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ELECTION LAW

Christopher R. Nolen *
Jeff Palmore **

I. INTRODUCTION

Other than a few controversial measures, the 2012 Virginia General Assembly made modest changes to Virginia's laws regarding the administration and conduct of elections. Most activity in this arena concerned issues that had significant federal election implications: specifically, the adoption of changes to strengthen Virginia's existing voter identification law and the enactment of a congressional redistricting plan. This article surveys developments in Virginia election law for the latter part of 2011 and the 2012 General Assembly session. The focus is on those statutory developments that have significance or general applicability to the implementation of Virginia's election laws. Consequently, not every election-related bill approved by the General Assembly is discussed.

II. LEGISLATIVE ENACTMENTS

A. *General Administration*

The General Assembly passed identical versions of legislation in both the House of Delegates and Senate of Virginia that made a number of changes to the duties and responsibilities of the State Board of Elections, registrars, and local electoral boards. The legislation first provides that general registrars may administer the oath of office "for assistant and substitute registrars, of-

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ficers of election, and voting equipment custodians.”¹ The legislation also adjusted several public notice requirements related to elections. Notice of a change in the location of a general registrar’s office and notice of upcoming primary elections must be posted on the locality’s website, in at least ten public locations, or in a newspaper of general circulation.² Previously, notice of voting location changes only had to be mailed directly to voters in certain circumstances.³ The legislation updated the notice requirements for the date, hours, and locations for registration on the final day of registration, as well as times and locations for voter registration generally.⁴ For each of these, the notice previously only had to be posted at the courthouse in addition to publication in a newspaper of general circulation.⁵ Under the legislation, posting at the courthouse is replaced with posting on the locality’s official website.⁶

The General Assembly made a small change regarding payment of officers of election. Virginia Code section 24.2-116 outlines the compensation for officers of election.⁷ House Bill 37, sponsored by Delegate Mark Cole, provides that officers of election can waive compensation and serve as volunteer officers.⁸

A 2010 lawsuit challenged Virginia’s statute granting access to Virginia voter lists only to candidates, elected officials, and political party chairmen.⁹ The plaintiff in the case, a voter participation group, sought voter history but was barred under state law.¹⁰ The Richmond City Circuit Court agreed with the plaintiff and found the law unconstitutional as applied to the plaintiff.¹¹ The General Assembly took steps in 2012 to match state law to this decision, extending access to “members of the public or a nonprof-

1. Act of Mar. 30, 2012, ch. 486, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-120 (Supp. 2012)); Act of Mar. 22, 2012, ch. 328, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-120 (Supp. 2012)).

2. Ch. 486, 2012 Va. Acts ___; ch. 328, 2012 Va. Acts ___.

3. VA. CODE ANN. § 24.2-306 (Repl. Vol. 2011).

4. Ch. 486, 2012 Va. Acts ___; ch. 328, 2012 Va. Acts ___.

5. VA. CODE ANN. § 24.2-415 (Repl. Vol. 2011).

6. Ch. 486, 2012 Va. Acts ___; ch. 328, 2012 Va. Acts ___.

7. See VA. CODE ANN. § 24.2-116 (Supp. 2012).

8. H.B. 37, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 4, 2012, ch. 489, 2012 Va. Acts ___).

9. See *KnowCampaign v. Rodrigues*, No. CL10-3425, slip op. at 1–2 (Va. Cir. Ct. Dec. 21, 2010) (Richmond City).

10. See *id.*

11. *Id.* at 10.

it organization seeking to promote voter participation and registration by means of a communication or mailing without intimidation or pressure exerted on the recipient, for that purpose only.”¹²

B. *Conduct of Elections*

1. Voter Identification

Legislation changing Virginia’s voter identification laws was one of the most hotly contested issues of the 2012 General Assembly session. For years, Virginia has had in place a requirement that officers of election ask voters to present identification (“ID”) before voting.¹³ Prior to the legislation that passed in 2012, the law required an officer of election to ask a voter to present a voter registration card, a social security card, a Virginia driver’s license, a government ID, or a photo ID issued by an employer.¹⁴ If a voter showed up to the polling place and was unable to present ID, he first signed a statement that he was the voter he claimed to be.¹⁵ The voter then could cast a regular ballot.¹⁶

In several previous sessions, legislators tried to change the law to require that voters without ID must instead vote a provisional ballot that would be subject to review by the electoral board¹⁷ or to require photo ID to vote.¹⁸ Those bills usually met the same fate—defeat in the Democrat-led Senate Privileges and Elections Committee.¹⁹ With the new majority that the Republicans gained in the senate in 2012,²⁰ the Senate Privileges and Elections Commit-

12. Act of Apr. 6, 2012, ch. 664, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-406 (Supp. 2012)).

13. See VA. CODE ANN. § 24.2-643 (Repl. Vol. 2011).

14. *Id.*

15. *Id.*

16. *Id.*

17. See, e.g., H.B. 1560, Va. Gen. Assembly (Reg. Sess. 2011); S.B. 301, Va. Gen. Assembly (Reg. Sess. 2010); S.B. 963, Va. Gen. Assembly (Reg. Sess. 2009).

18. See, e.g., H.B. 498, Va. Gen. Assembly (Reg. Sess. 2010).

19. See, e.g., H. JOURNAL, House of Delegates of Va., Reg. Sess. 1324 (2011) (noting Senate Committee on Privileges and Elections failed to report H.B. 1560); S. JOURNAL, Senate of Va., Reg. Sess. 55 (2010) (noting S.B. 301 only referred to Senate Committee on Privileges and Elections); S. JOURNAL, Senate of Va. Reg. Sess. 29 (2009) (noting S.B. 963 only referred to Senate Committee on Privileges and Elections).

