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## Annual Survey of Virginia Law: Election Law

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## ELECTION LAW

*Christopher R. Nolen\**

### I. INTRODUCTION

Depending on your perspective or partisan persuasion, the 2000 presidential election was either an overwhelming triumph of the American electoral system or an abysmal example of justice. Regardless, the recount in Florida caught the attention of the citizens of the nation, and in particular, the legislators in many states. The question, “could ‘Florida’ happen here?” prompted many in the Virginia General Assembly to cast a scrutinizing eye upon the Commonwealth’s election laws. As a result, over one hundred legislative bills and resolutions were introduced in the 2001 Regular Session.<sup>1</sup> This article surveys the developments in Virginia’s election laws from June 2000 through June 2001. Additionally, this article focuses on those legislative enactments and judicial decisions that are significant, interesting, or show some developing trend in the area of election law. This article does not cover every legislative bill or judicial decision rendered within that time frame, nor does it cover the 2001 redistricting Special Session.

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The author wishes to express his sincere appreciation to the Virginia State Board of Elections staff for sharing their information, insight, and expertise pertaining to the matters discussed in this article.

1. For a concise list of all the bills and resolutions of the 2001 Regular and Special Sessions, see <http://leg1.state.va.us/lis.htm>.

## II. LEGISLATIVE ENACTMENTS

### A. *Binding Electors*

In response to the drama concerning whether electors would switch their votes given the outcome of the popular vote and the events subsequent to the presidential election, the General Assembly enacted legislation that binds Virginia electors to the Electoral College. Although this was never an issue before, many were surprised to learn that Virginia's electors were only "expected" to vote for the nominee who won the popular vote of the state.<sup>2</sup> As a result, the General Assembly enacted legislation that requires presidential electors to vote for the candidates of the political party or petitioners that selected the electors.<sup>3</sup> In order to bring to bear the importance of this duty, the electors are now also required to sign an oath to vote for the candidates for president and vice president of the party or petitioners that selected the elector.<sup>4</sup>

### B. *Recount Procedures*

#### 1. Procedural Requirements

As part of the fallout from the presidential election recount in Florida, Virginia took the opportunity to reexamine its voting laws and recount procedures. In the 2001 session, the General Assembly directed the State Board of Elections ("State Board") to promulgate standards regarding how ballots are counted in a recount.<sup>5</sup> By September 1, 2001, the State Board was to address how ballots and voting machines are to be handled as well as se-

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2. VA. CODE ANN. § 24.2-203 (Repl. Vol. 2000).

3. H.B. 1853, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 630, 2001 Va. Acts 772) (codified as amended at VA. CODE ANN. §§ 24.2-203, 24.2-542 to -543 (Cum. Supp. 2001)).

4. VA. CODE ANN. § 24.2-203 (Cum. Supp. 2001).

5. 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 (Cum. Supp. 2001)); H.B. 2849, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 639, 2001 Va. Acts 779) (codified as amended at VA. CODE ANN. § 24.2-802 (Cum. Supp. 2001)).

curity procedures after the election and during the recount.<sup>6</sup> The State Board also was directed to promulgate regulations that will assist recount officials in making an “accurate determination of votes based upon objective evidence,” considering the type of counting device and form of ballots that are used in the Commonwealth.<sup>7</sup> Moreover, the State Board was charged with developing other regulations that would “promote a timely and accurate resolution of the recount.”<sup>8</sup>

Additionally, the chief judge of the circuit court or the full recount court<sup>9</sup> is now explicitly empowered to resolve disputes over the application of standards and to take “all other appropriate actions” to ensure that the recount is conducted properly within the confines of the State Board’s standards.<sup>10</sup> The State Board was directed to submit recommendations for permanent standards to the House Committee on Privileges and Elections on or before December 1, 2001.<sup>11</sup> The General Assembly may codify the standards that the State Board adopts.<sup>12</sup>

## 2. Access to Absentee Ballots

Under Virginia law, at the beginning of a recount there is a preliminary hearing before the chief judge of the circuit court where the recount is to take place.<sup>13</sup> At the hearing, counsel for the parties and the court set the rules of procedure and dispose of any preliminary motions.<sup>14</sup> During the hearing, the chief judge may permit counsel and two members of the local electoral board to examine pertinent voting returns if “the print-out sheets are

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6. H.B. 2849, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 639, 2001 Va. Acts 779) (codified as amended at VA. CODE ANN. § 24.2-802 (Cum. Supp. 2001)).

7. Va. H.B. 2849.

8. Va. H.B. 1843.

9. Upon filing a petition for a recount, “[t]he chief judge of the circuit court in which a petition is filed shall promptly notify the Chief Justice of the Supreme Court of Virginia, who shall designate two other judges to sit with the chief judge, and the court shall be constituted and sit in all respects as a court appointed and sitting” to hear election contests. VA. CODE ANN. § 24.2-801 (Repl. Vol. 2000).

10. Va. H.B. 1843.

11. Va. H.B. 2849.

12. *Id.*

13. VA. CODE ANN. § 24.2-802(B) (Cum. Supp. 2001).

14. *Id.*

not clearly legible.”<sup>15</sup> In an effort to avoid a scene similar to Florida, where ballots were handled and rehandled extensively before significant court involvement, the General Assembly deleted language that allowed counsel at this preliminary hearing to have access to absentee ballots for examination purposes.<sup>16</sup> Formerly, if the number of absentee votes cast in the election was sufficient to change the result of the election, each party to the recount could have access to the absentee ballots for examination at the preliminary hearing.<sup>17</sup> Individual ballots cast in the election, however, cannot be examined at the preliminary hearing.<sup>18</sup>

### 3. “Over” and “Under” Votes

The General Assembly also took note of the problem that occurred in the Florida recount with “under” and “over” votes.<sup>19</sup> Some Virginia localities still use punch card ballots, like the ones at issue in Florida, to conduct elections.<sup>20</sup> Although the General Assembly did not require that counting devices instantly reject any ballots that contained more votes for candidates than the voter was lawfully entitled to cast, it did require, to the extent possible, that those voting systems record the number of “under” or “over” votes read by that machine to separate such ballots when necessary.<sup>21</sup> In the Florida recount, thousands of ballots were rejected for various reasons, and for some time it was uncertain whether those ballots were not counted because of “over” voting or for some other reason.<sup>22</sup> By requiring the machines to record that information at the time of the election, the information

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15. *Id.* § 24.2-802(B)(ii) (Cum. Supp. 2001).

