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ELECTION LAW

Christopher R. Nolen *

I. INTRODUCTION

While the 2008 election held its share of drama, the 2009 General Assembly Session was conservative in its adoption of election-related measures. Those measures that were successful were not aimed at far-reaching electoral reforms, but rather targeted “fixes” for certain procedures related to the election process. Over eighty election-related bills were considered by the General Assembly, with twenty-four of those being signed into law.¹ This article surveys developments in Virginia election law from June 2008 through June 2009 and focuses on those statutory developments that have significance or general applicability to the implementation of Virginia’s election laws. Therefore, not every election-related bill approved by the General Assembly is covered.

II. LEGISLATIVE ENACTMENTS

A. *General Powers of State Board of Elections*

The State Board of Elections (“State Board”) is charged with ensuring uniformity in the conduct of elections within the Commonwealth.² At various times, there have been disputes between the State Board, and local general registrars and their respective electoral boards over the proper application of state law.³ The

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1. For a list of all bills and resolutions of the 2009 Regular Session, see Virginia General Assembly, Legislative Information System, <http://leg1.state.va.us/091/lis.htm> (last visited Oct. 11, 2009).

2. See VA. CODE ANN. § 24.2-103 (Cum. Supp. 2009).

3. See, e.g., Julian Walker, *Getting Strict on Provisional Ballots; Chesterfield Will Not Count Them if Voter Didn't Follow Process*, RICH. TIMES-DISPATCH, Jun. 14, 2005, at B5.

general registrars and local electoral boards are not appointed by the State Board, and, as such, there is a certain degree of independence from the State Board in the application of the election laws exercised by local election officials.⁴ Given the level of independence local election officials have, it can be unclear as to how to properly resolve conflicts regarding the interpretation of state law when they arise with the State Board.

In an effort to bring some certainty, the General Assembly enacted legislation that deals with the State Board's authority to manage the election process. Specifically, the electoral boards and registrars are directed to "follow (i) the elections laws and (ii) the rules and regulations of the Board insofar as they do not conflict with Virginia or federal law."⁵ Presumably, the State Board follows state and federal law when adopting its policies. Unfortunately, the phrase "insofar as they do not conflict with Virginia or federal law" leaves open an opportunity for registrars and local electoral boards to interpret a State Board policy differently than the State Board, to the extent they believe the policy conflicts with state or federal law.⁶

To bring uniformity to the conduct of elections, the General Assembly charged the State Board with setting training standards for "officers of election."⁷ Officers of election are those individuals stationed at each polling precinct to conduct the elections, and they work at the direction of the local electoral board.⁸ Before this change, the State Board was only responsible for ensuring that local electoral boards and general registrars were properly trained to fulfill their statutory duties.⁹ Now, the local electoral board and the general registrar are responsible for implementing the training standards set by the State Board.¹⁰

4. See VA. CODE ANN. § 24.2-103 (Cum. Supp. 2009); *id.* § 24.2-106 (Repl. Vol. 2006 & Cum. Supp. 2009); *id.* § 24.2-109 (Repl. Vol. 2006).

5. Act of Mar. 27, 2009, ch. 407, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-103(A) (Cum. Supp. 2009)).

6. See Julian Walker, *Provisional-Ballots Dispute Still Unresolved; Chesterfield Officials, State Elections Panel Had Meeting in Richmond Yesterday*, RICH. TIMES-DISPATCH, July 9, 2005, at B8.

7. Act of Mar. 27, 2009, ch. 407, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-103(B) (Cum. Supp. 2009)).

8. See VA. CODE ANN. §§ 24.2-608, 24.2-639 (Repl. Vol. 2006).

9. *Id.* § 24.2-103(A) (Repl. Vol. 2006 & Cum. Supp. 2008).

10. *Id.* § 24.2-103(B) (Cum. Supp. 2009).

The General Assembly also enacted a provision to ensure that the staff of the State Board does not engage in partisan political activities. State Board employees are now prohibited from serving as “the chairman of a political party or other officer of a state-, local-, or district-level political party committee or . . . as a paid or volunteer worker in the campaign of a candidate for nomination or election to an office filled by election in whole or part” by the voters of the state.¹¹ Similar prohibitions already exist for members of the State Board, local electoral boards, and general registrars.¹²

B. Voter Registration

1. Definition of Residence

The issue of determining a voter’s “residence” has been lurking in the background of each election with respect to the voter registration of students, homeless persons, and individuals with multiple places of abode.¹³ In an attempt to bring certainty to making determinations for the purpose of voter registration, the legislature amended the definition of “residence” and “resident.”¹⁴ Section 24.2-101 defines “‘residence’ or ‘resident,’ for all purposes of qualification to register and vote,” to require “both domicile and a place of abode.”¹⁵ The amendment adopted by the legislature de-

11. *Id.* § 24.2-103(E) (Cum. Supp. 2009).

12. *See* VA. CODE ANN. § 24.2-102 (Cum. Supp. 2009) (pertaining to members of the State Board of Elections); *id.* § 24.2-106 (Repl. Vol. 2006 & Cum. Supp. 2009) (“No member of an electoral board shall serve as the chairman of a state, local or district level political party committee or as a paid worker in the campaign of a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of the jurisdiction of the electoral board.”); *id.* § 24.2-110 (Cum. Supp. 2009) (“No general registrar shall serve as the chairman of a political party or other officer of a state, local or district level political party committee. No general registrar shall serve as a paid or volunteer worker in the campaign of a candidate for nomination or election to an office filled by election in whole or in part by the qualified voters of his jurisdiction.”).