20. Michael Sluss, *2 Concessions Cement GOP’s Senate Control*, ROANOKE TIMES, Nov. 11, 2011, at A11.

tee also gained a Republican majority—one that was more amenable to legislation changing voter ID requirements.

The 2012 session began with several bills that proposed to adjust the voter ID requirements, but two emerged as the primary vehicles for this change—Senate Bill 1 and House Bill 9.

Senate Bill 1, introduced by Senator Steve Martin, initially was similar to House Bill 9, as introduced.²¹ Both bills would have essentially required a provisional ballot when a voter did not present ID.²² In committee, however, the two bills diverged. The Senate Privileges and Elections Committee added current utility bills, bank statements, government checks, and paychecks with name and address to the list of acceptable forms of ID for voting—forms of ID that largely mirrored the forms of ID permitted for certain first-time voters in federal elections.²³ The new version of the bill also required that a voter who voted without ID would have to present ID to the local electoral board at its meeting the next day.²⁴ The committee also added a provision (“Person Recognition Provision”) that waived the identification requirements if the voter were “recognized and acknowledged by an officer of election to be the person that he claims to be.”²⁵

House Bill 9 similarly underwent several changes beginning with committee consideration. The House Committee on Privileges and Elections added a provision that would have allowed the electoral board,²⁶ when a voter cast a provisional ballot without identification, to compare the signature on the provisional ballot envelope with the signature on file with the registrar (“Signature Comparison Provision”).²⁷

The two bills wound their way through the legislative process and were presented to the governor. In total, the bills required a

21. Compare S.B. 1, Va. Gen. Assembly (Reg. Sess. 2012) (as introduced, Jan. 11, 2012), with H.B. 9, Va. Gen. Assembly (Reg. Sess. 2012) (as introduced, Jan. 11, 2012).

22. See S.B. 1; H.B. 9.

23. Compare S.B. 1 (as amended in the nature of a substitute, Jan. 31, 2012), with VA. CODE ANN. § 24.2-643(e) (Supp. 2012).

24. S.B. 1 (as amended in the nature of a substitute, Jan. 31, 2012). Instead of providing identification at the electoral board meeting, the voter could ask for an extension to the following day. *Id.*

25. *Id.*

26. The electoral board could have delegated the task of signature comparison to the registrar or staff. H.B. 9 (as amended in the nature of a substitute, Jan. 27, 2012).

27. *Id.*

provisional ballot for voting without ID; added additional forms of acceptable ID to include student ID from any four-year private or public college or university located in Virginia, utility bills, bank statements, government checks, and paychecks; included the Personal Recognition Provision; and provided that a voter could present ID to the electoral board by the next day or ask for an extension.²⁸ The enrolled legislation did not include the Signature Comparison Provision.²⁹

The governor, in turn, returned the legislation with a number of proposed amendments. His amendments sought to add community college ID to the list of acceptable forms of ID, to reinsert the Signature Comparison Provision into the legislation, and to give voters who vote without an ID additional time to present ID to the electoral board.³⁰ He also proposed an amendment removing the Personal Recognition Provision.³¹ The General Assembly rejected the Signature Comparison Provision³² but approved the governor's other amendments.³³

After facing pressure from the left to veto the legislation³⁴ and pressure from the right to sign it,³⁵ Governor Bob McDonnell signed the legislation and issued an accompanying executive order.³⁶ Most significantly, the executive order required the State

28. See H.B. 9 (as enrolled, Mar. 10, 2012); S.B. 1 (as enrolled, Mar. 9, 2012).

29. See H.B. 9 (as enrolled, Mar. 10, 2012); S.B. 1 (as enrolled, Mar. 9, 2012).

30. See H. JOURNAL, House of Delegates of Va., Reg. Sess. ___ (2012), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hb9>; Press Release, Office of the Governor, Governor McDonnell Takes Action on 2012 General Assembly Legislation (Apr. 10, 2012), available at <http://www.governor.virginia.gov/News/viewRelease.Cfm?id=1197>.

31. See H. JOURNAL, House of Delegates of Va., Reg. Sess. ___ (2012), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hb9>; Governor McDonnell Takes Action on 2012 General Assembly Legislation, *supra* note 30.

32. See S. JOURNAL, Senate of Va., Reg. Sess. ___ (2012), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=sb1>.

33. See *id.* The house and senate, however, rejected all amendments to House Bill 9. See H. JOURNAL, House of Delegates of Va., Reg. Sess. ___ (2012), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hb9>.

34. See, e.g., Julian Walker, *Governor Weighs Options on Voter ID Restrictions*, VIRGINIAN-PILOT, Apr. 24, 2012, at B1 ("Brian Moran, Virginia Democratic Party chairman, has urged McDonnell to veto the bills, saying the legislation is 'beyond repair.'").

35. See, e.g., *Bob McDonnell's Big Test: Voter ID*, NETRIGHTDAILY (Apr. 20, 2012), <http://netrightdaily.com/2012/04/bob-mcdonnells-big-test-voter-id/> ("This is Bob McDonnell's ultimate test—is he soft on voter ID laws, a popular position of the left and groups like ACORN? Or is he a conservative who is able to represent the overwhelming majority sentiment of the GOP and the country? Looks like we will have to wait and see.").