16. *See* 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 (Cum. Supp. 2001)).

17. VA. CODE ANN. § 24.2-802(A) (Repl. Vol. 2000).

18. *Id.* § 24.2-802(B) (Cum. Supp. 2001).

19. On a ballot, an “over” vote occurs when the voter casts more votes than he is legally entitled to cast for that office. *See* Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. RICH. L. REV. 237, 247 n.50 (2001). An “under” vote occurs when a voter chooses not to vote for any candidate for a particular office, but votes in the other offices that are up for election. *See id.*

20. *See, e.g.*, Tyler Whitley, *Florida: “A Failure in Law,”* RICH. TIMES-DISPATCH, June 15, 2001, at B3.

21. VA. CODE ANN. § 24.2-802(D) (Cum. Supp. 2001).

22. *See, e.g.*, Martin Merzer, *Count of Disputed Ballots Reveals Split Decision*, DALLAS MORNING NEWS, May 11, 2001, at 4A.

can be used immediately for a recount or election contest. Once again, this is an effort to address some of the problems that caused the Florida recount to drag on for weeks. During a recount, the first count of the voting machine is the official count.<sup>23</sup> The recount court is given the authority to order that ballots voted by insertion into electronic counting devices be reinserted and read to determine which ballots were “over” or “under” votes.<sup>24</sup> Then, those ballots that are determined to be “under” votes will be recounted according to the standards promulgated by the State Board.<sup>25</sup>

#### 4. Defining “Chad” and, As a Consequence, Defining “Vote”

Since some Virginia localities still use punch ballot voting, it was obvious that if Virginia was to avoid the situation that occurred in Florida, the General Assembly would need to define what should be counted as a vote. In an effort to address the chad problem where punch card ballots are used, the General Assembly prescribed what constitutes a vote with respect to the possible variations of hanging chads.<sup>26</sup>

The new law prescribes that when a punch card voting device is used, the first machine count is considered the official count.<sup>27</sup> If the ballot counting machine does not accept an individual ballot, the recount official must apply the standards that have been codified to determine whether a ballot has been properly cast and therefore should be counted.<sup>28</sup>

In an effort to bring certainty to the recounting of punch card ballots, the General Assembly defined both what constitutes a chad and its function.<sup>29</sup> Most importantly, a chad separated from the punch card at two or more corners is now considered a vote

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23. VA. CODE ANN. § 24.2-657 (Repl. Vol. 2000).

24. *Id.* § 24.2-802(D) (Cum. Supp. 2001).

25. 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 (Cum. Supp. 2001)).

26. *See* S.B. 986, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 646, 2001 Va. Acts 790) (codified as amended at VA. CODE ANN. § 24.2-802 (Cum. Supp. 2001)).

27. VA. CODE ANN. § 24.2-802(D) (Cum. Supp. 2001).

28. *Id.*

29. Va. S.B. 986.

and is counted.<sup>30</sup> If a chad is broken on only one corner or otherwise depressed, dimpled, or marked, the ballot is not counted as a vote.<sup>31</sup> If a voter votes for more candidates than he is entitled, this is now considered an “over” vote and no vote is counted for any candidate in that office.<sup>32</sup> If a ballot has two or more corners of the chad broken for any candidate and the voter also casts a vote for another candidate for the same office, then the partially punched chad is deemed a vote.<sup>33</sup> If this results in more votes than the voter is lawfully entitled to cast, the ballot is then considered an “over” vote for that office and will not be counted.<sup>34</sup>

Unlike Florida prior to the 2000 presidential election, Virginia limits the options of a candidate who loses a recount.<sup>35</sup> In Virginia, the candidate may not appeal the decision of the recount court to the Supreme Court of Virginia.<sup>36</sup>

### C. Campaign Finance

#### 1. Failure to File Campaign Finance Disclosure Reports

Although the General Assembly rejected legislation that would have limited campaign contributions,<sup>37</sup> it did enact legislation that stiffened the penalties for those who fail to comply with certain provisions of the Campaign Finance Disclosure Act (“CFDA”).<sup>38</sup> Previously, if a candidate or political action committee failed to file a campaign finance report before the applicable deadline, the candidate or political action committee was subject to a civil penalty not to exceed \$300.<sup>39</sup> The General Assembly increased the penalty for failing to file before the applicable dead-

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30. VA. CODE ANN. § 24.2-802(D) (Cum. Supp. 2001).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.* § 24.2-802(H) (Cum. Supp. 2001).

36. *Id.*

37. *See* H.B. 1763, Va. Gen. Assembly (Reg. Sess. 2001).

38. *See* H.B. 656, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 620, 2001 Va. Acts 762) (codified as amended at VA. CODE ANN. § 24.2-929 to -930 (Cum. Supp. 2001)). H.B. 2323, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 635, 2001 Va. Acts 776) (codified as amended at VA. CODE ANN. §§ 24.2-928 to -929 (Cum. Supp. 2001)). This amendment becomes effective July 1, 2002. *Id.*

39. VA. CODE ANN. § 24.2-929(A) (Repl. Vol. 2000).

line and differentiated the failure to file a report from filing an incomplete report.<sup>40</sup> Under the new law, failure to file a report by the applicable deadline may be punishable by a civil penalty not to exceed \$500.<sup>41</sup> Additionally, each subsequent violation within one election cycle is also punishable by a civil penalty of \$500.<sup>42</sup> Filing an incomplete campaign finance disclosure report may subject the campaign or political committee to a civil penalty not to exceed \$300.<sup>43</sup> The State Board is given the power to assess the penalties and is required to post such violations and assessments on the Internet.<sup>44</sup> For incomplete reports, candidates and political action committees have the opportunity to cure the defect upon request by the State Board or the local electoral board.<sup>45</sup>

The General Assembly also increased the penalty for statewide campaigns that fail to file a campaign finance report or information required to complete the report within the statutory grace period.<sup>46</sup> The penalty increased from \$100 to \$300 “for each day that the violation continues . . . after the eighth day following the date of [the] mailing [of] the written notice, of such deficiency.”<sup>47</sup> Again, in an effort to keep the public and the media informed of a campaign’s compliance with the CFDA, the Secretary of the State Board must post any such violations for statewide campaigns on the Internet.<sup>48</sup> Prior to the 2001 Regular Session, the Secretary was only required to make a list of the violators and violations available at his office for the public.<sup>49</sup>

## 2. Exemption from Filing Requirements for Local Candidates

Recognizing that most candidates for local elected office do not

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40. *Id.* § 24.2-929(A)(1)–(2) (Cum. Supp. 2001).

