



★ V I R G I N I A ★  
**STATE BOARD**  
*of* **ELECTIONS**



**Review of Presidential Primary**

**February 12, 2008**

**in Chesterfield County**

**May 23, 2008**



\*VIRGINIA\*  
**STATE BOARD**  
*of* **ELECTIONS**



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## **A. Review Team: Abstract of Presidential Primaries on February 12, 2008**

Voting is a fundamental right and voters expect that the Commonwealth will conduct elections in an orderly and uniform manner, thereby providing an opportunity for all eligible voters to participate in the electoral process. Any impediments to this right, whether intentional or unanticipated, threaten the very foundation of our government. Hence, we are obligated to scrutinize our processes and procedures, always with a view toward making this process as accessible as possible.

On February 12, 2008 the Commonwealth of Virginia held dual Presidential Primaries in 134 localities. In one locality, Chesterfield County, 299 voters cast their ballot on scrap pieces of paper. The State Board of Elections, on advice of Counsel in the Office of the Attorney General, determined that the Code of Virginia did not allow counting the 299 handwritten ballots because they were deemed unofficial ballots. Hence, 299 voters were harmed.

Chesterfield County does not support this view and urges SBE to count the votes, arguing that the emergency circumstances justified their instructions related to using handwritten ballots and made them official ballots that should be counted. Such a view is troubling for the SBE and potentially could undermine the integrity of elections in the Commonwealth. As a result of voter complaints and a formal complaint initiated by the Democratic Party of Virginia, SBE formed a Review Team to examine processes and procedures, including election materials, related to the election. The Review Team found long lines and extended wait times presented voter disenfranchisement concerns as great as or greater than the handwritten ballots issue caused, in part, by Chesterfield's exclusive reliance upon paper based optical scan voting equipment.

The review of the documents revealed that the votes of the paper ballots were consistent with the official ballots in that the majority of votes cast supported the winning candidate. Furthermore, the Review Team discovered that the ballots ordered by the County for use on that day had not been properly allocated among the precincts within Chesterfield County. Specifically, nine precincts ran out of official Democratic ballots and officers of election instructed the voters to use handwritten unofficial ballots, per authorization of the Electoral Board of Chesterfield County.

Observations of voters and officers of elections on that day indicated that some of the problems that day could have been avoided if they had been allowed to split the pollbooks alphabetically. They had been instructed by the General Registrar not to split the pollbooks and to have only one line during check-in. However, some officers of elections used their better judgment and split the pollbooks as recommended by the State Board of Elections. Moreover, witnesses observed several persons leaving the polls because of the long lines. Some persons with disabilities unable to stand for an extended period left as well.

The findings of the Review Team support the following recommendations:

- a. After every election there needs to be an evaluation of the election, to identify what worked well and where improvements need to be made. Post election evaluations, including comments from voters and officers of elections, should be reviewed at both

the local and state levels with the emphasis directed toward improving subsequent elections. These reports could also assist the SBE in documenting the need for legislation and looking at training provided for officers of elections, General Registrars and Electoral Board members. Agreements with polling place locations should be reviewed for parking and accessibility concerns.

- b. Carefully scrutinize every procedure and process associated with conducting elections. Specifically, look at how ballots are ordered for elections in the Commonwealth. Require supporting justification for ballot orders (SBE-612 forms) for less than all of the registered voters in a precinct. Track, review and comment on justification provided. Justification must include some analysis of past performance to determine future ballot needs. This will require a database to track the information and SBE must look independently at voting trends in evaluating these forms, although great deference will be given to the locality's recommendation. This recommendation would require additional staffing.
- c. Educate voters about absentee voting. Many voters have special needs and are eligible for voting absentee. In an effort to eliminate long lines on Election Day and to prevent voters with special needs from leaving the polls without voting, the locality and the State Board of Elections must make every effort to communicate to voters the benefits associated with absentee voting, if they are indeed eligible to vote absentee. Additionally, it must be communicated to voters that the registrar's office is open on two Saturdays prior to the General Election in November for in-person absentee voting. This recommendation would require additional funding.
- d. Establish a minimum level of training necessary for officers of election. Expand training of officers of election to deal specifically with unanticipated emergency situations. Officers of elections need clear instructions regarding what to do when the lines are extremely long and the voters are upset; when ballots are running low and under what circumstances copies of ballots can be made from copiers inside or outside of the polling place; and under what circumstances handwritten ballots can be used when equipment is inoperable. The Election Assistance Commission has even stated that officers of elections should be trained in creating an audit trail to track and review procedures to document compliance with election laws and procedures. Any deviations from normal procedures will be included in this audit.
- e. Clarify the roles of the Electoral Boards and General Registrars. The tasks required of Electoral Boards used to be relatively simple in nature; thus, the position grew into one of political patronage. The tasks currently required by Electoral Boards have increased and have become more complex, especially with the new technologies. Many of those tasks require much more than a part time Electoral Board. For that reason, many Electoral Boards delegate much of their authority to their General Registrar or rely very heavily on the advice of their General Registrar.