36. Exec. Order No. 45 (2012) (May 18, 2012); Press Release, Office of the Governor,

Board of Elections to issue new voter registration cards to all Virginia voters before the 2012 election.³⁷ The executive order also called for a voter outreach campaign regarding the new ID requirements, collection of statistics regarding the number of provisional ballots cast under the new law, and passage of regulations clarifying that local registrars may contact voters who vote provisionally to remind them of the law's requirements.³⁸ The United States Department of Justice granted preclearance for the legislation pursuant to section five of the Voting Rights Act on August 20, 2012.³⁹

The General Assembly also passed another much less controversial piece of legislation dealing with voter ID requirements. Senator Ralph Smith sponsored, and the General Assembly approved, legislation that added concealed weapons permits as acceptable forms of ID to present for voting.⁴⁰

2. Absentee Voting

The General Assembly passed legislation adopting certain provisions of the Uniform Military and Overseas Voters Act (UMOVA).⁴¹ The legislation, as introduced, was very different in form than the final legislation,⁴² but similarly sought to streamline voting for overseas and military voters and carried the support of Governor McDonnell.⁴³ After the House Committee on

Governor McDonnell Signs SB1 and HB9 and Issues Executive Order (May 18, 2012), available at <http://www.governor.virginia.gov/news/viewRelease.cfm?id=1263>. As the Acts of Assembly chapter numbers indicate, the Governor signed S.B. 1 (Chapter 839) after H.B. 9 (Chapter 838). See Act of May 18, 2012, ch. 839, 2012 Va. Acts ___ (codified as amended in scattered sections of VA. CODE ANN. tit. 24.2 (Supp. 2012)); Act of May 18, 2012, ch. 838, 2012 Va. Acts ___ (codified as amended in scattered sections of VA. CODE ANN. tit. 24.2 (Supp. 2012)). As such, the version of the bill incorporating the governor's approved amendments went into law. See *supra* note 33.

37. Exec. Order No. 45 (2012).

38. *Id.*

39. See Laura Vozzella, *Justice Dept. Clears Voter ID Law, McDonnell Says*, WASH. POST, Aug. 21, 2012, at B04.

40. Act of Apr. 9, 2012, ch. 723, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 24.2-643, -651.1 (Repl. Vol. 2012)).

41. Act of Mar. 22, 2012, ch. 353, 2012 Va. Acts ___ (codified at VA. CODE ANN. § 24.2-451 to -470 (Supp. 2012)).

42. Compare S.B. 565, Va. Gen. Assembly (Reg. Sess. 2012) (as introduced, Jan. 17, 2012), with ch. 353, 2012 Va. Acts ___.

43. Press Release, Office of the Governor, Governor McDonnell Announces Military and Veterans Legislative Agenda for 2012 General Assembly Session (Jan 12, 2012), available at <http://www.governor.virginia.gov/News/viewRelease.cfm?id=1080>.

Privileges and Elections defeated companion legislation,⁴⁴ the legislation changed significantly when it came before the same committee after senate passage.⁴⁵ UMOVA was designed to “simplify the process of absentee voting for United States military and overseas civilians by making the process more uniform, convenient, secure and efficient.”⁴⁶ Some provisions of the UMOVA, particularly those regarding electronic communication with voters and electronic transmission of election materials, were not in the legislation passed by the General Assembly.⁴⁷

Senator Mark Obenshain sponsored legislation that requires a five-day buffer between when someone registers to vote and when that voter is eligible to cast an in-person absentee ballot.⁴⁸ Senator Obenshain proposed this legislation in order to prevent fraud where one would fraudulently register to vote and cast an absentee ballot at the same time.⁴⁹ The legislation contains an exemption for military voters as well as their spouses and dependents.⁵⁰ Democrats in the General Assembly opposed the legislation, arguing that the legislation served no purpose and that a “waiting period[]” imposed a burden on exercising a constitutional right.⁵¹ The legislation narrowly passed the senate with the lieutenant governor casting the tie-breaking vote.⁵²

The General Assembly passed a measure that changes the procedure when a voter obtains an absentee ballot but decides not to

44. See H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2012), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hb1057>.

45. Compare S.B. 565 (as introduced, Jan. 17, 2012), with *id.* (as amended in the nature of a substitute, Feb. 24, 2012).

46. *Military and Overseas Voters Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Military+and+Overseas+Voters+Act> (last visited Oct. 15, 2012).

47. Compare ch. 353, 2012 Va. Acts ____, with UNIF. MILITARY & OVERSEAS VOTERS ACT § 15, 13 U.L.A. 76 (Supp. 2012).

48. See S.B. 57, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 4, 2012, ch. 612, 2012 Va. Acts ____).

49. Michael Sluss, *General Assembly Notebook: Senate Passes Bill That Adds Wait Time to Absentee Voting*, ROANOKE TIMES (Feb. 3, 2012), <http://www.roanoke.com/politics/wb/304362>.

50. See ch. 612, 2012 Va. Acts ____ (referencing VA. CODE ANN. § 24.2-700(2) (Supp. 2012)).

51. *Senator Petersen Defends Constitutional Rights as Republicans Vote to Deny Voter Rights*, ALEXANDRIANNEWS.ORG (Feb. 3, 2012), <http://www.alexandrianews.org/2012/02/senator-petersen-defends-constitutional-rights-as-republicans-vote-to-deny-voter-rights/>.

52. See S. JOURNAL, Senate of Va., Reg. Sess. ____ (2012), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=sb57>.

cast that ballot.⁵³ Under Virginia law, a voter who obtains an absentee ballot and either decides not to vote absentee or incorrectly marks or otherwise defaces the ballot can vote in person by returning the new or marked ballot.⁵⁴ The legislation modifies that procedure by requiring the voter to cast a regular ballot if the unused or marked ballot is returned to the polling place or central absentee voter precinct on election day and by requiring a provisional ballot if the unused or marked ballot is returned somewhere else (e.g., to the registrar or electoral board).⁵⁵

The General Assembly also passed legislation providing that the state prohibition on voting more than once in any given election does not apply to voters entitled to fill out a federal write-in absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act.⁵⁶ Under the legislation, the prohibition against casting multiple votes does not apply if such a voter sends in a federal write-in absentee ballot and a state absentee ballot.⁵⁷ If both ballots reach the registrar before the polls close on election day, only the state ballot will be counted.⁵⁸