41. *Id.* § 24.2-929(A)(2) (Cum. Supp. 2001).

42. *Id.*

43. *Id.* The penalty for incomplete disclosure reports only applies to those finance disclosure reports due “120 days before or the 35 days after a November general election date.” *Id.*

44. *Id.* § 24.2-929(A)(3) (Cum. Supp. 2001).

45. *Id.* § 24.2-929(B) (Cum. Supp. 2001).

46. H.B. 656, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 620, 2001 Va. Acts 762) (codified as amended at VA. CODE ANN. § 24.2-924 to -930 (Cum. Supp. 2001)).

47. VA. CODE ANN. § 24.2-930(C) (Cum. Supp. 2001).

48. *Id.*

49. *Id.* § 24.2-930(C) (Repl. Vol. 2000).



receive or expend large amounts of campaign contributions, the General Assembly instituted an exemption for local candidates from the campaign finance reporting requirements.<sup>50</sup> A local candidate can now seek an exemption from the requirements for filing a campaign finance disclosure report listing the campaign's contributions and expenditures by filing a request with the local electoral board.<sup>51</sup> In order to qualify for this exemption, the candidate must certify that:

(i) he has not and will not solicit or accept any contribution from any other person during the course of his campaign, (ii) he has not and will not contribute to his own campaign more than \$1,000, (iii) he has not and will not expend more than \$1,000 in the course of his campaign, and (iv) that he has complied and will comply with the requirements of this article.<sup>52</sup>

The exemption applies for the duration of the campaign until the candidate is required to file a final report after the election.<sup>53</sup> Although the local candidate is exempt from the campaign finance disclosure reporting requirements, he is still required to file the necessary organizational documents for his campaign committee and to disclose large contributions immediately before the election.<sup>54</sup> During the course of the campaign, if the candidate wishes to forfeit the exemption, then he may rescind his certification and file campaign finance disclosure reports on the appropriate filing schedule for the remainder of the campaign.<sup>55</sup> However, the candidate must rescind his exemption certification prior to engaging in the prohibited conduct that forms the basis for granting the exemption.<sup>56</sup> Moreover, the first campaign finance report filed after the forfeiture of the exemption must account for all prior contributions and expenditures of the campaign that were previously exempt from disclosure.<sup>57</sup>

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50. See H.B. 1708, Va. Gen. Assembly (Ex. Sess. 2001) (enacted as Act of Apr. 4, 2001, ch. 794, 2001 Va. Acts 1083) (codified as amended at VA. CODE ANN. §§ 24.2-906.1, -915 (Cum. Supp. 2001)).

51. VA. CODE ANN. § 24.2-906.1 (Cum. Supp. 2001).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

### 3. Filing Deadlines

The CFDA requires campaign finance reports of candidates and political committees to be filed on certain dates throughout the election cycle.<sup>58</sup> This is to ensure that the public is fully informed of who is contributing to the campaign or political committee and how those organizations are spending their money. In the past, General Assembly candidates and statewide campaigns mailed their finance disclosure reports the day they were due, instead of delivering them by hand, in an effort to delay the State Board or the local registrar from receiving the report. This was an attempt to also delay, for as long as possible, making the information in the reports available to the public. At one time, statewide campaigns were known to mail their campaign finance reports from a post office far from Richmond in order for the document to take a lengthy time to arrive at the State Board.

In an effort to curb this practice, and make campaign finance information promptly available to the public and the media, the General Assembly enacted legislation requiring that the State Board receive campaign finance disclosure reports for statewide candidates and General Assembly candidates before the filing deadline.<sup>59</sup> Postmarks are no longer sufficient unless the report is actually received before the deadline, or the candidate sends the campaign finance report to the State Board by facsimile prior to the deadline and then mails an original copy of the report post-marked by the filing deadline.<sup>60</sup>

### 4. Itemization of Certain Campaign Expenditures

Campaign committees must now itemize any expenditure made by credit card payment.<sup>61</sup> Before this change, campaign committees were allowed to list on expenditure reports payments made to credit card companies as “for expenses” without itemizing what

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58. *Id.* § 24.2-915 (Repl. Vol. 2000 & Cum. Supp. 2001).

59. S.B. 1277, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 618, 2001 Va. Acts 761) (codified as amended at VA. CODE ANN. § 24.2-915 (Cum. Supp. 2001)).

60. VA. CODE ANN. § 24.2-915 (Cum. Supp. 2001).

61. *Id.* § 24.2-914 (Cum. Supp. 2001).

they used the credit card to purchase.<sup>62</sup> This new law will add transparency to the disclosure reporting system.<sup>63</sup>

## 5. Enforcement of Violations

The General Assembly expanded the power of the State Board to enforce the CFDA.<sup>64</sup> With the new law, the State Board is required to report any violations of campaign finance reporting requirements for statewide campaigns and political action committees to the Commonwealth's Attorney for the City of Richmond.<sup>65</sup> Any violations by a candidate for the General Assembly are now reported to the Commonwealth's Attorney for the locality in which the candidate resides.<sup>66</sup>

Before this legislation was enacted, the Virginia Code vaguely directed the State Board to report violations to the appropriate Commonwealth's Attorney.<sup>67</sup> This left little guidance for political action committees not based in Virginia. There were also questions concerning what locality would have jurisdiction over a statewide campaign, and what power Commonwealth's Attorneys had to enforce violations of the CFDA.<sup>68</sup> This legislation was an attempt to clarify those situations.