13. *See* Andrew Cain, *Critical Business Remains; Budget, ‘Triggerman Rule,’ Election Laws Among Issues to be Decided in Final Week*, RICH. TIMES-DISPATCH, Feb. 23, 2009, at A1; *see also* 2004 Op. Va. Att’y Gen. 35.

14. Act of May 6, 2009, ch. 865, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-101 (Cum. Supp. 2009)); Act of May 6, 2009, ch. 870, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-101 (Cum. Supp. 2009)); Act of May 6, 2009, ch. 874, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-101 (Cum. Supp. 2009)).

15. Act of May 6, 2009, ch. 865, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-101 (Cum. Supp. 2009)); Act of May 6, 2009, ch. 870, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-101 (Cum. Supp. 2009)); Act of May 6, 2009, ch.

leted language in the definition originally provided to assist in determining domicile.¹⁶ That language included factors that local registrars could use to determine whether an individual had the requisite intent to establish domicile in the locality in which he applied to become a voter.¹⁷ However, those previously listed criteria were subject to differing interpretations.

The new definition still requires the elements of domicile and place of abode, but it further provides that “[t]o establish domicile, a person must live in a particular locality with the intention to remain” and that “[a] place of abode is the physical place where a person dwells.”¹⁸ As with the prior definition of residence, whether a person has the “intention to remain” to establish domicile is still an open issue. In conjunction with the amendment, the General Assembly tasked the State Board with promulgating “rules and regulations to ensure the uniform application of the law for determining a person’s residence.”¹⁹ Presumably, such regulations will be exempt from the Administrative Process Act; therefore, public comment and input on any proposed regulation will be at the discretion of the State Board.²⁰

874, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-101 (Cum. Supp. 2009)); *see also* VA. CONST. art. II, § 1 (“Residence, for all purposes of qualification to vote, requires both domicile and a place of abode”).

16. *See* Act of May 6, 2009, ch. 865, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-101 (Cum. Supp. 2009)); Act of May 6, 2009, ch. 870, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-101 (Cum. Supp. 2009)); Act of May 6, 2009, ch. 874, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-101 (Cum. Supp. 2009)) (collectively deleting “In determining domicile, consideration may be given to a person’s expressed intent, conduct, and all attendant circumstances including, but not limited to, financial independence, business pursuits, employment, income sources, residence for income tax purposes, marital status, residence of parents, spouse and children, if any, leasehold, sites of personal and real property owned by the person, motor vehicle and other personal property registration, and other factors reasonably necessary to determine the qualification of a person to register or vote.”).

17. VA. CODE ANN. § 24.2-101 (Cum. Supp. 2008).

18. *Id.* § 24.2-101 (Cum. Supp. 2009).

19. Act of May 6, 2009, ch. 865, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-404(D) (Cum. Supp. 2009)); Act of May 6, 2009, ch. 870, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-404(D) (Cum. Supp. 2009)); Act of May 6, 2009, ch. 874, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-404(D) (Cum. Supp. 2009)).

20. *See* VA. CODE ANN. § 2.2-4002(B)(8) (Cum. Supp. 2009) (“Agency action relating to the following subjects shall be exempted from the provisions of [the Administrative Process Act]: . . . The conduct of elections or eligibility to vote.”).

2. Registration Process for Domestic Violence Victims

Generally, a voter is required to list a physical address on his voter registration application.²¹ This requirement ensures that a voter is properly listed for the election district in which he is eligible to vote. To protect personal information of domestic violence victims, the legislature enacted provisions to allow victims of domestic violence that participate in a confidentiality program run by the Virginia Attorney General's office²² to list on their voter registration application a post office box instead of a street address as required for most voter registrants.²³ Previously, the law provided certain law-enforcement officers, persons granted protective orders, and victims of stalking the same opportunity to refrain from publicly listing their residence addresses on the voter application form.²⁴

3. Voter Rolls and Social Security Matches

Among the modest measures adopted by the General Assembly to protect the integrity of the voter registration rolls is a requirement that the State Board, prior to October 1 of each year, match the statewide voter registration list "with the list of deceased persons maintained by the Social Security Administration."²⁵ Presumably, this is an attempt to reduce the opportunity for persons to vote under the name of a deceased person by removing the deceased person's name from the voter rolls as an eligible voter.

4. Application Forms—Notice of Felony

To emphasize the fact that the Commonwealth takes the integrity of its elections seriously, the legislature now requires voter application forms to "contain a statement that whoever votes more than once in any election in the same or different jurisdic-

21. *See id.* § 24.2-418 (Cum. Supp. 2009).

22. *See id.* § 2.2-515.2(B) (Repl. Vol. 2008) (establishing the "Address Confidentiality Program").

23. Act of Mar. 27, 2009, ch. 318, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-418 (Cum. Supp. 2009)).

24. *See* VA. CODE ANN. § 24.2-418 (Repl. Vol. 2006).