3. Petitions

a. Presidential Petition Litigation

Four candidates submitted petitions by the December 22, 2011 deadline to get on the Republican presidential primary ballot—Newt Gingrich, Mitt Romney, Ron Paul, and Rick Perry.⁵⁹ Three active candidates at the time—Michele Bachmann, Jon Huntsman, and Rick Santorum—did not file petitions.⁶⁰ Mitt Romney submitted 16,026 petition signatures while Ron Paul submitted 14,361, Rick Perry submitted 11,911, and Newt Gingrich submit-

53. See Act of Apr. 5, 2012, ch. 645, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-708 (Supp. 2012)).

54. VA. CODE ANN. § 24.2-708 (Repl. Vol. 2012).

55. Ch. 645, 2012 Va. Acts ___.

56. See Act of Apr. 6, 2012, ch. 667, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-1004 (Supp. 2012)); Act of Apr. 6, 2012, ch. 652, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-1004 (Supp. 2012)).

57. Ch. 667, 2012 Va. Acts ___; Ch. 652, 2012 Va. Acts ___.

58. Ch. 667, 2012 Va. Acts ___; Ch. 652, 2012 Va. Acts ___.

59. Olympia Meola & Jim Nolan, *Four Republicans Seek to Run in Va.*, RICH. TIMES-DISPATCH, Dec. 23, 2011, at A1.

60. *Id.*

ted 11,050 signatures.⁶¹ The political parties are responsible for counting petition signatures for the parties' respective candidates,⁶² so the Republican Party of Virginia ("RPV") took over the task from there. After the RPV examined petitions, only Mitt Romney and Ron Paul qualified for the ballot.⁶³ According to the RPV, Gingrich and Perry "did not come close to the 10,000 valid signature threshold."⁶⁴

A few days later, Perry filed a lawsuit against the State Board of Elections and the RPV seeking to get on the presidential primary ballot.⁶⁵ Perry's suit was based, among other things, on the claim that Virginia's requirement that petition circulators be eligible or registered Virginia voters was unconstitutional.⁶⁶ Soon thereafter, Newt Gingrich, Jon Huntsman, and Rick Santorum sought to join the suit as additional plaintiffs,⁶⁷ and the court quickly granted their motion.⁶⁸ With the March 6, 2012 Republican primary just two months away, absentee ballots soon would be available and "[t]ime [was] of the essence."⁶⁹ Accordingly, the court issued a temporary ruling preventing the printing or delivery of absentee ballots.⁷⁰ Ultimately, the court found that the doctrine of laches barred the candidates' lawsuit.⁷¹ This was not before a strong statement by the court that Virginia's residency requirement for petition circulators likely was unconstitutional.⁷² Perry filed an emergency motion for an injunction with the Fourth Circuit, a motion that the court denied, finding that "the

61. *Id.*

62. *See* VA. CODE ANN. § 24.2-545 (Repl. Vol. 2011 & Supp. 2012).

63. Press Release, Republican Party of Virginia, Statement of RPV on Petition Certification (Dec. 28, 2011), available at <http://rpv.org/node/1037>.

64. *Id.*

65. *See* Complaint at 1–2, *Perry v. Judd*, 840 F. Supp. 2d 945 (E.D. Va. 2012) (No. 3:11-CV-856).

66. *See id.*

67. *See* Motion of the Honorable Newt Gingrich et al. to Intervene and Motion for Expedited Consideration at 1, *Perry*, 840 F. Supp. 2d 945 (No. 3:11-CV-856).

68. *See* Order Granting Motion to Intervene, *Perry*, 840 F. Supp. 2d 945 (No. 3:11-CV-856).

69. Frank Green, *Judge Says to Wait on GOP Ballot*, RICH. TIMES-DISPATCH, Jan. 10, 2012, at B2.

70. Order to Refrain from Printing Absentee Ballots, *Perry*, 840 F. Supp. 2d 945 (No. 3:11-CV-856).

71. *See Perry*, 840 F. Supp. 2d at 955.

72. *Id.* at 957.

district court was correct in concluding that the defense of laches bars the requested relief.”⁷³

b. Presidential Petition Fraud Investigation

This ruling did not bring a close to controversy over the petitions. Newt Gingrich alleged that his attempts to get on the Virginia ballot were thwarted by a petition circulator who submitted 1500 illegitimate signatures.⁷⁴ Upon request by the State Board of Elections, the Virginia Office of the Attorney General began investigating these allegations of election fraud.⁷⁵

c. Petition Circulator Litigation and Legislation

The Libertarian Party of Virginia and a petition circulator from Pennsylvania filed a lawsuit similar to Perry’s in federal court in Virginia in May of 2012.⁷⁶ The suit sought to have the rules on petition circulator residency requirements declared unconstitutional as applied to non-major party candidates for president.⁷⁷ The Libertarian Party of Virginia litigation came on the heels of the decision of *Lux v. Judd*, where the court determined that Virginia’s in-district residency requirement to circulate candidate petitions was unconstitutional.⁷⁸

In response to all the activity surrounding candidate petitions, the General Assembly loosened some of the requirements pertaining to who may circulate petitions on behalf of candidates seeking to be listed on the ballot. Virginia law previously required that “[e]ach signature on the petition shall have been witnessed by a person who is himself a qualified voter, or qualified to register to

73. *Perry v. Judd*, 471 F. App’x 219, 224 (4th Cir. 2012).

74. Andrew Cain, *GOP Criticized on Signatures for Va. Primary*, RICH. TIMES-DISPATCH, Jan. 3, 2012, at A1.

75. See Anita Kumar, *Probe of Gingrich Signatures*, WASH. POST, Jan. 15, 2012, at A08; Dan Roem, *Virginia AG Investigates Gingrich Worker Over Fake Ballot-Petition Signatures*, NATIONAL JOURNAL (Jan. 31, 2012, 1:44 PM), <http://www.nationaljournal.com/2012-presidential-campaign/virginia-ag-investigating-gingrich-worker-over-fake-ballot-petition-signatures-20120131>.