## 6. Expanded Review of Disclosure Reports

Under prior Virginia law, the State Board and local registrars were charged with implementing a system for receiving and cataloging campaign finance disclosure reports.<sup>69</sup> Moreover, they were directed to verify that the reports were complete and submitted

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62. *Id.* § 24.2-914 (Repl. Vol. 2000).

63. *Id.* § 24.2-914 (Cum. Supp. 2000).

64. See S.B. 1275, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 648, 2001 Va. Acts 792) (codified as amended at VA. CODE ANN. §§ 24.2-928 to -929 (Cum. Supp. 2001)); see also H.B. 2323, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 635, 2001 Va. Acts 776) (codified as amended at VA. CODE ANN. §§ 24.2-928 to -929 (Cum. Supp. 2001)).

65. VA. CODE ANN. § 24.2-928(A) (Cum. Supp. 2001).

66. *Id.*

67. See *id.* § 24.2-928(B) (Repl. Vol. 2000).

68. Interview with Virginia State Board of Elections staff (May 31, 2001).

69. VA. CODE ANN. § 24.2-928(C) (Repl. Vol. 2000).

on time.<sup>70</sup> This mandate left little room for the State Board or the local registrar to look beyond the mere facts of whether the report provided all the information required or whether it was submitted on time.<sup>71</sup> Neither the local registrar nor the State Board could inquire whether the information was being reported correctly.<sup>72</sup>

Although the General Assembly rejected legislation that would require the State Board to audit campaign finance disclosure reports, it did add, as one of the charges of the State Board and local registrars, the duty to “review” filed reports.<sup>73</sup> Under prior law, if the report was incomplete, the local registrar or the State Board could notify candidates or political committees within seven days after the report due date and request supplemental information.<sup>74</sup> Now the State Board, local registrar or secretary of the local electoral board “may request additional information to correct obvious mathematical errors and to fulfill the requirements for information on the reports.”<sup>75</sup> This language suggests that the State Board is now required to determine if the reports are mathematically accurate and reflect the financial activities of the campaign committee. However, the State Board still lacks the authority to audit the campaign finance accounts to verify that the information is being reported in a truthful manner.

## 7. Expanded Power to Assess Penalties

The State Board, the local registrar, and the secretary of the local electoral board now have the power to assess and collect civil penalties for violations of the CFDA.<sup>76</sup> Previously, all violations were reported to the local Commonwealth’s Attorney for enforcement.<sup>77</sup> Under Senate Bill 1275, all violations are still reported to

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70. *Id.*

71. *Id.*

72. In fact, as long as something was written in the space that requested information, the State Board deemed the report to be complete. Interview with Virginia State Board of Elections staff (May 31, 2001).

73. S.B. 1275, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 648, 2001 Va. Acts 792) (codified as amended at VA. CODE ANN. §§ 24.2-928 to -929 (Cum. Supp. 2001)).

74. VA. CODE ANN. § 24.2-928(C) (Repl. Vol. 2000).

75. *Id.*

76. *Id.* § 24.2-928(1) (Cum. Supp. 2001).

77. *Id.* § 24.2-928(B) (Repl. Vol. 2000).

the appropriate Commonwealth's Attorney; however, now the local registrar, in addition to the State Board and the secretary of the local electoral board can assess civil penalties.<sup>78</sup> If the State Board, local registrar, or secretary of the electoral board is unable to collect the assessed civil penalty, they shall report the violation to the appropriate Commonwealth's Attorney for enforcement.<sup>79</sup> Each locality must report to the State Board any penalties assessed, collected, or reported to the local Commonwealth's Attorney.<sup>80</sup> Additionally, the length of the delinquency is now a factor in determining the amount of the civil penalty assessed.<sup>81</sup>

#### D. Absentee Ballots

##### 1. Annual Absentee Ballot Program

The General Assembly has taken steps to make it easier for those who need absentee ballots to get them in a timely fashion. This year, the General Assembly passed legislation that allows voters with a physical disability or physical illness to file a special annual application if it is likely they will remain disabled or ill for the remainder of the calendar year.<sup>82</sup> This application will allow the voter to receive ballots for all elections in which he is eligible to vote in that calendar year.<sup>83</sup>

The voter's first application must be accompanied by a statement signed by the voter and his physician or an "accredited religious practitioner" affirming that the voter is eligible for an absentee ballot because of a "physical disability or physical illness and [is] likely to remain so disabled or ill for the remainder of the

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78. *Id.* § 24.2-928(D) (Cum. Supp. 2001).

79. *Id.*

80. Additionally, the General Assembly changed where the money collected from such fines is deposited. The State Board must deposit any civil penalties collected to the Commonwealth's general fund. *Id.* § 24.2-929(A)(3) (Cum. Supp. 2001). Any civil penalties collected by action of the General Registrar or local Electoral Board are now payable to the Treasurer of the locality and deposited in that locality's general fund. *Id.*

81. *Id.* § 24.2-929(C) (Cum. Supp. 2001).

82. H.B. 1579, Va. Gen. Assembly (Ex. Sess. 2001) (enacted as Act of Apr. 4, 2001, ch. 789, 2001 Va. Acts 1079) (codified at VA. CODE ANN. § 24.2-703.1 (Cum. Supp. 2001)).

83. VA. CODE ANN. § 24.2-703.1 (Cum. Supp. 2001). However, to receive a ballot for a primary, the applicant must choose, at the time of his application, in which party's primary he wishes to participate; that party must subsequently decide to hold a primary election before the voter will receive a primary ballot. *Id.*

calendar year.<sup>84</sup> The local registrar is charged with retaining the application form and enrolling the applicant on a special absentee voter applicant list.<sup>85</sup> The local registrar is required to send a blank application to enrolled applicants by December 15 of each ensuing year.<sup>86</sup> Upon completion of the new absentee ballot application, the voter is then eligible to again receive ballots for all elections for which he is eligible to vote in the next calendar year.<sup>87</sup>

## 2. Signature Requirement

The General Assembly also eliminated the requirement for a signature of a witness on an absentee ballot application.<sup>88</sup> Despite this legislation, there must still be a witness at the time the absentee voter marks and seals his absentee ballot, and that witness still must sign the outside of the envelope containing the marked ballot.<sup>89</sup> The lack of a witness signature on the absentee ballot application is one of the primary reasons registrars reject absentee ballot applications. This is particularly true for overseas absentee ballot applications.