25. Act of Mar. 27, 2009, ch. 492, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 24.2-404.3 (Cum. Supp. 2009)).

tions shall be guilty of a Class 6 felony.”²⁶ The underlying election offenses constituting a felony are not new. The prohibition against voting in different jurisdictions was enacted in 2001.²⁷ That provision was enacted, in part, to address reports of double voting by college students registered to vote in two states who voted absentee in one jurisdiction and in-person where they were attending school.²⁸ Now, the person submitting his voter application form will have actual notice of the possible ramifications for such conduct. Arguably, the notice on the voter registration form will make it easier to prosecute those who “intentionally” vote more than once in the same election.²⁹

B. Absentee Ballots

1. Federal Absentee Ballot—Witness Requirement

Active duty military personnel and their spouses “may use a federal write-in absentee ballot in general, special, and primary elections for federal office” provided the ballot is “submitted and processed in the manner provided by the Uniformed and Overseas Citizens Absentee Voting Act” and applicable Virginia law.³⁰ In the fall of 2008 a controversy arose over the counting of federal write-in absentee ballots cast by overseas voters.³¹ Specifically, the issue dealt with absentee ballots that omitted the printed name of the signing witness to the ballot and whether the omission caused the ballot to be improperly cast and therefore not counted.³² One locality initially refused to count approximately 100 absentee ballots, several of which were cast by military personnel based overseas.³³ Virginia law required a witness to pro-

26. Act of May 6, 2009, ch. 865, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-418(A) (Cum. Supp. 2009)); Act of May 6, 2009, ch. 870, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-418(A) (Cum. Supp. 2009)); Act of May 6, 2009, ch. 874, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-418(A) (Cum. Supp. 2009)).

27. See Act of Mar. 25, 2001, ch. 636, 2001 Va. Acts 777, 777 (codified at VA. CODE ANN. § 24.2-1004(B),(C) (Supp. 2001)).

28. Christopher R. Nolen, *Annual Survey of Virginia Law: Election Law*, 35 U. RICH. L. REV. 575, 589 (2001).

29. See generally VA. CODE ANN. § 24.2-1004(B) (Cum. Supp. 2009).

30. VA. CODE ANN. § 24.2-702.1 (Cum. Supp. 2009).

31. Julian Walker, *Absentee Ballots Without Witness Information to Count*, VIRGINIAN-PILOT, Oct. 29, 2008, at A14.

32. See *id.*

33. See Gary Emerling, *NAACP Sues Over Feared Disenfranchisement; Complaint*

vide his signature, printed name, and address in the witness statement box on the absentee ballot envelope.³⁴ The Virginia Attorney General opined that the Uniformed and Overseas Citizens Absentee Voting Act preempted the printed name and address of the witness to the ballot provision in section 24.2-702.1(B); therefore, those ballots could not be rejected based on such omission.³⁵

The General Assembly enacted amendments to eliminate the confusion caused by the apparent conflict between Virginia and federal law with regard to federal write-in absentee ballots. The statutory language in the provisions of section 24.2-702.1(B) requiring the witness's printed name and address was eliminated, so now all that is required for witness information is the person's signature.³⁶

2. Federal Absentee Ballot—Extension of Deadline

The absentee ballot process for overseas voters figured prominently in the media just prior to Election Day in 2008. The campaign of Republican presidential candidate John McCain filed suit just prior to the November 4, 2008 presidential election, seeking an extension of the deadline to accept ballots cast by military personnel stationed overseas until ten days after the election.³⁷ The lawsuit contended that absentee ballots were not sent to overseas voters quickly enough as required under federal law for their receipt by the voter and subsequent return to the local electoral board to be counted on election day.³⁸

In response, the legislature extended the period in which a federal write-in absentee ballot may be received to be considered validly cast.³⁹ Provided the absentee ballot is received no later than

Claims Shortage of Polling Places, Materials, WASH. TIMES, Oct. 29, 2008, at A16.

34. 2008 Op. Va. Att'y Gen. 100.

35. *Id.*

36. Act of Mar. 27, 2009, ch. 230, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-702.1(B) (Cum. Supp. 2009)); Act of Mar. 27, 2009, ch. 310, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-702.1(B) (Cum. Supp. 2009)).

37. See Julian Walker, *McCain Campaign Sues Over Overseas Military Ballots*, VIRGINIAN-PILOT, Nov. 4, 2008, available at <http://hamptonroads.com/2008/11/mccain-campaign-sues-over-overseas-military-ballots>.

38. See Julian Walker, *Judge Won't Dismiss Suit Over Overseas Absentee Ballots*, VIRGINIAN-PILOT, Dec. 9, 2008, at B9.

39. Act of Mar. 27, 2009, ch. 230, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-702.1(B) (Cum. Supp. 2009)); Act of Mar. 27, 2009, ch. 310, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-702.1(B) (Cum. Supp. 2009)).

the closing of the polls on election day, the ballot will be counted if otherwise valid.⁴⁰ Under prior law, the ballot had to be received no later than five days before election day.⁴¹ Additionally, the federal write-in ballot now “shall also be considered valid for the purpose of serving as a voter registration application.”⁴² All of these provisions appear to be aimed at ensuring that military and overseas voters are afforded every opportunity to have their ballots considered lawfully cast and counted.