76. Complaint at 2, *Libertarian Party of Va. v. Judd*, No. 312cv367 (E.D. Va. July 30, 2012).

77. *Id.* at 1.

78. 842 F. Supp. 2d 895, 904 (E.D. Va. 2012); see also Christopher R. Nolen & Jeff Palmore, *Annual Survey of Virginia Law: Election Law and Government Ethics*, 46 U. RICH. L. REV. 119, 133–34 (2011).

vote, for the office for which he is circulating the petition.”⁷⁹ This requirement prevented individuals living outside the election district of the office for which the petitions were being circulated from gathering petition signatures. The legislature replaced the prior language, and now the law requires that “[e]ach signature on the petition shall have been witnessed by a person who is himself a legal resident of the Commonwealth and who is not a minor or a felon whose voting rights have not been restored.”⁸⁰ The legislation also allows “a constitutionally qualified candidate for President of the United States” to witness his own petition.⁸¹

4. Authorized Representatives

Continuing its efforts to regulate the conduct of authorized representatives of political parties or candidates present during the casting and counting of ballots, the General Assembly further defined what activities by such persons are allowed. This action came on the heels of an opinion from the attorney general concerning the power of an electoral board to regulate the conduct of an authorized representative. The attorney general was asked to opine on the power of an electoral board to keep an authorized representative in one area behind the voter registration desk for the entirety of the election day and prohibit him from leaving that area to observe the election process taking place in other parts of the polling place.⁸² The attorney general noted that

the Code sets forth two basic principles regarding the representatives. First, they must be close enough to the process to hear and see what is occurring. Second, they cannot hinder or delay a qualified voter or the officers of election, provide or exhibit campaign materials, attempt to influence a person voting, or otherwise impede the orderly conduct of the election.⁸³

The attorney general pointed out that authorized representatives also have the right, just as any qualified voter, to challenge the vote of a person listed on the pollbook but is known or suspected to not be a qualified voter.⁸⁴ The attorney general deter-

79. VA. CODE ANN. §§ 24.2-506, -521 (Repl. Vol. 2011).

80. Act of Mar. 7, 2012, ch. 166, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 24.2-506, -521 (Supp. 2012)).

81. *Id.* (codified as amended at VA. CODE ANN. § 24.2-543 (Supp. 2012)).

82. *See Op. to Richard E. Sincere, Jr.* (Oct. 6, 2011).

83. *Id.* (footnotes omitted).

84. *Id.* (quoting VA. CODE ANN. § 24.2-651 (Supp. 2012)).

mined that the electoral board's "rules confining the representatives to a specific area and prohibiting cell phone usage are contrary to the Code of Virginia."⁸⁵

During the 2012 session, the General Assembly clarified that an authorized representative may be "close enough to the voter check-in table to be able to hear and see what is occurring."⁸⁶ Previously, the law provided that such persons may be "close enough to the process to be able to hear and see what is occurring."⁸⁷ There are new limits, however, to how close an observer may be to the mechanics of voter check-in and the casting of ballots. Specifically, the General Assembly provided that "such observation shall not violate the secret vote provision of Article II, Section 3 of the Constitution of Virginia or otherwise interfere with the orderly process of the election."⁸⁸ Moreover, the legislation made it unlawful for such authorized representative to "be in a position to see the marked ballot of any other voter."⁸⁹

C. Campaign Finance

1. Loans to Campaigns

Virginia law does not prohibit candidate campaign committees from obtaining loans for campaign activities nor does it limit the amount of interest that may be charged on a loan to a candidate campaign committee.⁹⁰ It is not uncommon for candidates to loan their campaigns money.⁹¹ Some candidates charge interest for loans made to their campaigns, others do not.⁹² Given the lack of guidance in Virginia law, candidate practices vary as to when and how such loans are paid off and when and if interest is charged.

85. *Id.*

86. Act of Apr. 18, 2012, ch. 826, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-604(C) (Supp. 2012)); Act of Apr. 18, 2012, ch. 754, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-604(C) (Supp. 2012)).

87. VA. CODE ANN. § 24.2-604(C) (Repl. Vol. 2011).

88. Ch. 826, 2012 Va. Acts ___; ch. 754, 2012 Va. Acts ___.

89. Ch. 826, 2012 Va. Acts ___; ch. 754, 2012 Va. Acts ___.

90. See Olympia Meola, *Campaign Loans on Easy Terms*, RICH. TIMES-DISPATCH, May 8, 2011, at A1.

91. *See id.*

92. *See id.*

In a further attempt to restrict candidates from personally benefiting from the use of campaign funds,⁹³ the General Assembly enacted legislation to prohibit candidate campaign committees from paying interest to “the candidate or his immediate family member . . . on the amount of the loan.”⁹⁴ No candidate, or his immediate family, may be repaid more than the “face value of the loan.”⁹⁵ Additionally, the General Assembly penalized the acceptance or payment of interest in violation of the new provision as a civil penalty “equal to the amount of the prohibited interest payment or \$500, whichever amount is greater.”⁹⁶ It is important to note that the General Assembly did not prohibit loans to campaign committees nor did it prohibit such committees from paying interest on loans made by third-parties not related to the candidate. Instead, it limited the ability of candidates or certain family members of those candidates to benefit from such loans through the repayment of interest.⁹⁷

2. Campaign Finance Reports

The General Assembly enacted legislation concerning candidate campaign finance reports that are inaccurate due to embezzlement of campaign funds.⁹⁸ Fraudulent activity related to campaign accounts has occurred on a number of occasions over the last few years.⁹⁹ During the course of a campaign for the House of Delegates in 2009, it was discovered that a campaign staffer stole more than \$50,000 through approximately 900 unauthorized expenditures from a candidate’s campaign treasury during a two-year period.¹⁰⁰ The embezzlement created a situation where the

