

Six-Month Narrative Report

- Name of Organization:** The Election Law Program of the Institute of Bill of Rights Law at the William & Mary Law School
- Principal Investigators:** Prof. Rebecca Green (William & Mary Law), David Rottman (National Center for State Courts); and, serving as principal consultant, Prof. Edward Foley (Moritz College of Law)
- Name of Proposed Project:** *A Continuing Program to Improve the Judicial Role in Resolving Election Disputes and Promote Election Law Reform in the United States*
- Grant term:** November 2011-November 2012

The Election Law Program hosted the first of its “Election Law War Games” on May 16, 2012 in Norfolk, VA at the Virginia Judicial Conference. The war game featured a scenario developed with the help Ned Foley, several election law attorneys affiliated with our program, three student research assistants, and an unpaid voting technology consultant based in Arlington, Virginia.

Approximately 20 judges attended the May 15 event, as well as 15 county registrars, John Fortier of the Bipartisan Policy Center, and Secretary Donald Palmer of Virginia’s State Board of Election (and members of his staff). Our technical advisor Jeremy Epstein, a student researcher, and David Rottman of the National Center also attended. We filled the room (designated seating for forty).

We created a detailed scenario complete with an overview document, mock briefs for each side, an affidavit from a technologist, bios for participants, a timeline, and background materials on Virginia election law and recount procedures (we sent these materials to you via snail mail the day after the event, and have attached them to the email attaching this report. We crafted the scenario to (1) highlight a major flaw in VA’s election code, and (2) demonstrate the unique nature of election litigation. The attorneys (Jessica Ring Amunson, Partner at Jenner & Block and Steffan Passantino, Partner at McKenna, Long & Aldridge) took their roles seriously, arguing strenuously for their case. Both attorneys also took an active part in the thirty-minute debrief following oral arguments. They also participated in the second part of the session during which we talked about election litigation nationally and in Virginia in the lead up to November’s elections. Although we were unable to secure actual (retired) judges to sit on our panel because of an active recall list in Virginia for retired judges, we were very pleased with the level of engagement from our bench. John Harrison of UVA Law, John Levy of William & Mary Law (emeritus), and Ned Foley sat as judges.

The presence of SBE Secretary Don Palmer and his deputy secretary added considerably to the exercise. His presence made the experience all the more worthwhile from a reform perspective—we highlighted a problem of which the SBE was largely unaware that could very well factor in to a close election: malfunctioning DRE machines (80% of voting

machines in VA are DREs; they are rapidly aging and unlikely to be replaced due to budget issues). Participating county registrars were interested and vocal with questions.

We captured the oral argument and debrief on video and will post the session at electionlawissues.org, along with the complete set of underlying documents. We will actively publicize the availability of these materials, and will use this online resource for marketing purposes as we work to line up the next two venues.

A few thoughts about what we learned from the experience and improvements going forward:

- Our event at the Judicial Conference of Virginia was scheduled as an add-on that took place following the close of the conference. The conference officially ended at 1:00 and our event ran from 2:30 to 5:00. For the next event, we will work to schedule the event as part of the regular conference to boost attendance.
- We will focus more on press coverage. We posted a press release which we sent out to targeted press outlets, we posted a story on the war game on the Law School website, and did a bit of reaching out to individual reporters, but we would have liked to create more of a media buzz which we will work harder at the next time around.
- We would like to get more legislators involved. We invited the members of the Privileges & Elections Committee of the Virginia General Assembly, but none attended. Perhaps we could have found takers had we asked in a more targeted way.

In terms of next steps, the National Center is working on lining up the next state to schedule a war game. We originally lined up Nevada as our next state, but they backed out in early May from holding the program in 2012 for budget reasons. We have a list of states we are pursuing (based on their status as likely swing states in November). Our current plan is to host the next session in August or September and the third session post November. Nevada is still a possibility for 2013.

We would be more than happy to answer any questions you might have. Overall, we are quite satisfied with the substance and tone of our last event and very much look forward to designing and executing the next two.