3. Ballots Outside the Commonwealth

The legislature relaxed the requirement for certain voters outside the Commonwealth on the day of the election to receive an absentee ballot by e-mail.⁴³ Active duty members of the military and members of the merchant marine absent from the Commonwealth on the day of the election are now allowed to receive an absentee ballot by e-mail.⁴⁴ Previously, such individuals were required to be residing or stationed outside the United States in order to receive a ballot by e-mail.⁴⁵ Presumably, this will assist more members of the military and their spouses who may be temporarily outside the Commonwealth, as opposed to overseas, in the timely casting of their absentee ballots.

4. Absentee Voting for “First Responders”

The General Assembly expanded the list of voters that may vote by absentee ballot prior to election day to include certain law-enforcement officers, paid and volunteer firefighters, search and rescue personnel, and emergency medical services personnel.⁴⁶ The legislature was not willing to transform absentee balloting into “no-excuse” absentee balloting or “early-voting” by removing the statutory requirements that a voter must demonstrate in

40. VA. CODE ANN. § 24.2-702.1(B) (Cum. Supp. 2009).

41. *Id.* § 24.2-702.1(B) (Repl. Vol. 2006).

42. *Id.* § 24.2-702.1(B) (Cum. Supp. 2009).

43. See Act of Mar. 27, 2009, ch. 345, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2009)).

44. VA. CODE ANN. § 24.2-706 (Cum. Supp. 2009). This provision also applies to the spouses of such individuals. See VA. CODE ANN. § 24.2-700 (Cum. Supp. 2009).

45. See VA. CODE ANN. § 24.2-706 (Cum. Supp. 2008).

46. Act of Mar. 27, 2009, ch. 405, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 24.2-700, -701(C) (Cum. Supp. 2009)); Act of May 6, 2009, ch. 873, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 24.2-700, 24.2-701(C) (Cum. Supp. 2009)).

order to vote by absentee ballot.⁴⁷ Numerous bills addressing such absentee ballot issues were defeated.⁴⁸

5. Dissemination of Absentee Ballots

The General Assembly also made changes to the process by which absentee ballots are disseminated, and it extended legal standing to various parties to enforce certain provisions of the statutes governing absentee ballots.⁴⁹ If the absentee ballot application is in proper order, the electoral board is now required to send the absentee ballot to the voter “within three business days of receiving an application for an absentee ballot, or as soon thereafter as is reasonably possible.”⁵⁰ In an effort to enforce the proper and timely dissemination of absentee ballots, the legislature granted jurisdiction to circuit courts to enforce the provisions governing the duty of the general registrar and electoral board on receipt of applications for absentee ballots.⁵¹ Standing to enforce such provisions is provided to “(i) any aggrieved voter, (ii) any candidate in an election district in whole or in part in the court’s jurisdiction where a violation of this section has occurred, or is likely to occur, or (iii) the campaign committee or the appropriate district political party chairman of such candidate.”⁵² This is an extension of standing for candidates, campaign committees, and political parties to enforce the absentee ballot laws.

47. See Dave Forster, *Early Voting Bill Tabled Quickly, Not Likely to Return*, VIRGINIAN-PILOT, Jan. 30, 2009, at B4.

48. See H.B. 1620, Va. Gen. Assembly (Reg. Sess. 2009); H.B. 1621, Va. Gen. Assembly (Reg. Sess. 2009); H.B. 1644, Va. Gen. Assembly (Reg. Sess. 2009); H.B. 1894, Va. Gen. Assembly (Reg. Sess. 2009); H.B. 2301, Va. Gen. Assembly (Reg. Sess. 2009); H.B. 2307, Va. Gen. Assembly (Reg. Sess. 2009); S.B. 819, Va. Gen. Assembly (Reg. Sess. 2009).

49. Act of Mar. 27, 2009, ch. 405, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2009)); Act of May 6, 2009, ch. 873, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2009)).

50. VA. CODE ANN. § 24.2-706 (Cum. Supp. 2009).

51. Act of Mar. 27, 2009, ch. 405, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2009)); Act of May 6, 2009, ch. 873, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2009)).

52. Act of Mar. 27, 2009, ch. 405, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2009)); Act of May 6, 2009, ch. 873, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2009)).

C. *Conduct of Elections*

1. Appointment of Officers of Election

The General Assembly granted authority to local electoral boards to appoint citizens who are not nominated by one of the two major political parties as officers of election.⁵³ However, citizens selected under this process are prohibited from serving as the chief election officer or the assistant chief officer for the precinct.⁵⁴ Previously, Virginia law required local electoral boards to select officers of election, in virtually equal number, from nominations provided by the two major political parties.⁵⁵ The granting of greater authority to appoint an individual not associated with either major political party appears to be an attempt to give local electoral boards more flexibility in staffing polling precincts to ensure an adequate level of support to conduct the election.