## 3. Emergency Absentee Ballots

The General Assembly also expanded the circumstances under which an emergency absentee ballot may be applied for and cast.<sup>90</sup> The former law allowed a late application and in-person

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* If the application that is sent to the voter is returned as undeliverable, or if the registrar has knowledge that the applicant is no longer a qualified voter or no longer disabled or ill, then a ballot should not be sent to the voter until a new application is filed and accepted. *Id.* The enacting legislation also directs the State Board to monitor the implementation of this program and, beginning in 2002, the State Board must annually report to the General Assembly and the Governor the number of individuals benefiting from the absentee ballot program in each locality, as well as any reported abuses of the procedure. Va. H.B. 1579.

88. H.B. 1580, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 621, 2001 Va. Acts 764) (codified as amended at VA. CODE ANN. §§ 24.2-701, -706 (Cum. Supp. 2001)).

89. VA. CODE ANN. § 24.2-707 (Cum. Supp. 2001).

90. See H.B. 1667, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 622, 2001 Va. Acts 766) (codified as amended at VA. CODE ANN. §§ 24.2-705,

absentee voting on the Monday before the election in cases of business emergencies requiring travel out of the locality, if knowledge of such emergency arose after 12 noon on the Saturday before the election.<sup>91</sup> Normally, the deadline for in-person absentee voting is three days before the election.<sup>92</sup> The new law extends the time for casting in-person emergency absentee ballots from noon to 2:00 p.m. of the Monday before the election.<sup>93</sup> Additionally, the legislature expanded the reasons for use of this procedure to include the hospitalization of the applicant or a member of his immediate family or the death of a member of his immediate family, as long as such event occurs outside the locality.<sup>94</sup>

#### 4. Longer Period to Apply for Absentee Ballot

The General Assembly also expanded the period during which an absentee ballot application may be filed in advance of an election.<sup>95</sup> Under the former law, a voter could not apply for an absentee ballot more than ten months prior to the date of the election.<sup>96</sup> This time period has been extended to twelve months prior to the election.<sup>97</sup>

#### 5. Commuter Absentee Ballot

Previously, a voter could apply for an absentee ballot if that person, in the "orderly course" of his "business, profession, or occupation," would be at his place of work for eleven or more hours of the thirteen hours that the polls were open.<sup>98</sup> Recognizing the lengthy commute that voters in Northern Virginia and other parts of the Commonwealth had, the General Assembly amended Virginia Code sections 24.2-700 and 24.2-701 to include commute

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-705.1, -710 (Cum. Supp. 2001)).

91. VA. CODE ANN. § 24.2-705.1 (Repl. Vol. 2000).

92. *Id.*

93. *Id.*

94. *Id.* The legislation defines "immediate family" as: "children, grandchildren, grandparents, parents, siblings and spouse of the applicant." *Id.*

95. H.B. 1677, Va. Gen. Assembly (Ex. Sess. 2001) (enacted as Act of Apr. 4, 2001, ch. 793, 2001 Va. Acts 1082) (codified as amended at VA. CODE ANN. §§ 24.2-701, -703 (Cum. Supp. 2001)).

96. VA. CODE ANN. § 24.2-701(A) (Repl. Vol. 2000).

97. *Id.* § 24.2-701(A) (Cum. Supp. 2001).

98. *Id.* § 24.2-700(9) (Repl. Vol. 2000).

time in computing the eleven out of the thirteen hours that the polls are open.<sup>99</sup> Before this change, the voter was required to be at work for eleven or more hours before using this reason to obtain an absentee ballot.<sup>100</sup>

## 6. Errors or Omissions on Absentee Ballot Application

In response to the various court actions in Florida challenging whether absentee ballot applications with omissions or errors should have been accepted, the Virginia General Assembly decided to make its intentions clear concerning the circumstances under which an absentee ballot application will be accepted or rejected.<sup>101</sup> The General Assembly enacted legislation that requires local registrars and electoral boards to “not reject the application of any individual because of an error or omission on any record or paper relating to the application, if such error or omission is not material in determining whether such individual is qualified to vote absentee.”<sup>102</sup>

### E. *Criminal Multiple Voting*

After the 2000 presidential election, there were reports of citizens voting in two or more places and two or more states. For instance, there were claims by some college students that they voted by absentee ballot in their home state and voted in person in the locality where their college was located.<sup>103</sup> In an effort to deter such behavior, the General Assembly created a new election crime aimed at multiple voting.<sup>104</sup>

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99. See H.B. 1856, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 631, 2001 Va. Acts 773) (codified as amended at VA. CODE ANN. §§ 24.2-700 to -701 (Cum. Supp. 2001)).

100. VA. CODE ANN. § 24.2-700(9) (Repl. Vol. 2000).

101. See H.B. 1842, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 866, 2001 Va. Acts 1616) (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2001)).

102. *Id.*

103. Melissa McCord & Anne Naujeck, *Voter Fraud at Marquette?*, WIS. ST. J., Nov. 15, 2001, at C3.

104. H.B. 2646, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 636, 2001 Va. Acts 777) (codified as amended at VA. CODE ANN. § 24.2-1004 (Cum. Supp. 2001)).



