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ETHICS IN VIRGINIA: REFORMING ETHICS AND CONFLICT OF INTEREST LAWS IN THE 2010 VIRGINIA GENERAL ASSEMBLY

*Christopher E. Piper**

“In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.”¹

INTRODUCTION

The 2010 Virginia General Assembly’s efforts to reform Ethics and Conflict of Interest Laws began with a scandal involving a high-profile politician.² On August 21, 2009, an article appeared in a Virginia newspaper, the Daily Press, indicating that Virginia State Delegate Phil Hamilton (R-Newport News), who was also Vice Chairman of the House Appropriations Committee, pursued funding for a “Center for Teacher Quality and Education Leadership” at Old Dominion University (“ODU”) in exchange for a \$40,000 per year part-time position at the Center.³ After funding for the center was secured in the final state budget, he was hired for the position.⁴ The article was based on e-mail correspondence between the Delegate and University administrators. In the following weeks and months, the backlash from the press and other political leaders intensified,

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1. THE FEDERALIST NO. 51 (James Madison).

2. Hugh Lessig and Kimball Payne, *Job talks preceded ODU bill*, DAILY PRESS (Newport News), Aug. 21, 2009, available at

http://www.dailypress.com/news/dp-local_hamiltonline_0821aug21,0,6608958.story.

3. *Id.*

4. *Id.*

and eventually Delegate Hamilton, the seemingly unbeatable incumbent, was defeated for re-election by nearly 10 percent of the votes cast despite greatly outspending his opponent.⁵

Per the existing law and rules of the House of Delegates, an ethics panel opened a formal investigation after receiving a complaint.⁶ The House panel later ended its review of the matter claiming that it did not have jurisdiction after Delegate Hamilton's resignation from the House following his defeat.⁷

The public and legislators alike criticized the entire investigation process, particularly the ethics panel's lack of jurisdiction. Consequently, numerous bills were introduced which sought to reform ethics and conflict of interest laws.⁸

This article will review the process by which an ethics complaint was handled in 2009 as well as the laws that passed the 2010 General Assembly. It will also examine criticisms of ethics laws in Virginia and throughout the country. Finally, this article concludes with a discussion of the current criticisms of ethics laws in Virginia and across the country.

HOW ETHICS COMPLAINTS WERE HANDLED CIRCA 2009

Virginia is one of only 10 states without an independent ethics commission.⁹ The major difference between an independent ethics commission and an ethics committee is who oversees the complaints.¹⁰ Commissions are typically independent and oversee the administration of ethics laws.¹¹ Committees, on the other hand, typically only respond to

5. Virginia Public Access Project, Elections: House of Delegates, http://www.vpap.org/elections/chamber/4?competition=challenger&year_and_type=2009regular (last visited June 21, 2010).

6. Kimball Payne and Cathy Grimes, *NN schools subpoenaed in Hamilton investigation*, DAILY PRESS (Newport News), Sept. 4, 2009, available at http://dailypress.com/news/dp-local_ethics_1125nov25,0,4991038.story; Bill Sizemore and Julian Walker, *Hamilton's ODU deal spurs state ethics inquiry*, VIRGINIAN-PILOT, Aug. 25, 2009, available at <http://hamptonroads.com/print/520599>.

7. Kimball Payne, *House ethics panel ends investigation into Phil Hamilton, ODU*, DAILY PRESS (Newport News), Nov. 25, 2009, available at http://www.dailypress.com/news/dp-local_ethics_1125nov25,0,4991038.story.

8. Rosalind Helderman, *Speaker takes back ethics issue, appoints subcommittee*, WASH. POST, Nov. 25, 2009, available at http://voices.washingtonpost.com/virginiapolitics/2010/01/speaker_takes_back_ethics_issu.html.

9. National Conference of State Legislatures, State Ethics Commission: Powers & Duties (2008), <http://www.ncsl.org/default.aspx?tabid=15348>.

10. National Conference of State Legislatures, Ethics Committees and Ethics Commissions: What's the Difference? <http://www.ncsl.org/Default.aspx?TabId=15303>.