2. Assistance for Certain Voters

The General Assembly set forth a procedure to assist voters that require assistance in a language other than English.⁵⁶ Specifically, if the voter does not have his own representative to assist him, an officer of election may assist the voter.⁵⁷ The officer of election may only assist such voter after having consulted with authorized representatives for each party or candidate to determine if any of them have an interpreter available to assist.⁵⁸ “One representative interpreter for each party or candidate, insofar as available, shall be permitted to observe the officer of election communicate with the voter.”⁵⁹ Moreover, if the voter desires, he “may designate one of the volunteer party or candidate interpreters to provide assistance” so long as the volunteer meets all of the requirements for persons authorized to assist voters.⁶⁰

53. Act of Mar. 30, 2009, ch. 639, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-115 (Cum. Supp. 2009)).

54. VA. CODE ANN. § 24.2-115 (Cum. Supp. 2009).

55. VA. CODE ANN. § 24.2-115 (Repl. Vol. 2006).

56. Act of Apr. 8, 2009, ch. 809, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-649(C) (Cum. Supp. 2009)).

57. VA. CODE ANN. § 24.2-649 (Cum. Supp. 2009).

58. *Id.*

59. *Id.*

60. *Id.* For instance, the person designated to provide assistance

3. Direct Recording Electronic Voting Machines

Continuing the legislature's love-hate relationship with direct recording electronic voting machines ("DREs"), the General Assembly modified the prohibition against localities acquiring additional machines.⁶¹ The new law addresses the situation where not enough voting machines are available when a special election is scheduled to be conducted soon after a general or primary election.⁶² Under prior law, voting machines were kept under seal for several days after an election, and if the election was contested or if there was a recount, this further complicated the availability of machines for another election scheduled soon thereafter.⁶³ In June of 2008, the Attorney General of Virginia issued an advisory opinion to the chairman of a local electoral board opining that "§ 24.2-626 prohibits local electoral boards from borrowing or leasing direct recording electronic machines" and that local electoral boards were prohibited from "purchasing, borrowing, or leasing [DREs] for use at polling places on election day to demonstrate to voters how to operate the equipment."⁶⁴ Under the new law, localities that use DREs as of July 1, 2007, may temporarily acquire additional such machines to conduct special elections when its "existing . . . inventory is insufficient to conduct the election because all or part of its inventory is under lock or seal as required by § 24.2-659."⁶⁵

shall not enter the [voting] booth with the voter unless (i) the voter signs a request stating that he requires assistance by reason of physical disability or inability to read or write and (ii) the officer of election or other person signs a statement that he is not the voter's employer or an agent of that employer, or an officer or agent of the voter's union, and that he will act in accordance with the requirements" of the applicable statute.

VA. CODE ANN. § 24.2-649(B) (Cum. Supp. 2009).

61. Act of Mar. 30, 2009, ch. 751, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-626 (Cum. Supp. 2009)); Act of Mar. 30, 2009, ch. 759, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-626 (Cum. Supp. 2009)).

62. See Frank Delano, *Winner in 99th Gets Seat Quickly*, FREE LANCE-STAR, Feb. 4, 2008, available at <http://fredericksburg.com/News/FLS/2008/022008/02042008/352554>; see also Phyllis Cook, *King George Voters to Use Touch Screen Machines in December Special Election*, JOURNAL-KING GEORGE COUNTY, available at http://www.stpns.net/view_article.html?articleId=64648662107616827.

63. See VA. CODE ANN. § 24.2-659 (Repl. Vol. 2006 & Cum. Supp. 2008).

64. 2008 Op. Va. Att'y Gen. 107.

65. VA. CODE ANN. § 24.2-626 (Cum. Supp. 2009).

4. Presence of Authorized Political Party and Candidate Representatives

Virginia law allows a representative of each political party or independent candidate in the election to be present in the polling place during the election.⁶⁶ The purpose of allowing representatives of each major political party or candidate to be present to view the election is to ensure the integrity of the process.⁶⁷ Additionally, such representatives may use the opportunity to determine which voters have cast their ballot and to report that information to their respective party or candidate headquarters to assist in the “get-out-the-vote effort.”⁶⁸ The presence of the representatives also allows the parties to observe the election officials and, if there are violations of the proper election procedures, to lodge complaints with the local electoral board or State Board.⁶⁹

The General Assembly enacted provisions to clarify that these representatives may be relieved by successive representatives during the course of election day.⁷⁰ The presence of party and candidate representatives at the polling place can sometimes lead to conflict with the officers of election. In a continuing effort to clearly delineate appropriate activities for party and candidate representatives within the polling place, the law now provides that the authorized representatives “shall be allowed . . . to be close enough to the process to be able to hear and see what is occurring.”⁷¹ If an authorized representative complains about where the chief election officer positions the representative, he may “immediately appeal the decision to the local electoral board.”⁷² The legislature also clarified that “[a]uthorized representatives shall not be allowed in any case to provide assistance to any voter” with balloting “or to wear any indication that they are authorized to assist voters either inside the polling place or within 40 feet of any entrance to the polling place.”⁷³ This prohibition on

66. See VA. CODE ANN. § 24.2-604(C) (Cum. Supp. 2009).

67. See *id.* §§ 24.2-604(D), 24.2-604(E) (Cum. Supp. 2009).

68. See Laurence Hammack, *They're Watching, Not Staring*, ROANOKE TIMES, Nov. 2, 2008, at A1.

69. See *id.*

70. Act of Mar. 27, 2009, ch. 494, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-604(C) (Cum. Supp. 2009)).

71. See VA. CODE ANN. § 24.2-604(C) (Cum. Supp. 2009).

72. *Id.*

73. Act of Mar. 27, 2009, ch. 494, 2009 Va. Acts ___ (codified as amended at VA. CODE

providing assistance and portraying oneself as an official election worker also extends to neutral observers that the local electoral board authorizes to be present in the polling place.⁷⁴