Specifically, any person who intentionally votes more than once in the same election is now guilty of a class six felony.<sup>105</sup> For example, voting in Virginia more than once in the same election, or voting in Virginia and another state in the same election, violates the new law.<sup>106</sup> Additionally, any person who intentionally registers to vote at more than one address at the same time, including registrations in Virginia and another state or territory of the United States, is guilty of a class six felony.<sup>107</sup> Moreover, any person who intentionally “procures, assists, or induces another to register to vote at more than one address at the same time” is guilty of a class six felony.<sup>108</sup> This includes registering in Virginia in two or more locations, or registering in Virginia and another state or territory of the United States.<sup>109</sup> It is not a violation of the new law when a person changes the address at which he is registered to vote, or transfers his registration, or assists another to do the same.<sup>110</sup> A person is entitled to the “hold harmless” provision so long as they provide their previous voter registration address on the registration form.<sup>111</sup>

#### F. *Proof of Identity for Placing Political Advertisements*

The General Assembly also passed legislation requiring that when a newspaper, magazine, or periodical accepts a political advertisement, it must obtain proof of identity from the person placing the advertisement.<sup>112</sup> If the advertisement is submitted in person, then that person must produce “a valid Virginia driver’s license, or any other identification card issued by a government agency of the Commonwealth, one of its political subdivisions, or the United States.”<sup>113</sup> If the advertisement is not placed in-

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. S.B. 1244, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 26, 2001, ch. 747, 2001 Va. Acts 1011) (codified as amended at VA. CODE ANN. §§ 24.2-1013 to -1014 (Cum. Supp. 2001)). The publisher must retain a copy of the proof of identity for one year. *Id.* Additionally, the new provision only applies to advertisements not authorized by a candidate, his campaign committee, or a political committee. *Id.*

113. *Id.*

person, then the person submitting the advertisement is required to provide a telephone number, and “the person accepting the advertisement may phone the person to verify the validity of the person’s identifying information before publishing the advertisement.”<sup>114</sup> Failure of a publisher to require and obtain such information is punishable by a civil penalty not to exceed \$50 and if the violation was willful, it is punished as a class one misdemeanor.<sup>115</sup> The requirement to obtain such proof of identity is also applicable to advertisements placed through television or radio.<sup>116</sup>

### III. JUDICIAL DECISIONS

#### A. *Ballot Access*

In *Wood v. Meadows*,<sup>117</sup> the Fourth Circuit determined whether Virginia’s filing deadline for independent candidates for the United States Senate imposed an unconstitutional burden on independent candidates and their supporters.<sup>118</sup> Although the 1994 United States Senate race in Virginia was completed seven years ago, it took six years to finally resolve whether George R. “Tex” Wood should have been listed on the 1994 ballot.<sup>119</sup> Wood contended that Virginia’s June filing deadline for independent candidates unconstitutionally burdened his First Amendment rights.<sup>120</sup> In particular, he made three assertions. First, he claimed that the June filing deadline limited an independent candidate’s “ability to react to events after the primary elections.”<sup>121</sup> Second, he asserted that, by limiting the time period for collecting the required signatures to the late winter and early spring, it imposed an “unequal burden” on an independent candidate who did not have the resources or backing of large organizations.<sup>122</sup> Lastly, he asserted that the June filing deadline made it more difficult for independent candidates to garner media public-

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114. *Id.*

115. *Id.*

116. *Id.*

117. 207 F.3d 708 (4th Cir. 2000).

118. *Id.*

119. *Id.*

120. *Id.* at 711.

121. *Id.*

122. *Id.*

ity or recruit and retain volunteers because voters were not interested in the campaign at that time.<sup>123</sup>

The court held that Virginia's interest in the filing deadline outweighed the burden imposed on independent candidates.<sup>124</sup> In examining Wood's claim that Virginia's filing deadline was unconstitutional, the court examined Virginia's ballot access scheme in its entirety.<sup>125</sup> In doing so, the court concluded that the filing deadline for independent candidates was not so impermissibly burdensome as to make it unconstitutional.<sup>126</sup>

The court first evaluated the "character and magnitude" of Wood's asserted "injury to the rights protected by the First and Fourteenth Amendments."<sup>127</sup> The court noted that the United States Constitution does not prevent a state from "subjecting independents to reasonable burdens, similar in degree, to those imposed on party candidates."<sup>128</sup> The court pointed out that Wood only had to file his certificate of candidacy and petition on the day that the major political parties held their primary elections, which was sixty days after the majority party candidates filed their certificates and petitions to get on the ballot.<sup>129</sup> As such, Virginia's statutory scheme "place[d] independent and major party candidates in roughly comparable positions."<sup>130</sup> Although a major party candidate has to file earlier, the administrative concerns of the state in conducting a primary election justified the burden on those candidates, and the "publicity and party organization attendant to primaries ameliorate[d] the administrative burdens of having to file earlier."<sup>131</sup> The court found it significant that neither Wood nor the court found a single case in which a court held a statutory scheme similar to Virginia's to be unreasonably burdensome.<sup>132</sup> The court pointed out that Wood would have a better argument if the primary deadline was earlier in the election year, or required a higher

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123. *Id.*

124. *Id.* at 709.

125. *Id.* at 711.

126. *Id.* at 717.

127. *Id.* at 711 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

128. *Id.* at 712.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 713. Virginia's statutory scheme requires an independent candidate to file his petitions with the same number of signatures "well after the deadline by which major party candidates must file [their] petitions." *Id.*

election year, or required a higher number of signatures to be placed on the ballot.<sup>133</sup> Because Virginia's scheme did not contain such additional or onerous requirements it was permissible.<sup>134</sup> The court also pointed out that independent candidates had approximately sixty days after "state law require[d] major party candidates to have met identical petition requirements."<sup>135</sup> Additionally, the court went on to note that the signature requirement itself was not so high as to "transform the scheme into an unreasonably burdensome one."<sup>136</sup>

There were additional factors that limited the burden imposed by the Virginia filing deadline. For example, a voter that signs an independent candidate's petition can also vote in the major party primaries.<sup>137</sup> A voter may also sign as many petitions as they choose.<sup>138</sup> Lastly, Virginia does not require independent candidates to have been previously unaffiliated with a major political party.<sup>139</sup> These factors indicated that independent candidates could gain the support of many people including those who planned to participate in the primaries.<sup>140</sup> In the end, the court felt that "the burden imposed [was] both reasonable and non-discriminatory, particularly when compared with statutes" that this and other courts had previously upheld.<sup>141</sup>

In the second step of the court's analysis, it identified and evaluated the "precise interests" put forward by Virginia as justification for the burden imposed by its filing deadline.<sup>142</sup> In doing so, the court determined the "legitimacy and strength" of each of those interests.<sup>143</sup> Relying on United States Supreme Court precedent, the Fourth Circuit noted that if a challenged state statute imposed "reasonable, non-discriminatory restrictions" upon First and Fourteenth Amendment rights, as [was] the case [at bar], "the State's important regulatory interests . . . generally