11. *Id.*

ethics complaints, which involve members of the legislature and have no authority to offer advisory opinions on the law.¹² Similar to the other nine states without a commission, Virginia's ethics oversight is handled by one of two standing committees, one from the House and one from the Senate, that only meet when a complaint is received.¹³

Virginia's two ethics committees are the House and Senate Ethics Advisory Panels ("the Panel"), with each committee overseeing its respective house in the General Assembly.¹⁴ The Senate Panel is comprised of three former Senators and two non-legislative citizens.¹⁵ The Senate nominates all members for a four-year term, unless the member is filling an unexpired term.¹⁶ For the House Panel, membership is similarly acquired; however, only two of the members are former Delegates and one member is a former justice or judge.¹⁷

The process for either Panel to start an investigation begins with the filing of a signed and sworn complaint by a citizen of the state.¹⁸ If after a preliminary investigation conducted in private, the Panel finds that further investigation is necessary, the Panel may schedule a hearing and provide the accused legislator with an opportunity to defend him or herself.¹⁹ All parts of the investigation remain confidential until the Panel releases its findings.²⁰ The hearings may be made public only if the accused legislator made such a request.²¹

The Panel has 120 days from receipt of the complaint to complete their work.²² However, their jurisdiction only applies to current members of the General Assembly.²³ In the case of Delegate Hamilton, he resigned after losing his bid for re-election.²⁴ At the moment he resigned, he was no longer a member of the House of Delegates and therefore outside the jurisdiction of the committee.²⁵ Assuming that an accused legislator does not resign, the committee may: (1) dismiss the complaint if they do not

12. *Id.*

13. VA. CODE ANN. § 30-114 (2009).

14. VA. CODE ANN. § 30-112 (2009).

15. *Id.*

16. *Id.*

17. *Id.*

18. VA. CODE ANN. § 30-114 (2009).

19. *Id.*

20. *Id.*

21. VA. CODE ANN. § 30-117 (2009).

22. VA. CODE ANN. § 30-114(C) (2009).

23. VA. CODE ANN. § 30-116 (2009).

24. Payne, *supra* note 7.

25. VA. CODE ANN. § 30-100 (2009).

believe that any violation occurred,²⁶ (2) refer their findings to the appropriate Privileges and Elections committee with recommendations where they find that the legislator unknowingly violated the law,²⁷ or (3) refer the matter to the Attorney General where they find that the legislator willfully violated the law.²⁸ The Panel must release their findings to the public at the same time that they refer the matter to either the Privileges and Elections committee or the Attorney General.²⁹

The Panel's power ends there. They have no authority to prosecute, to file a motion in court, or to request a warrant for the accused legislator's arrest. If they find that the legislator unknowingly violated the law, then the appropriate Privileges and Elections committee conducts its own hearing.³⁰ It reports its findings and recommendations to the full body, who then votes on whether any violation occurred and any disciplinary action that must be taken.³¹ The body can remove the member with a 2/3 majority vote.³² Cases where the Panel has found a willful violation of the law, the Panel shall refer the matter to the Attorney General "for such action he deems appropriate."³³ Should the Attorney General choose to pursue the matter further, he must appoint an independent counsel from the Commonwealth Attorney's Office.³⁴ Of course, the Attorney General can decide not to pursue the matter, and consequently, the complaint is referred to the appropriate Privileges and Elections committee and thus follows the same process as if the Panel had referred it directly to the legislative committee. The committee can then decide to do nothing or pursue the matter. Should they pursue it and find that the legislator knowingly violated the law, they may refer the matter to the Attorney General.³⁵

AN OVERVIEW OF THE ETHICS REFORM BILLS INTRODUCED IN THE 2010 VIRGINIA GENERAL ASSEMBLY

Throughout the ethics scandal involving Delegate Hamilton, many of Virginia's politicians discussed the need for ethics reform and promised to take substantive action in the upcoming General Assembly session,

26. VA. CODE ANN. § 30-116(1) (2009).

27. § 30-116(2).

28. § 30-116(3).

29. § 30-116(5).

30. § 30-116(2).

31. *Id.*

32. VA CODE ANN. § 30-116(4) (2009).

33. § 30-116(3).

34. VA. CODE ANN. § 30-122(1) (2009).

35. § 30-116(4).

particularly in regard to the secretive and closed nature of the investigation by the panel. House Speaker William J. Howell (R-Stafford) promised to “lead in ensuring that the manner in which legislative ethics inquiries are conducted is thoughtfully examined during the 2010 session of the General Assembly.”³⁶ House Minority Leader Delegate Ward Armstrong (D-Henry) promised to introduce several ethics reform bills, stating that “[w]hen government officials fail to hold ourselves to high standards or conduct our business in the light of day, the public ceases to have faith in us.”³⁷

Twenty-five bills were introduced in the 2010 General Assembly Session seeking to reform Virginia’s ethics laws.³⁸ That compares with one bill in 2009, four in 2008, and three in 2007.³⁹ Of the 25 bills introduced in 2010, nine were incorporated into other bills, nine were killed in one parliamentary maneuver or another, one was stricken at the request of the bill’s patron, and six passed.⁴⁰ The majority of the bills that passed did not increase the extent of the legislator’s financial disclosures; rather, they only sought to open up the process to the public after a complaint is received and determined by the ethics panel to be valid.