Additionally, the General Assembly allocated the number of authorized representatives for the political parties and independent candidates that may be present in the polling place to one representative per pollbook station.⁷⁵ In most instances, this change allows there to be more than the previous three-person limit on the number of authorized representatives in the polling place.⁷⁶

5. Removal of Voting Machines

Virginia law provides that “[n]o voting or counting equipment shall be removed from the plain view of the officers of election or from the polling place at any time during the election and through the determination of the vote”⁷⁷ However, under certain circumstances, an electronic voting device may be taken outside to assist voters over the age of sixty-five or those with physical disabilities that prevent them from easily casting a ballot.⁷⁸ When such machines are removed from the polling place, the General Assembly now requires officers of election to record “the names of the voters who used the machine while it was removed provided that secrecy of the ballot is maintained in accordance with guidance from the State Board”⁷⁹ If a polling place fails to record the names of the voters that used the portable machines, the officer or officers that accompanied the machine, or if

it is later proven that the information recorded was intentionally falsified, the local electoral board shall dismiss at a minimum the chief officer or the assistant chief officer, or both, as appropriate; and shall dismiss any other officer of election who is shown to have caused the

ANN. § 24.2-604(C) (Cum. Supp. 2009)).

74. VA. CODE ANN. § 24.2-604(I) (Cum. Supp. 2009).

75. Act of Mar. 27, 2009, ch. 396, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-604(C) (Cum. Supp. 2009)).

76. See VA. CODE ANN. § 24.2-604(C) (Cum. Supp. 2009).

77. *Id.* § 24.2-638 (Cum. Supp. 2009).

78. *Id.* §§ 24.2-638, -649(A) (Cum. Supp. 2009).

79. Act of Mar. 27, 2009, ch. 494, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-638 (Cum. Supp. 2009)).

failure to record the required information intentionally or by gross negligence or to have intentionally falsified the information.⁸⁰

Moreover, the legislature enacted a severe penalty for such conduct by providing that “[t]he dismissed officers shall not be allowed thereafter to serve as an officer or other election official anywhere in the Commonwealth.”⁸¹

6. Campaign Apparel—“What Not to Wear”

With intense media coverage of the 2008 presidential election and expectations of historic voter turnout, there was increased media attention on the “dos and don’ts” of election day procedures. At that time, Virginia law prohibited the display or dissemination of campaign materials within forty feet of a polling precinct.⁸² In October of 2008, the State Board adopted a policy interpreting the law as prohibiting a voter from wearing campaign-related apparel within the forty-foot “no-election activity zone” proscribed by code sections 24.2-604(A) and (D).⁸³ The policy was adopted in response to inquiries made as to how election officials would handle voters that showed up to vote on election day wearing campaign apparel with their preferred candidate’s name or image emblazoned upon it.⁸⁴ At issue was an individual’s right to freely express his political preference for a candidate on the day of the election versus the government’s ability to regulate express advocacy in and around a limited area at the polling precinct set aside for the orderly conduct of the election.⁸⁵

The State Board adopted its policy based on a plain reading of the statute. Section 24.2-604(A) provided that “[d]uring the times the polls are open and ballots are being counted, it shall be unlawful for any person (i) to . . . congregate within 40 feet of any

80. VA. CODE ANN. § 24.2-638 (Cum. Supp. 2009).

81. Act of Mar. 27, 2009, ch. 494, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-638 (Cum. Supp. 2009)).

82. VA. CODE ANN. § 24.2-604(A) (Cum. Supp. 2008).

83. State Board of Elections Policy 2008-007, Oct. 14, 2008, available at http://www.sbe.virginia.gov/cms/documents/Election_Laws/SBE_Policy-2008-007_-_Definition_of_Exhibit_Other_Campaign_Materials.pdf; see VA. CODE ANN. § 24.2-604 (A), (D) (Cum. Supp. 2008).

84. See Timothy Warren & William Ehart, *Virginia Bans Campaign Garb at Polling Places; Maryland Allows Paraphernalia*, WASH. TIMES, Oct. 15, 2008, at A18.

85. See *id.*; Tyler Whitley, *Groups Say They’ll Sue to Overturn Clothing Ban*, RICH. TIMES-DISPATCH, Oct. 30, 2008, at B2.

entrance of any polling place; (ii) within such distance to . . . exhibit any . . . campaign material to any person.”⁸⁶ Section 24.2-604(D) provides that “[i]t shall be unlawful for any authorized representative, voter, or any other person in the room to . . . exhibit . . . campaign material to any person.”⁸⁷ The State Board’s decision set off a fire storm of criticism by those who asserted a First Amendment right to wear candidate-related apparel to vote.⁸⁸

One voter was arrested for refusing to cover her John McCain T-shirt at the polling precinct where she voted.⁸⁹ While the woman was allowed to vote, she was informed that a complaint would be filed with the local commonwealth’s attorney for violating the prohibition against displaying campaign materials inside the polling place.⁹⁰ The ACLU was prepared to defend her free speech right to wear the T-shirt inside the polling place.⁹¹ However, the case was withdrawn soon after the legislature enacted a provision to address the wearing of certain election-related apparel near a polling booth.⁹² The issue was ripe for action by the legislature given the criticism of the policy and its inconsistent application and enforcement on election day.⁹³

To address the issues associated with the State Board’s interpretation of Virginia Code section 24.2-604, the legislature enacted legislation expressly providing that the provisions of subsections 24.2-604(A) and (D)

shall not be construed to prohibit a person who approaches or enters the polling place for the purpose of voting from wearing a shirt, hat, or other apparel on which a candidate’s name or a political slogan appears or from having a sticker or button attached to his apparel on which a candidate’s name or a political slogan appears.⁹⁴

86. VA. CODE ANN. § 24.2-604(A) (Cum. Supp. 2008).

87. *Id.* § 24.2-604(D).