93. See VA. CODE ANN. § 24.2-946(E) (Repl. Vol. 2011 & Supp. 2012); Nolen & Palmore, *supra* note 78, at 129–30.

94. Act of Mar. 7, 2012, ch. 163, 2012 Va. Acts ___ (codified at VA. CODE ANN. § 24.2-947.4:1 (Supp. 2012)).

95. *Id.*

96. *Id.*

97. *See id.*

98. Act of Mar. 21, 2012, ch. 298, 2012 Va. Acts ___ (codified as amended at VA CODE ANN. § 24.2-953(G) (Supp. 2012)).

99. See, e.g., Kimball Payne, *Lawmaker’s Aide Arrested for Embezzlement*, DAILY PRESS (Mar. 3, 2011), http://articles.dailypress.com/2011-03-03/news/dp-nws-ward-aide-20110303_1_embezzlement-campaign-finances-legislative-aide; Michael Owens, *Cynthia Ann Fuqua-Clark To Serve Five-Year Sentence on Embezzlement Charges*, BRISTOL HERALD COURIER (Mar. 17, 2012), <http://www2.tricitie.com/business/2012/mar/17/cynthia-ann-fuqua-clark-serve-five-year-sentence-e-ar-1772551/>.

100. Deirdre Fernandes & Shawn Day, *Ex-Mathieson Aide Charged With Embezzle-*

campaign finance reports that were filed technically were inaccurate. Moreover, for the remainder of the campaign, the candidate who was the victim of the theft filed campaign finance reports showing a zero cash-on-hand balance when there was money both in the account and being spent on campaign activities.¹⁰¹ This situation allowed the candidate to know what his opponent was spending during the closing months of the campaign without revealing his own campaign cash balance.

A candidate that has been the victim of such theft faces a unique situation in that Virginia law makes it “unlawful for any candidate, his treasurer, or any person receiving contributions or making expenditures on a candidate’s behalf or in relation to his candidacy, to fail to report every contribution and expenditure as required.”¹⁰² Moreover,

Any willfully false material statement or entry made by any person in any statement, form, or report required by this title shall constitute the crime of election fraud and be punishable as a Class 5 felony. Any preprinted statement, form, or report shall include a statement of such unlawful conduct and the penalty provided¹⁰³

Candidates and campaign treasurers in situations like the one described are in a difficult situation because after the embezzlement is discovered, but before the full extent of it is revealed, they may have to file campaign finance reports that contain inaccurate or false information.

Prior to this year’s enactment by the General Assembly, it was unclear what the candidate’s duties were in such situations. The General Assembly enacted legislation that explicitly provides that Virginia’s campaign finance laws concerning

the filing of timely and complete statements and reports . . . shall at all times remain in full force and effect and shall not be vacated, suspended, or modified as the result of any pending or completed criminal or civil investigation of the candidate campaign committee,

ment, VIRGINIAN-PILOT, Nov. 17, 2009, at B1.

101. To compare original and amended reports of campaign expenditures for Robert Mathieson, candidate for House of Delegates, District 21, for the period of September 9, 2009, through November 26, 2009, see VIRGINIA STATE BOARD OF ELECTIONS, http://www.sbe.virginia.gov/cms/Campaign_Finance_Disclosure/View_Disclosure_Reports/Index.html (select “Candidate Reports;” then click “Continue;” then select “Report Year ‘2009;” then click “Submit;” then select “Mathieson Robert-HOD-021-2007”) (last visited Oct. 15, 2012).

102. VA. CODE ANN. § 24.2-947.3(F) (Repl. Vol. 2011).

103. *Id.* § 24.2-1016 (Repl. Vol. 2011).

the political committee, or any individual participant in the committee.¹⁰⁴

The new provision does not resolve the conflict between not having the full picture of the extent of the criminal conduct and the requirement to attest that the information provided on the campaign finance report is accurate.

3. Listing of Certain Addresses on Campaign Finance Reports

The General Assembly also enacted legislation that allows certain voters to protect their residential address from public disclosure on campaign finance reports.¹⁰⁵ Law enforcement, a party granted a protective order, a party in fear of his personal safety, and victims of domestic violence are allowed to provide a post office box address in lieu of their residential addresses for the purposes of lists, such as voter registration and who voted in an election, that are made available to the public.¹⁰⁶ This law is intended to protect certain individuals from having to reveal information in the exercise of their right to vote. Previously, that protection did not apply to making campaign contributions to candidates which, when greater than a certain amount, are required to be disclosed publicly along with information about the contributor, including name, address, occupation, and employer.¹⁰⁷

The new provision allows such voters to request the State Board of Elections to “replace the individual’s residence address in copies of campaign finance reports available to the public with the individual’s alternative mailing address found in the Virginia voter registration system.”¹⁰⁸

4. Candidate Fundraising for Federal Office

Earlier this year, the attorney general issued an official opinion concerning the ability of General Assembly members to raise

104. Act of Mar. 21, 2012, ch. 298, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-953(G) (Supp. 2012)).

105. See Act of Apr. 4, 2012, ch. 527, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-946.2(A) (Supp. 2012)).

106. VA. CODE ANN. § 24.2-418(B) (Supp. 2012).

107. See *id.* §§ 24.2-946.2(A), -947.4(B)(2) (Repl. Vol. 2011).

108. *Id.* § 946.2(A) (Supp. 2012).

campaign funds.¹⁰⁹ Virginia Code section 24.2-954 prohibits fundraising by members of the General Assembly during a regular session of the General Assembly “for an office of the Commonwealth or one of its governmental units.”¹¹⁰ The requestor of the opinion asked whether “during the General Assembly legislative session, a member of the General Assembly may continue to raise funds for a candidate for federal office.”¹¹¹