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 714.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 710 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

suffice to justify' it."<sup>144</sup> The court determined that Virginia's interest in "administrative convenience" justified the filing deadline.<sup>145</sup> Additionally, the Commonwealth asserted that the filing deadline supported the state's interest in limiting the number of candidates on the general election ballot by requiring those who are included on the ballot to demonstrate a preliminary showing of voter support and by having the primary election date serve as the date for determining the full slate of candidates for the fall election.<sup>146</sup> The court agreed that these interests were legitimate and that the filing deadline furthered those interests.<sup>147</sup> Finally, the court determined that, "in achieving these objectives the filing deadline attempt[ed] to treat all candidates roughly alike."<sup>148</sup>

Never deterred, Mr. Wood later attempted to be placed on the statewide ballot in 2000, but the State Board denied him the privilege because of his failure to comply with the statutory requirements for independent candidates.<sup>149</sup> In *Wood v. Quinn*, the United States District Court for the Eastern District of Virginia heard Wood's argument regarding why he should have been allowed on the Virginia ballot for the 2000 United States Senate election.<sup>150</sup> Wood brought an action seeking declaratory injunctive relief against the State Board alleging violations of his rights under the First and Fourteenth Amendments of the United States Constitution.<sup>151</sup> In particular, Wood argued that Virginia's signature and filing requirements for independent candidates unconstitutionally burdened those independent candidates' access to the ballot.<sup>152</sup> Wood challenged a Virginia statute that required each signature on a petition to be witnessed by a qualified voter who is a resident of the same or contiguous congressional district as the voter whose signature is witnessed.<sup>153</sup> Wood also challenged Virginia's requirement that an independent candidate must garner at least 10,000 signatures on his petition, four hun-

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144. *Id.* at 714–15 (quoting *Anderson*, 460 U.S. at 788).

145. *Id.* at 715.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Wood v. Quinn*, 104 F. Supp. 2d 611 (E.D. Va. 2000).

150. *Id.* at 612.

151. *Id.* at 614.

152. *Id.* at 613.

153. *Id.*

dred of which must be obtained from each congressional district.<sup>154</sup>

The district court held that Virginia's signature and filing requirements for independent candidates seeking statewide elective office did not unconstitutionally restrict a candidate's access to the ballot.<sup>155</sup> The court recognized that "[r]easonable, non-discriminatory restrictions that serve important regulatory interests should generally be upheld."<sup>156</sup> The court pointed out that Wood misread the requirements of the statute concerning the witnessing of signatures.<sup>157</sup> Thus, the court summarily dismissed Wood's argument on this point.<sup>158</sup>

Moving on to Wood's second argument, the court determined the appropriate level of scrutiny for this particular type of case.<sup>159</sup> For First and Fourteenth Amendment challenges to ballot access restrictions, the court must "assess the burden placed on candidates for office" and the "interests of the state" that could possibly "justify that burden."<sup>160</sup> Since an independent candidate is not a "suspect class" and the right to be on the ballot is not a fundamental right, the court determined that Virginia's statutes should be analyzed under the rational basis test.<sup>161</sup> The court also noted that a restriction may fail the rational basis test if the restriction makes it "virtually impossible" for an independent candidate to appear on the ballot.<sup>162</sup>

The court was satisfied that Virginia's signature requirements did not make it "virtually impossible" for Wood to obtain access to the ballot.<sup>163</sup> First, it was not impossible for a candidate to collect four hundred signatures per congressional district.<sup>164</sup> The court pointed out that such a requirement had a legitimate interest in

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154. *Id.* at 612.

155. *Id.* at 617.

156. *Id.* at 613 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

157. *Id.* at 613-14.

158. *Id.* at 614. The court informed Wood that the candidate need not live in the same district or in a district contiguous to those voters signing the petition. *Id.* The statute only requires that the person witnessing the signatures live in one of those districts. *Id.*

159. *Id.* at 614-15.

160. *Id.* at 613.

161. *Id.* at 615.

162. *Id.*

163. *Id.*

164. *Id.*

ensuring that candidates having access to a statewide ballot showed support across all regions of the state.<sup>165</sup> As such, the signature requirement for each congressional district bore “a rational relationship to Virginia’s legitimate interests in regulating ballot access.”<sup>166</sup> To obtain these signatures a candidate needs to enlist the support of other like-minded individuals to garner the required signatures.<sup>167</sup> In doing so, the independent candidate demonstrates that he has support across all areas of the state.<sup>168</sup> In fact, Wood garnered enough signatures to meet this requirement in nine out of eleven congressional districts.<sup>169</sup>

Second, the 10,000 signature requirement was also rationally related to “Virginia’s legitimate interest in restricting ballot access to those candidates with the chance of winning the election.”<sup>170</sup> In essence, such a threshold “weeds out” candidates that do not have a basic level of support.<sup>171</sup> Moreover, since the Fourth Circuit had already upheld the 10,000 signature threshold in a previous case, the court had no problem finding this aspect of Virginia’s ballot access provisions constitutional.<sup>172</sup> Consequently, Wood was again denied relief from the courts in his struggle to be placed on a statewide ballot.<sup>173</sup>

### B. *Form of Constitutional Amendments*

In *Fund for Animals, Inc. v. Virginia State Board of Elections*,<sup>174</sup> a Virginia circuit court decided whether a ballot for the adoption of a constitutional amendment had to recite the entire text of the constitutional amendment or whether the proposed amendment could be paraphrased in the form of a question for Virginia voters.<sup>175</sup> The case was brought by two animal welfare organizations and three individuals challenging the constitution-

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165. *Id.* at 616.

166. *Id.*

167. *See id.*

168. *Id.*

169. *Id.* at 615.

170. *Id.* at 616.

171. *Id.*

172. *Id.* (citing *Libertarian Party of Va. v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985)).

173. *Id.* at 617.

174. 53 Va. Cir. 405 (Cir. Ct. 2000) (Richmond City).