Several bills attempted to make wholesale changes to the House and Senate Advisory Panels in order to make them more like commissions rather than committees, but none of these bills made it into law. For instance, House Bill 1140, proposed creating a State and Local Ethics Advisory Council which would have powers similar to other state ethics commissions such as publishing advisory opinions, releasing educational materials, and complete administration of the state and local conflict-of-interest laws.⁴¹ The bill failed to make it out of a House subcommittee.⁴² Another bill, House Bill 813, sought to give the House and Senate Ethics

36. Payne, *supra* note 7.

37. Press Release, Ward Armstrong, Delegate Ward Armstrong Announce 2010 Legislative Package (Jan. 18, 2010), available at <http://www.wardarmstrong.com/PressRoom/article/12149>.

38. See, e.g., H.B. 330, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010); H.B. 655, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010); H.B. 657, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010); H.B. 813, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010); H.B. 814, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010); H.B. 1140, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010); S.B. 186, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010); S.B. 508, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010); S.B. 524, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010).

39. See Va. Gen. Assem., Legis. Info. Sys., <http://leg1.state.va.us/lis.htm>.

40. H.B. 655, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted); H.B. 740, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted); H.B. 933, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted); S.B. 430, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted); S.B. 506, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted); S.B. 512, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted).

41. H.B. 1140, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010).

42. *Id.*

Advisory Panels authority to review the legislator's conflict of interest disclosure forms and report non-compliance to the appropriate house's Privileges and Elections committee.⁴³ This bill also failed to make it out of a House subcommittee.⁴⁴ House Bill 814 and its Senate companion Senate Bill 186 proposed that the existing House and Senate Ethics Advisory Panels be combined into a single, five-member review panel. The language from these bills was incorporated into House Bill 655, which later passed, but the language from House Bill 814 and Senate Bill 186 was stricken.⁴⁵

Other bills that were introduced but failed would have required that the conflict of interest disclosure forms be made available online for five years (Senate Bill 118) or through a searchable database on the web (House Bill 328).⁴⁶ One attempted to extend the period of time before a former legislator can return to lobby the General Assembly from one year to two (House Bill 122).⁴⁷ While another sought to prohibit gifts to legislators exceeding \$100 (House Bill 815).⁴⁸ And others wanted to increase penalties for violations of the law (Senate Bill 603 and House Bill 1215).⁴⁹

Of the bills that did pass, House Bill 655 was the most comprehensive. It allows for the ethics panel's investigation to continue even if the legislator resigns.⁵⁰ Preliminary investigations conducted by the panel remain confidential, but if the panel determines to raise its investigation to an inquiry, the matter becomes open to the public.⁵¹ House Bill 740 and Senate Bill 512 now require that legislators disclose any salaries paid to them or their immediate family due to their employment with a state or local government or advisory agency (ironically, the Daily Press' investigation into the matter began because Delegate Hamilton disclosed his salary from ODU, which was not required of him at the time).⁵² House Bill 933 requires the House or Senate, upon finding that a legislator knowingly violated the law, to refer the matter to the Attorney General (prior to the

43. H.B. 813, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010).

44. *Id.*

45. Compare H.B. 814, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010), and S.B. 186, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010), with H.B. 655, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted).

46. S.B. 118, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010); H.B. 328, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010).

47. H.B. 122, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010).

48. H.B. 815, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010).

49. H.B. 122, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (as introduced Jan. 13, 2010).

50. H.B. 655, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted).

51. *Id.*

52. H.B. 740, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted); S.B. 512, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted).