The attorney general’s opinion noted that the office previously had opined that a member of the General Assembly could solicit funds for his own campaign for federal office.¹¹² The attorney general asserted that the intent of the statute is “to prohibit fundraising during a regular session of the General Assembly by persons running for state office.”¹¹³ Additionally, the attorney general determined that the provisions of the federal campaign finance law “supersede and preempt any provision of State law with respect to election to Federal office.”¹¹⁴ Consequently, the attorney general opined “that a member of the General Assembly is not precluded from raising funds for a candidate for federal office while the General Assembly is in session.”¹¹⁵

D. *Campaign Advertisements*

The General Assembly updated the requirements for print media advertisements sponsored by a candidate campaign committee, person, or political committee to recognize the influence and limitations of the digital age. Virginia law requires certain campaign advertisements to have a disclaimer indicating who sponsored the advertisement.¹¹⁶ Virginia requires that such disclosure statements “be displayed in a conspicuous manner.”¹¹⁷ The General Assembly further defined that phrase to mean “in a minimum font size of seven point.”¹¹⁸ The legislature extended the sev-

109. Op. to Hon. Jeffrey L. McWaters (Jan. 25, 2012).

110. *Id.* (quoting Op. to Hon. Robert Hurt (Jan. 25, 2010)).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* (quoting 2 U.S.C. § 453(a) (2006)) (internal quotation marks omitted).

115. *Id.*

116. See VA. CODE ANN. § 24.2-956 to -956.1 (Supp. 2012).

117. *Id.*

118. Act of Apr. 4, 2012, ch. 519, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-956 to -956.1 (Supp. 2012)).

en point type minimum to “[a]ny print media advertisement appearing in electronic format” unless “the [media] advertisement lacks sufficient space for a disclosure statement in a minimum font size of seven point.”¹¹⁹ In such cases, “the advertisement may meet disclosure requirements if, by clicking on the print media advertisement appearing in electronic format, the viewer is taken to a landing page or a home page that displays the disclosure statement in a conspicuous manner.”¹²⁰ This change recognizes that campaign messages are increasingly delivered in electronic formats such as text messages, emails, and mobile applications.

E. *Redistricting*

In one of the first actions of the 2012 regular session, the General Assembly passed legislation redrawing the Commonwealth’s congressional districts.¹²¹

Prior to the 2012 session, the Republican-led House of Delegates and the Democrat-led Senate of Virginia could not agree on an acceptable congressional redistricting plan.¹²² Attempts to pass congressional redistricting legislation failed in the 2011 regular¹²³ and special¹²⁴ sessions. The November 2011 elections gave the Republicans a working majority in the senate with twenty out of forty members and a Republican lieutenant governor, who was elected in 2009, to break ties.¹²⁵ This gave the new Republican majority the votes it needed to pass congressional redistricting legislation,¹²⁶ and it was the first bill that reached the governor’s desk in 2012.¹²⁷ The governor signed the bill on January 25,

119. *Id.*

120. *Id.*

121. See Act of Jan. 25, 2012, ch. 1, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. § 24.2-302.2 (Supp. 2012)).

122. Ben Pershing, *Redistricting Plan Set to Advance, but Hurdles Remain*, WASH. POST, Jan. 20, 2012, at B03.

123. See, e.g., S.B. No. 455, Va. Gen. Assembly (Reg. Sess. 2011).

124. See, e.g., H.B. No. 5004, Va. Gen. Assembly (Spec. Sess. 2011).

125. Sluss, *supra* note 20.

126. Michael Sluss, *Senate Passes Congressional Districts*, ROANOKE TIMES, Jan. 21, 2012, at A10.

127. Act of Jan. 25, 2012, ch. 1, 2012 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 2.2-508, 24.2-302.2 (Cum. Supp. 2012)).

2012,¹²⁸ and the United States Department of Justice granted preclearance under the Voting Rights Act on March 14, 2012.¹²⁹

Seeking to prevent enactment of redistricting legislation by the new Republican majority, two groups of Virginia voters filed lawsuits in state and federal court following the 2011 election to prevent the General Assembly from redrawing the lines after failing to do so in 2011.¹³⁰ The basis for the two lawsuits was a provision in the Virginia Constitution stating that “[t]he General Assembly *shall* reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.”¹³¹ The respective courts dismissed both lawsuits.¹³² Judge Trenga of the U.S. District Court for the Eastern District of Virginia ruled from the bench in granting the Commonwealth’s motion to dismiss.¹³³ Judge Taylor of the Richmond City Circuit Court issued a written opinion stating that although the provision in the Virginia Constitution requiring redistricting by the General Assembly in “2011 and *every ten years thereafter*”¹³⁴ was mandatory, it did not prohibit the General Assembly from taking action in 2012 when it had failed to do so in 2011.¹³⁵

At the beginning of the legislative session, it was unclear whether the congressional redistricting legislation would receive the necessary preclearance in time for the June congressional primaries. Preparing for this possibility, Delegate Chris Jones sponsored legislation to move the primary to August.¹³⁶ The legislation contained an enactment clause that voided the legislation if

128. *See id.*

129. *See* Letter from Thomas E. Perez, U.S. Assistant Att’y Gen., to E. Duncan Getchell, Jr., Solicitor General (Mar. 14, 2012), *available at* http://redistricting.dls.virginia.gov/2010/Data/Ref/preclearance_letters.pdf (“The Attorney General does not interpose any objection to the specified change.”).

130. *See* Order, *LaMarca v. Va. State Bd. of Elections*, No. 1:11-cv-01255 (E.D. Va. Feb. 10, 2012); Opinion and Order, *Little v. Va. State Bd. of Elections*, No. CL11-5253 (Va. Cir. Ct. Feb. 27, 2012) (Richmond City).