88. See Anih Kumar, *Attorney General Offers Proposals to Make Voting Easier, Laws Clearer*, WASH. POST, Dec. 17, 2008, at B5.

89. *Voter Won’t Be Prosecuted; Madison Woman Was Arrested for Wearing a Political T-shirt*, RICH. TIMES-DISPATCH, Mar. 27, 2009, at B6.

90. *Id.*

91. *Id.*

92. *Id.*

93. See Lauren Knight & Malcolm Venable, *What to Wear to the Polls*, VIRGINIAN-PILOT, Nov. 3, 2008, at E1.

94. Act of May 6, 2009, ch. 865, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-604(K) (Cum. Supp. 2009)); Act of May 6, 2009, ch. 870, 2009 Va. Acts ___

D. Campaign Finance

The General Assembly enacted one modest provision to tighten Virginia's campaign finance laws. Prior law prohibited a person from converting for his personal use "contributed moneys, securities, or like intangible personal property" to a candidate, referendum committee, political action committee, or political party committees.⁹⁵ The legislature added to this prohibition to include "the use of a member of the 'immediate family,' . . ." of the candidate, treasurer, or chief executive of the committee, depending on the type of committee at issue.⁹⁶

E. Recounts

Virginia law previously required "a difference of not more than one percent of the total vote cast for the [apparent winning candidate and losing candidate] as determined by the State Board or the electoral board" when determining whether a recount is allowed.⁹⁷ The General Assembly loosened the margin between voting percentages of a winning and losing candidate to five percent if one of the candidates affected is a write-in candidate.⁹⁸

F. Removal of Public Officers

Virginia law provides a process through which the voters of a locality may petition a circuit court to remove from office elected and certain appointed officers.⁹⁹ A circuit court may remove an elected official for a variety of reasons, including "neglect of duty, misuse of office, or incompetence in the performance of duties" when those actions have "a material adverse effect upon the con-

(codified as amended at VA. CODE ANN. § 24.2-604(K) (Cum. Supp. 2009)); Act of May 6, 2009, ch. 874, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-604(K) (Cum. Supp. 2009)).

95. VA. CODE ANN. § 24.2-948.4(D) (Repl. Vol. 2006) (pertaining to campaign committees); *id.* § 24.2-949.9 (Repl. Vol. 2006) (pertaining to political action committees); *id.* § 24.2-950.9 (Repl. Vol. 2006) (pertaining to political party committees); *id.* § 24.2-951.9 (Repl. Vol. 2006) (pertaining to referendum committees).

96. Act of Mar. 27, 2009, ch. 231, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 24.2-948.4, 24.2-949.9, 24.2-950.9, 24.2-951.9, 24.2-952.7 (Cum. Supp. 2009)).

97. VA. CODE ANN. § 24.2-800(B) (Repl. Vol. 2006 & Cum. Supp. 2008).

98. Act of Mar. 27, 2009, ch. 386, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-800(B) (Cum. Supp. 2009)).

99. *See* VA. CODE ANN. §§ 24.2-230 to 24.2-238 (Repl. Vol. 2006 & Cum. Supp. 2008).

duct of the office.”¹⁰⁰ The process requires that the petition “be signed by a number of registered voters who reside within the jurisdiction of the officer equal to ten percent of the total number of votes cast at the last election for the office that the officer holds.”¹⁰¹ The petition “shall state with reasonable accuracy and detail the grounds or reasons for removal and shall be signed by the person or persons making it under penalties of perjury.”¹⁰²

In 2008, several individuals petitioned a circuit court to remove from office four members of the Gloucester Board of Supervisors who had received indictments by a special grand jury.¹⁰³ The indictment concerned charges that the foursome misused their office.¹⁰⁴ The charges were eventually dismissed.¹⁰⁵ The petition to remove the officials from elected office was also dismissed.¹⁰⁶ In dismissing the petition, the judge ordered the forty individuals who circulated the petitions to pay \$80,000 of the approximately \$125,000 legal bill faced by the defendants, with the balance to be paid by Gloucester County.¹⁰⁷

The court’s ruling called into question the constitutionality of imposing legal costs and sanctions on citizens petitioning their government for redress. Specifically, the Bill of Rights of the United States Constitution and the Virginia Constitution protect the rights of citizens to freely express themselves and petition the government for the redress of grievances.¹⁰⁸

The General Assembly enacted two major changes to the removal statutes as a result of the Gloucester case. First, it inserted a “materiality” standard for a circuit court to use when determin-

100. *Id.* § 24.2-233 (Repl. Vol. 2006).

101. *Id.*

102. *Id.* § 24.2-235 (Repl. Vol. 2006).