House or Senate had the option to refer, but were not required to do so).⁵³ Finally, Senate Bill 430 clarified that officials list each real estate parcel individually.⁵⁴

CRITICISMS OF EXISTING ETHICS LAWS

Jeff Schapiro, a Virginia Politics columnist for the Richmond Times-Dispatch sums up the chief criticism of Virginia's ethics disclosure laws in his June 28, 2009 article stating,

The law says so little about so many questionable forms of conduct. Activities illegal elsewhere are legal here simply because the law is silent or sieved with loopholes. Because of disclosure requirements—never mind, they're lenient and rarely enforced—elective officials tut-tut that Virginians have nothing to fear. Translated: Trust us; we're politicians.⁵⁵

The editorial boards of numerous other newspapers in Virginia have echoed the same sentiment over the years.⁵⁶ Even the Center for Public Integrity observed that “the state lacks the necessary oversight to ensure that the forms are filled out correctly. While other states have made efforts to ensure accuracy, often with the creation of an independent commission, Virginia's legislators are mostly left to police themselves.”⁵⁷

Virginia is hardly alone, however, in receiving such criticism. Leslie W. Merritt, Jr., Executive Director of the Foundation for Ethics in Public Service, Inc. observed that even strong “ethics commissions either lack the resources and jurisdiction or the political will to dive deep into the major corruption issues in their respective states.”⁵⁸

53. H.B. 933, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted).

54. S.B. 430, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (enacted).

55. Jeff E. Shapiro, *The G-man is sniffing at the Capitol*, RICHMOND TIMES DISPATCH, June 28, 2009 at B1, available at http://www2.timesdispatch.com/rtd/news/columnists_news/article/JEFF28_20090627-215004/276822.

56. See Daniel Gilbert, *Elected Officials Failing to Ensure Transparency*, CULPEPER STAR EXPONENT, July 27, 2009, available at

http://www2.starexponent.com/cse/news/state_regional/article/elected_officials_failing_to_ensure_transparency/40222; Editorial, *Vague Ethics Rules Invite Confusion*, VIRGINIAN-PILOT, Jan. 5, 2008, available at

<http://hamptonroads.com/2008/01/vague-ethics-rules-invite-confusion>.

57. Caitlin Ginley, *States of Disclosure, Louisiana, Mississippi Movin' Up; 20 States Still Flunk*, June 24, 2009, available at

http://www.publicintegrity.org/investigations/states_of_disclosure/articles/entry/1428#continue.

58. Leslie W. Merritt, Jr., *Ethics Void: Ethics Commission Still Lack Teeth*, Feb. 11, 2010, available at <http://www.reportpubliccorruption.org/blog/ethics-void-ethics-commissions-lack-teeth-401.html>.

In its 2009 survey of state legislative disclosures, the Center for Public Integrity praised Louisiana for the state's major overhaul of ethics laws.⁵⁹ However, after the implementation of these new laws, the role of the state's Ethics Board was reduced, and all but one board member quit the commission as a result.⁶⁰ Further, the chairman of the House and Governmental Affairs committee, Rep. Rick Gallot (D-Ruston), was the champion of the ethics law overhaul in 2008, but later found himself embroiled in an ethics scandal in 2009.⁶¹ However, Rep. Gallot was able to argue that his case was not reviewable due to the statute of limitations having been expired.⁶² It is important to note that Rep. Gallot helped usher through reforms, which decreased the statute of limitations from two years to only one.⁶³

In June 2009, just before the Virginia scandal erupted, the Center for Public Integrity ("CPI") released a 50-state survey ranking legislative financial disclosure laws of all 50 states. Its findings gave Virginia a failing grade and ranked it in 31st place.⁶⁴ Virginia had company: 19 other states also received a failing grade.⁶⁵ What made the distinction more difficult to swallow is that Virginia ranked 8th in the 1999 CPI survey.⁶⁶ The Roanoke Times stated that the reason for the precipitous drop in rankings over the past 10 years was because "nothing has changed since [1999]. While other states adopted tougher disclosure policies and embraced new technology, the Commonwealth stood still...Virginia lost ground by standing still."⁶⁷

CPI's methodology for determining the rankings comes from a 43-question survey obtained by examining state statutes and disclosure forms,

59. Ginley, *supra* note 57.

60. Posting of James Gill to NOLAblog, http://blog.nola.com/jamesgill/2009/09/james_gill_ethics_laws_useless_1.html (Sept. 29, 2009, 18:00 CST).

61. Marsha Schuler, *Legislator faces ethics complaints*, ADVOCATE CAPITOL NEWS BUREAU (Baton Rouge), July 15, 2009, available at <http://www.theadvocate.com/news/50813642.html>.

62. Marsha Schuler, *Officials: Time's up in ethics case*, ADVOCATE CAPITOL NEWS BUREAU (Baton Rouge), July 29, 2009, available at <http://www.theadvocate.com/news/51949307.html>.

63. Gill, *supra* note 60.

64. Ctr. for Pub. Integrity, *States of Disclosure, Rankings* (2010), http://www.publicintegrity.org/investigations/states_of_disclosure/articles/entry/1428#continue.

