, or the number of votes cast for the office
102 or on the question, totals more than the number of names on the pollbooks of persons voting on the
103 devices, the figures recorded by the devices shall be accepted as correct *so long as the discrepancy is*
104 *not sufficient to affect the outcome of the election.*

105 At the conclusion of the recount of all precincts, after allowing the parties to inspect the questioned
106 ballots, and after hearing arguments, the court shall rule on the validity of all questioned ballots and
107 votes. After determining all matters pertaining to the recount and redetermination of the vote as raised
108 by the parties, the court shall certify to the State Board and the electoral board or boards (a) the vote for
109 each party to the recount and declare the person who received the higher number of votes to be
110 nominated or elected, as appropriate, or (b) the votes for and against the question and declare the
111 outcome of the referendum. The State Board shall post on the Internet any and all changes made during
112 the recount to the results as previously certified by it pursuant to § 24.2-679.

113 E. Costs of the recount shall be assessed against the counties and cities comprising the election
114 district when (i) the candidate petitioning for the recount is declared the winner; (ii) the petitioners in a
115 recount of a referendum win the recount; or (iii) there was between the candidate apparently nominated
116 or elected and the candidate petitioning for the recount a difference of not more than one-half of one
117 percent of the total vote cast for the two such candidates as determined by the State Board or electoral
118 board prior to the recount. Otherwise the costs of the recount shall be assessed against the candidate
119 petitioning for the recount or the petitioners in a recount of a referendum. If more than one candidate
120 petitions for a recount, the court may assess costs in an equitable manner between the counties and
121 cities and any such candidate if both are liable for costs under this subsection. Costs incurred to date

shall be assessed against any candidate or petitioner who defaults or withdraws his petition.

F. The court shall determine the costs of the recount subject to the following limitations: (i) no per diem payment shall be assessed for salaried election officials; (ii) no per diem payment to officers of election serving as recount officials shall exceed two-thirds of the per diem paid such officers by the county or city for service on election day; and (iii) per diem payments to alternates shall be allowed only if they serve.

G. Any petitioner who may be assessed with costs under subsection E shall post a bond with surety with the court in the amount of \$10 per precinct in the area subject to recount. If the petitioner wins the recount, the bond shall not be forfeit. If the petitioner loses the recount, the bond shall be forfeit only to the extent of the assessed costs. If the assessed costs exceed the bond, he shall be liable for such excess.

H. The recount proceeding shall be final and not subject to appeal.

I. For the purposes of this section:

"Overvote" means 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 and no vote shall be counted with respect to that office or issue.

"Undervote" means 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.