103. See Cory Nealon, *Ruling Puzzles Law Experts; Fining Residents in Gloucester Case May Be Unconstitutional*, RICH. TIMES-DISPATCH, Dec. 23, 2008, at B10.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); VA. CONST. art. I, § 12 (“[A]ny citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.”).

ing the sufficiency of a petition of removal.¹⁰⁹ Second, it prohibited the imposition of certain costs and sanctions against petitioners.¹¹⁰

With regard to the “materiality” standard, circuit courts are now directed by the legislature to

not dismiss [a petition to remove] solely because of an error or omission in the form of the petition relating to its statement of the grounds or reasons for removal if such error or omission is not material in determining whether the [substance of the petition] provides a reasonable basis . . . to consider the removal of the officer.¹¹¹

Regarding costs and fees, the General Assembly amended section 24.2-235 to explicitly prohibit the imposition of “costs associated with removal proceedings conducted pursuant to the petition, including attorney fees incurred by any other party or court costs”¹¹² Moreover, a petitioner now cannot have “sanctions imposed against him pursuant to § 8.01-271.1.”¹¹³ Unchanged is the provision providing for elected officials to possibly have their fees reimbursed if successful in defeating the petition.¹¹⁴ In cases where the petitioners are unsuccessful in removing the official, “the court in its discretion may require the state agency or political subdivision which the [official] serves to pay court costs or reasonable attorney fees, or both, for the respondent.”¹¹⁵

Both amendments seem to ensure a citizen’s right to petition a circuit court for the removal of an elected official by eliminating

109. Act of May 6, 2007, ch. 868, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-235 (Cum. Supp. 2009)).

110. *Id.* (codified as amended at VA. CODE ANN. § 24.2-238 (Cum. Supp. 2009)).

111. *Id.* (codified as amended at VA. CODE ANN. § 24.2-235 (Cum. Supp. 2009)).

112. *Id.* (codified as amended at VA. CODE ANN. § 24.2-238 (Cum. Supp. 2009)).

113. VA. CODE ANN. § 24.2-238 (Cum. Supp. 2009). Section 8.01-271.1 provides, in part, [t]he signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 2009).

114. *See* Act of May 6, 2009, ch. 868, Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-238 (Cum. Supp. 2009)).

115. VA. CODE ANN. § 24.2-238 (Cum. Supp. 2009).

the fear of having to pay the attorney's fees of the targeted officer and the potential sanctions imposed by a court for a frivolous suit.

III. ATTORNEY GENERAL OPINIONS¹¹⁶

In 2008, the Attorney General had occasion to opine on the perennial problem of localities dealing with campaign posters posted within state rights-of-way along the highways.¹¹⁷ Fairfax County contemplated an agreement to act as an agent of the Commonwealth Transportation Commissioner to enforce the provisions of Virginia Code section 33.1-373.¹¹⁸ Section 33.1-373 generally provides for a \$100 civil penalty for each occurrence of posting an advertisement within the limits of any highway and allows for the recoupment of costs related to removing the advertisements.¹¹⁹

Due to a prior amendment changing the definition of "advertisement," which specifically deleted reference to political party or candidate signs,¹²⁰ the Attorney General opined that section 33.1-373 does not prohibit the posting of political campaign signs within state rights-of-way.¹²¹ Moreover, "signs and advertising supporting an individual's candidacy for elected public office or other ballot issues are not subject to [agreements with the Commissioner to remove them and collect penalties and costs], unless such signs and advertising remain in place more than three days after the election to which they apply."¹²² Interestingly, the Attorney General indicated in his opinion that, to the extent this opinion conflicted with a 2000 opinion of the Attorney General, the 2000 opinion was overruled.¹²³ The 2000 opinion concluded that the placing of political signs within state rights-of-way violated the Commonwealth Transportation Board's rule governing the

116. 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).

117. 2008 Op. Va. Att'y Gen. 115.

118. *Id.* 115-16.

119. VA. CODE ANN. 33.1-373 (Repl. Vol. 2005 & Cum. Supp. 2009).

120. Act of Mar. 25, 1993, ch. 538, 1993 Va. Acts 668 (codified as amended at VA. CODE ANN. § 33.1-351 (Cum. Supp. 1993)).

121. 2008 Op. Va. Att'y Gen. 115-17.

122. *Id.* at 117.

123. *Id.* at 117 n.1.

use of rights-of-way within the system of state highways.¹²⁴ However, the Attorney General revisited this opinion in 2009 and concluded that “only Fairfax County is authorized to enter into an agreement with the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373 as addressed in the 2008 opinion.”¹²⁵

The Attorney General issued other opinions related to election law during the previous year; however, those have been treated in the body of this article as they related to subsequent legislative action on the same subject.¹²⁶

IV. CONCLUSION

In sum, the General Assembly used the 2009 Session to develop practical “fixes” to the mechanics of running elections. With each ensuing election, the prior year’s legislative changes are tested and, if deficient, changed again in future legislative sessions. The 2008 presidential election and prior state elections exposed certain deficiencies in Virginia law, and the General Assembly took the opportunity in 2009 to correct some of those issues.

124. 2000 Op. Va. Att’y Gen. 136, 138.

125. Op. to Hon. David S. Ekern (Feb. 2, 2009).

126. See *supra* text accompanying notes 34–35, 64, 88.