65. *Id.*

66. Ctr. for Pub. Integrity, *Hidden Agendas: How Legislators Keep Conflicts of Interest Under Wraps* (1999), <http://projects.publicintegrity.org/oi/report.aspx?aid=617#1999rank>.

67. Editorial, *Financial Disclosure Rules Need Revision*, ROANOKE TIMES, June 29, 2009, available at <http://www.roanoke.com/editorials/wb/210040>.

and by interviewing state ethics officers.⁶⁸ The survey seeks to understand how the states perform in the following four areas:

- 1) Filing — how often are lawmakers required to file complete reports?
- 2) Extent — what information and level of detail are lawmakers required to report on the forms?
- 3) Access — how much access do the state agencies provide to the information?
- 4) Enforcement — what type of audit authority does the state have?⁶⁹

Virginia's worst score was in the area of "Access."⁷⁰ Out of a possible maximum score of eight points, Virginia only scored 1.5.⁷¹ The biggest reason for this low score is that the disclosure forms filled out by legislators are not available online.⁷² Further, the disclosure forms are not housed in a central location, making it more difficult for the average citizen to locate the office where the form is on file.⁷³

In order to improve their standings, many states look toward non-profit groups such as CPI for guidelines on what they can do to make their programs work better, either through legislation or through internal procedural changes. According to CPI, Mississippi used CPI's grading criteria to draft legislation, which improved their grade by 11.5 points and their ranking went from 34th to 24th.⁷⁴

In my own experience, Virginia's Campaign Finance system went from being ranked 8th by CPI⁷⁵ to 22nd in 2003.⁷⁶ In 2003, we sought to make internal changes to improve our ranking while simultaneously requesting legislative changes. For example, we upgraded the state-developed report creation software, discontinued charging a price, and began a major marketing initiative to encourage more filers to file electronically. Furthermore, the General Assembly passed a bill that required electronic filing by Political Action Committees seeking to raise more than \$10,000 annually. Finally, we put in place an approval process for private software vendors and introduced a more user-friendly website and disclosure search

68. Ctr. for Pub. Integrity, *States of Disclosure, Methodology* (2010), http://www.publicintegrity.org/investigations/states_of_disclosure/about/methodology.

69. *Id.*

70. Ctr. for Pub. Integrity, *States of Disclosure, Virginia* (2010), http://www.publicintegrity.org/investigations/states_of_disclosure/rankings/Virginia.

71. *Id.*

72. *Id.*

73. *Id.*

74. Ginley, *supra* note 57.

75. Ctr. for Pub. Integrity, *Hidden Agendas: How Legislators Keep Conflicts of Interest Under Wraps* (1999), <http://projects.publicintegrity.org/oi/report.aspx?aid=617#1999rank>.

76. Campaign Disclosure Project, *Grading State Disclosure* (2003), <http://www.campaigndisclosure.org/gradingstate2003>.

page. The combination of these efforts increased the number of electronic filers, which in turn improved the availability and the accessibility of the data to any person who has a computer and an Internet connection. As a result, Virginia was recognized as the most improved state improving our ranking from 22nd back to 7th and our grade from a D+ to a B in 2005.⁷⁷

In 2010, Virginia addressed one deficiency in their CPI score by requiring the legislators to list income received from public money. Had that law been in place prior to 2009, Virginia's grade would have been a 'D' and the rankings could've potentially moved them into 28th. Combining the 2010 legislation with simply requiring the completed disclosure forms to be published on-line (legislation was introduced, but killed) would move Virginia's ranking up to 27th.⁷⁸ Simple changes to the law could have a drastic effect not just on Virginia's rankings compared to other states, but in its citizen's access to the information.

CONCLUSION

Virginia's conflict of interest and ethics laws are based on the premise of disclosure: politicians will disclose and the public will review. But in 2010 the General Assembly failed to pass a law requiring these disclosure forms be displayed on-line. Only one bill increased the extent of the information disclosed and one bill clarified an already existing requirement. Other attempts to increase enforcement or oversight were killed.

The laws passed during the General Assembly session go a long way to improving the process by which complaints are handled, but how far did it go to reaffirm the trust of the people who elected them into office?

77. Press Release, Campaign Disclosure Project, Washington State Ranks First; Virginia Makes Greatest Improvement with Jump from "D+" to "B" (Oct. 26, 2005), <http://www.campaigndisclosure.org/gradingstate2005/pressrelease.html>.

78. Ctr. for Pub. Integrity, States of Disclosure, Rankings (2010), http://www.publicintegrity.org/investigations/states_of_disclosure/rankings.