## **B. Introduction**

The 2008 Presidential Primaries on February 12, 2008 resulted in the State Board of Elections receiving complaints from voters in Chesterfield County related to the election. Specifically, voters alleged that in addition to long lines which resulted in wait times in excess of 60 minutes, a number of voters were unable to vote because of the lack of ballots. In fact, 299 voters who voted on scrap pieces of paper did not have their votes counted because of a state law prohibiting the casting of votes on anything other than an official ballot. Hence, these voters were basically disenfranchised and unable to exercise their right to participate in the election on February 12. Moreover, as a result of this mishap, deemed egregious by many, the State Board of Elections is reviewing these voter complaints and the formal complaint received from the Democratic Party of Virginia as related to the occurrences on February 12. (Exhibit 1)

The State Board of Elections, in response to these complaints, formed a Review Team, consisting of Valarie Jones, Deputy Secretary; James Alcorn, Confidential Policy Advisor to the Secretary; and Martha Brissette, Policy Analyst. They all possess a Juris Doctor degree. These members of the SBE staff were tasked to evaluate the election process in Chesterfield County with a view toward identifying the issues and proposing corrective action in order to properly prepare for future elections.

Hence, the report prepared for your review contains the Review Team's findings, opinions and recommendations as related to Chesterfield County. Moreover, it is SBE's desire to prepare a report that will be both informative and instructive for the elections community in the Commonwealth as we prepare for future elections, specifically the Presidential Election on November 4, 2008. It is not our intent to dwell on what occurred on February 12 for the sake of attributing blame only, but to look beyond what was to what should have been and what will be for future elections in Virginia. Our obligation is primarily and singularly focused toward ensuring that qualified voters are able to participate fully in the electoral process and that every vote is counted.

## **C. Statement of Facts**

### **Pre-Election**

The Presidential dual primaries were scheduled in Virginia for February 12, 2008. Although a week after what is known as Super Tuesday, where a third of the states throughout the country held primaries, the Commonwealth of Virginia was viewed as a major player in selecting the nominees for both the Republican Party and Democratic Party.

Billed as the Potomac Primary, two states (Maryland and Virginia) and the District of Columbia were holding their primaries on February 12, 2008. In preparation for the dual primaries, the

localities have to, among the myriad of duties related to conducting elections, ensure that a sufficient number of ballots are ordered.

The responsibility to order and produce ballots for elections is a local responsibility with some state oversight. (Exhibit 2) In Chesterfield County the Electoral Board had the responsibility for determining the number of ballots to be printed for the February 12<sup>th</sup> election.

All localities are required to submit form SBE-612 (Certificate of Number of Ballots Ordered to be Printed). The State Board of Elections received the Form SBE-612, but did not communicate to Chesterfield County as to whether or not the amount order was sufficient.

The form submitted by Chesterfield County to the State Board of Elections dated January 28, 2008 (Exhibit 3) indicates that they ordered fifteen (15%) percent of the total number of registered voters in the election district. The signature on the form was that of the Secretary of the Electoral Board, Horace Mann. The form indicated that Larry Haake affixed Horace Mann's signature to the form. Chesterfield County has approximately 190,247 registrants. (Exhibit 4)

The oaths of printers received from Chesterfield indicate that the printer created 35,600 Republican ballots and 30,000 Democratic ballots on January 4, 2008. A second oath from the printer indicates that they created another 12,000 Republican ballots and 12,000 Democratic ballots on February 6, 2008. Combined, Chesterfield County ordered 47,600 Republican and 42,000 Democratic ballots before Election Day.

On the Saturday prior to the election, per Mr. Haake, Chesterfield County had problems with the ballot printing machine in their office. The part needed for the machine was ordered the weekend before the election.