175. *Id.* at 406.

ality of a proposed amendment to the Constitution of Virginia to be voted on in a referendum in the November 7, 2000, election.<sup>176</sup> The amendment in question concerned the right of people to hunt, fish, and harvest game.<sup>177</sup> The plaintiffs asserted that the proposed measure trivialized Virginia's constitution and that the constitution required that the amendment be put to the voters for approval in its actual text as opposed to a ballot question.<sup>178</sup> The plaintiffs also contended that the ballot question was "misleading and confusing."<sup>179</sup>

The court denied the plaintiffs injunctive relief to stop the question from being put to the voters of Virginia.<sup>180</sup> The court determined that the plaintiffs failed to show that the claims would probably be successful on the merits.<sup>181</sup> In particular, the court did not agree that Article XII, section 1 of the Constitution of Virginia required that the amendment be put to the voters verbatim.<sup>182</sup> Article XII, section 1 provides, in part: "it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the voters qualified to vote in elections by the people, in such manner as it shall prescribe."<sup>183</sup>

Had the framers of the Constitution of Virginia intended for all amendments to the constitution to be a verbatim text on the ballot, they could have expressed this without inserting the clause "in such manner as it shall prescribe."<sup>184</sup>

Additionally, the court determined that exercising jurisdiction over this matter three weeks before the general election would be premature.<sup>185</sup> In particular, relying on precedent from the Supreme Court of Virginia, the court determined that if the amendment was not adopted by the voters of Virginia, then the court would not have to decide the issue of whether it was consti-

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* The question posed to the voters was: "Shall the Constitution of Virginia be amended by adding a provision concerning the right of the people to hunt, fish, and harvest game?" *Id.* Interestingly, the verbatim text of the amendment was 26 words in length, while the question to the voters consisted of 23 words. *See id.*

180. *Id.* at 408.

181. *Id.* at 407-08.

182. *Id.* at 407.

183. VA. CONST. art. XII, § 1.

184. *Fund for Animals*, 53 Va. Cir. at 407.

185. *Id.* at 408.



tutional.<sup>186</sup> If, after the election, the amendment garnered a majority of support, then the courts could determine the validity of the amendment.<sup>187</sup> As such, the court dismissed the case.<sup>188</sup>

### C. *Attorney General Opinions*<sup>189</sup>

At the request of a legislator, the Attorney General of Virginia was asked to opine whether the receipt of a campaign contribution the day before the regular General Assembly session commenced, which could not be deposited in the legislator's campaign account until after the General Assembly session convened, violated the statutory prohibition against legislators accepting campaign contributions "after the first day of a regular session of the General Assembly through adjournment *sine die* of that session."<sup>190</sup> The Attorney General used standard statutory construction rules in interpreting the applicable statute and concluded that since a check is essentially an agreement to pay a certain amount of money on demand, the legislator "accepted the campaign contribution in the form of a check at the time [he] received the check."<sup>191</sup> As such, under the plain meaning of the statute, the prohibition against accepting contributions during the regular legislative session did not apply.<sup>192</sup> Consequently, the legislator could deposit the check during or after the legislative session or return the check to the contributor.<sup>193</sup>

During the past year, the Attorney General was also asked to opine on the impact of the decennial redistricting of election districts on a special election to fill a vacancy occurring on the York County Board of Supervisors.<sup>194</sup> A member of the York County Board of Supervisors was elected to the House of Delegates; as

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186. *Id.* (citing *Scott v. James*, 114 Va. 297, 76 S.E. 283 (1912)).

187. *Id.*

188. *Id.*

189. Although the Attorney General's opinions are not binding on a court, "[t]he construction of a statute by the Attorney General is persuasive and entitled to considerable weight." *Andrews v. Shepherd*, 201 Va. 412, 415, 111 S.E.2d 279, 282 (1959). As such, the Attorney General's opinions are listed in the judicial section of this article.

190. Op. to Hon. H. Morgan Griffith (Feb. 8, 2001) (quoting VA. CODE ANN. § 24.2-940(A) (Repl. Vol. 2000)).

191. *Id.*

192. *Id.*

193. *Id.*

194. Op. to Hon. Melanie L. Rapp (Apr. 18, 2001).

such, that person's seat on the Board of Supervisors was left vacant.<sup>195</sup> This required a special election to be held to fill the vacancy for the remainder of the unexpired term.<sup>196</sup> The question before the Attorney General was whether a special election was to be conducted in the district that the vacating supervisor represented, or in that district as configured after the county completed the redistricting of its Board of Supervisor's districts.<sup>197</sup> The Attorney General noted that the ordinance adopted by a county that establishes the new election districts as a result of the required redistricting "must take effect immediately upon passage."<sup>198</sup> After the redistricting occurs, the Virginia Code requires "the members of the governing body in office on the effective date of the redistricting to complete their terms of office."<sup>199</sup> Moreover, the election to determine who shall succeed the members of the governing body in office on the effective date of the redistricting must be held "at the general election next preceding the expiration of the terms of office of the incumbent members."<sup>200</sup> As a consequence, "[t]he general election must be conducted on the basis of the district as comprised following the decennial redistricting."<sup>201</sup> Therefore, the Attorney General determined that the special election to fill the vacant supervisor position "must be conducted based on the election district existing at the time of the election."<sup>202</sup> As such, if the County's redistricting plan is adopted and pre-cleared by the United States Department of Justice, the election to fill the vacant position "must be conducted based on the new district that most closely approximates the old district from which the supervisor originally was elected to the board of supervisors."<sup>203</sup>

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* (citing VA. CODE ANN. § 24.2-311(B) (Repl. Vol. 2000)).

200. *Id.* (quoting VA. CODE ANN. § 24.2-311(B) (Repl. Vol. 2000)).

201. *Id.*

202. *Id.*

203. *Id.*

#### IV. CONCLUSION

Virginia's recent legislative enactments demonstrate that it learned from most of the mistakes that occurred in Florida. By addressing some of the most contentious points of the Florida fiasco, Virginia is better prepared for a recount of that magnitude. Virginia also made progress in expanding the absentee voting laws and giving more enforcement powers to the State Board. On the whole, Virginia is making progress, albeit through small steps, in its attempt to ensure fair, honest, and accurate elections and campaign finance practices.