131. VA. CONST., art. II, § 6 (emphasis added).

132. *See* Order, *LaMarca*, No. 1:11-cv-1255 (E.D. Va. Feb. 10, 2012); Opinion and Order, *Little*, No. CL11-5253 (Va. Cir. Ct. Feb. 2012) (Richmond City).

133. *See* Order, *LaMarca*, No. 1:11-cv-1255 (E.D. Va. Feb. 10, 2012).

134. Opinion and Order, *Little*, No. CL11-5253 (Va. Cir. Ct. Feb. 27, 2012) (Richmond City) (quoting VA. CONST., art. II, § 6).

135. *See id.* (“The Court is unable to construe Article II, Section 6, as cabining the General Assembly’s authority to enact decennial reapportionment legislation to 2011 and foreclosing the enactment of such legislation in 2012.”).

136. H.B. 736, Va. Gen. Assembly (Reg. Sess. 2012) (as introduced, Jan. 11, 2012).

preclearance was obtained.¹³⁷ By the time the governor acted on the legislation, the Department of Justice had granted preclearance,¹³⁸ so the governor vetoed the legislation in order “to avoid any confusion and to avoid publication of an Act not in effect in the Acts of Assembly.”¹³⁹

The delay in redistricting also caused a ripple effect in the 2012 elections, specifically regarding the ability of candidates to satisfy petition requirements. The Virginia Code requires candidates for elective office to obtain signatures on a petition of qualified voters.¹⁴⁰ Congressional candidates must obtain 1000 signatures from qualified voters in that district.¹⁴¹ Candidates for statewide office, in addition to obtaining 10,000 signatures, must also ensure that these signatures include 400 qualified voters from each of Virginia’s eleven congressional districts.¹⁴² With the new districts in flux, candidates collecting signatures in early 2012 were unsure whether to use the existing congressional district lines or to wait for new lines to be drawn.¹⁴³ Delegate Cole introduced legislation designed to correct the problem that would have required candidates to use the districts in place at the time if new districts were not yet drawn.¹⁴⁴ Candidates filed their petitions before the governor acted on the legislation,¹⁴⁵ but the still unanswered question

137. *See id.*

138. *See* Letter from Thomas E. Perez, U.S. Assistant Att’y Gen., to E. Duncan Getchell, Jr., Solicitor General, *supra* note 129.

139. *See* H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2012) available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hb736>.

140. *See* VA. CODE ANN. §§ 24.2-506, -521, -543 (Supp. 2012); *id.* § 24.2-545 (Repl. Vol. 2011 & Supp. 2012).

141. *Id.* §§ 24.2-506, -521 (Supp. 2012).

142. *Id.*

143. Wesley L. Hester, *Redistricting Could Hinder Hopefuls*, RICH. TIMES-DISPATCH, Jan. 7, 2012, at A1.

144. *See* H.B. 1151, Va. Gen. Assembly (Reg. Sess. 2012) (as introduced, Jan. 16, 2012).

145. *Compare* H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2012), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hb1151> (noting Governor’s recommendation received by General Assembly on April 9, 2012), with Wesley P. Hester, *4 Make Ballot for Senate Primary*, RICH. TIMES-DISPATCH, Mar. 31, 2012, at B1 (noting all major candidates had filed signatures).

did not trip up any of the candidates.¹⁴⁶ The governor signed the legislation after amending it by deleting the emergency clause.¹⁴⁷

III. CONCLUSION

Aside from a few high-profile measures and controversies, late 2011 and 2012 have brought only minor changes to Virginia's election laws. Some issues, however, attracted a great deal of attention. In a much-debated change, Virginia tightened its voter identification laws.¹⁴⁸ Second, controversy surrounding the presidential candidate petition process brought a national spotlight to Virginia's elections.¹⁴⁹ Lastly, after a year of debate, the Commonwealth updated its congressional districts and faced a challenge to the law's constitutionality.¹⁵⁰ With the upcoming presidential election and Virginia's role as a battleground state,¹⁵¹ this spotlight likely will continue to shine on Virginia's elections.

146. See, e.g., Press Release, Republican Party of Va., Four GOP Candidates Certified for U.S. Senate Primary, (Mar. 30, 2012), available at <http://www.rpv.org/node/1300>; Press Release, Democratic Party of Va., Tim Kaine Qualifies as Democratic Nominee for U.S. Senate, (Mar. 30, 2012), available at <http://www.vademocrats.org/news/press/tim-kaine-qualifies-democratic-nominee-us-senate>. But see *infra* note 150 (discussing that two presidential candidates who did not qualify for failure to meet the 10,000 signature requirement such that the congressional district rule was not tested).

147. H. JOURNAL, House of Delegates of Va., Reg. Sess. ___ (2012), available at <http://leg1.state.va.us/cgi-bin/leg540.exe?ses=121&typ=bil&val=hbl151>. Had the legislation gone into law as sent to the governor, it would have subjected non-party candidates to the previous lines, § 24.2-543, after the new congressional district lines had been in place for several months. See *supra* note 129 (describing preclearance of the congressional redistricting legislation).

148. See *supra* text accompanying notes 13–40.

149. See *supra* text accompanying notes 121–47.

150. See *GOP: Newt Gingrich, Rick Perry Fail to Qualify for Virginia Primary*, MSNBC (Dec. 30, 2011) http://today.msnbc.msn.com/id/45782410/ns/today-today_news/t/gop-newt-gingrich-rick-perry-fail-qualify-virginia-primary/.

151. See *Virginia's Profile as Battleground State Rises in Presidential Contest*, FOXNEWS (May 4, 2012), <http://www.foxnews.com/politics/2012/05/04/virginia-profile-as-battleground-state-rises-in-presidential-contest/print>.