As is customary, the Chesterfield County General Registrar conducted training for officers of election on February 9, the Saturday before primary Election Day. One officer serving as chief for the first time complimented the training she received and credited it with helping her maintain control and organization under trying circumstances. The training focused on issues that typically arise on Election Day such as voters in the wrong precinct or voters omitted from the pollbooks but did not address what actions to take if they ran out of official ballots. Additionally, the State Board of Elections makes training materials available to the local registrars who have discretion preparing the training packages actually used. Materials provided by the State Board include "What If" guides for handling common issues, etiquette and accessibility awareness.

The training sessions also provide officers of election an opportunity to share ideas about what works in dealing with voters on Election Day. One experienced officer recommended to others at training that pollbooks be split alphabetically but was overruled by instructions from Mr. Haake that pollbooks were not to be split. Mr. Haake indicated concerns about insufficient personnel and access to resources.

## **Election Day (February 12)**

In the Commonwealth of Virginia the polls open at 6 am. Officers of election are usually at the polls at 5 am in order to set up for the polls to open promptly at 6 am. There were no reports from voters that the polls did not open as scheduled. Staff at the State Board of Elections is also at work at 4:45 am so as to respond, if necessary, to officers of election as they are preparing for the polls to open. Attorneys from the two political parties (Democratic and Republican) are in the State Board of Elections' office on that day in order to address any issues which may arise in the field. On that day attorneys from the two political parties were in the Command Center with the Secretary of the State Board of Elections, an attorney from the Office of the Attorney General, the Deputy Secretary, Confidential Policy Advisor and several other SBE staff who visited the Center throughout the day.

Beginning about 8 am calls came in to the State Board of Elections regarding Chesterfield County. (Exhibit 5) The callers complained about the long wait time and that the check-in process was taking too long. Other callers complained about delays in the voting process and discourteous behavior by some officer of election. Due to the number of calls received from Chesterfield County, Sec. Rodrigues called Mr. Haake and inquired as to whether they needed assistance from the State Board of Elections. The response to the Secretary was no. (Secretary Rodrigues made a similar offer to the Henrico General Registrar who accepted it.) Mr. Haake initially denied that there were long waits at the polls. David Turetsky, the observer from the Democratic Party, asked Mr. Haake to call his polls to confirm. Mr. Haake called back and stated there was a high spike in the voters during the early morning hours. However, Mr. Haake did not anticipate that the spike would continue throughout the day.

Prior to this, one polling place was already dealing with long lines. The chief officer of election at Falling Creek 205 received complaints about long lines by 7:30 am. Even though she was instructed by Mr. Haake not to split the pollbook, she decided it was necessary and instructed her team to do so. Voting stopped momentarily while she trained and regrouped her staff.

The officers of election in Chesterfield reported turnout numbers to the General Registrar at 10:00 am and 2:00 pm. The Electoral Board met around noon to review the day and prepare for the evening. According to Mr. Haake, the Electoral Board discussed the turnout figures at their noon meeting and determined that they were okay. Somewhere around 2:00 pm, Mr. Haake states that the Board decided they needed to produce more ballots. Mr. Harris recalls asking for more ballots earlier in the day. Mr. Haake began producing ballots on Chesterfield's ballot printer which was malfunctioning. Mr. Haake states that the part, which was to be delivered on Tuesday, got stuck on the UPS truck and was installed on Election Day. UPS attempted to deliver the part and found that the door was locked. It was eventually delivered later that day. Prior to the delivery of the part, Chesterfield County printed ballots. When the part arrived, printing continued. Not until late in the afternoon did Mr. Haake start using high-speed photocopiers to reproduce ballots. Chesterfield then created around 4,500 additional ballots on Election Day and sent them in tandem to 36 precincts.

Officers of election called the registrar's office throughout the day and afternoon requesting more ballots. One officer stated that she called for more ballots hourly during the afternoon and evening. Officers were told that ballots were on their way and around 2:00 pm, members of the Electoral Board began delivering ballots to precincts which were predicting shortages.

Around 6:00 pm, the first call came in to the registrar's office to indicate that a precinct had run out of ballots. The call was transferred to Jack Clifford. Per comments made at the meeting before the Board of Supervisors on February 27, it was Jack Clifford, the chair of the Electoral Board who instructed officers of elections to use handwritten ballots. Mr. Mann and Mr. Harris were out of the office delivering ballots when the decision was made. Those in the office did not consult with an attorney, other than Mr. Clifford, prior to making the decision.<sup>1</sup> Mr. Clifford and Mr. Haake later explained that the instructions were not communicated simultaneously to all officers of election, but the recommendation related to handwritten ballots was given as the officers of election called to report ballot shortages.

The following nine precincts would run out of ballots and resort to handwritten official ballots:

- 102 South Chester
- 202 Beulah
- 205 Falling Creek
- 207 Chippenham
- 308 South Manchester
- 403 Brandermill
- 408 Reams
- 409 Manchester
- 515 Davis

At the same time, the State Board received a call indicating that precincts in Chesterfield County had run out of ballots. Sec. Rodrigues and James Alcorn immediately spoke with Mr. Haake on the telephone. Secretary Rodrigues offered assistance printing or distributing ballots. Mr. Haake indicated that he did not need any help, a statement contrary to Mr. Haake's recollection of this issue. The State Board offered to have State Police deliver ballots to which Mr. Haake declined. Sec. Rodrigues stated that State Police were on their way. Secretary Rodrigues called the Colonel of State Police at 6:06 pm and Mr. Alcorn followed up with an email to Mr. Haake at 6:09 pm.

In the polling places, officers of election tried to control the situation and calm voters as lines grew longer and ballot supplies grew shorter and eventually exhausted. One officer said, "I cried. I was told that someone would be forthcoming [with more ballots]. No one ever came."<sup>2</sup> Some voters reported waiting in line over an hour. Several precincts reported shortages of

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<sup>1</sup> *Heated Debate at State Board of Elections Hearing*, NBC12 News, March 5, 2008.

<sup>2</sup> *Testimony: Haake Repeatedly Told – But Ignored County Voting Fiasco*, Richmond Free Press, March 6, 2008.



parking which caused hazards to voters attempting to park and caused some voters to walk long distances. Numerous voters reported seeing long lines which crept to a crawl and eventually stopped moving when ballots ran out. Numerous voters reported seeing other voters leave because of the lines; some of those who left had meetings to attend or family to care for. One officer stated that she “was afraid they were going to string me up in that basketball court.”<sup>3</sup>

Without further guidance from the Electoral Board or General Registrar, the nine precincts which resorted to handwritten ballots used different procedures in their polling places. Some comments from voters that day are reflected below:

- a. At 202 Beulah Precinct one voter who was offered an opportunity to vote on regular loose-leaf paper declined the offer and left without voting. Another voter at that precinct stated that she and her husband voted on paper.
- b. At 205 Falling Creek Precinct one voter witnessed voters voting on paper. She was instructed to write the candidate’s full name as it appeared on the ballot. She was also told that the paper ballot would be counted the following day. Another voter overheard the officer of election informing voters that they had run out of ballots and could only vote on scrap pieces of paper. She too was informed that the vote would be counted.
- c. At 208 Meadowbrook Precinct the voter and his wife voted around 11:45 am with a wait time of approximately 30 minutes. He stated that when he voted the precinct was down to the last 50 ballots. It was clear to him that there was a large Democratic turnout.
- d. At 403 Brandermill Precinct the voter was informed that they had no more Democratic ballots. The voter was directed to write the candidate’s name on paper and place the ballot in the machine. He was assured that the vote would be counted.
- e. At 408 Reams Precinct the voter was given a piece of paper and informed that if the vote was challenged it would be deemed legal and counted. It took this voter until 10 pm to vote after arriving at 6:45 pm
- f. At 409 Manchester Precinct the voter was unable to vote because they had no Democratic ballots. The voter could not wait because the voter had a 2 year old child with him/her.
- g. For a listing of comments received by SBE from voters, see Exhibits 5 and 12.

Some officers checked in and recorded voters in the normal fashion. Others did not record voters who used handwritten ballots, a fact disputed by the General Registrar. Still others created a separate list of voters who used handwritten ballots. For ballot materials, precincts used notebook paper, reel to reel computer paper, colored paper, or sample ballots. Most of the paper was distributed blank while others contained blanks for voter and candidate names or a pollbook count number. Without sample ballots to distribute, one officer copied an official ballot to post as a reference for voters. Comments from officers of election are included herein:

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<sup>3</sup> *Voting Debacle Draws Critics*, The Progress Index, March 6, 2008.

- a. Precinct 102- We called central about being low about six times until we finally told them we were out. We were told by central that the ballots had to be printed and that they were on their way.
- b. Precinct 205 – The chief officer was instructed at Saturday training not to split the pollbooks. However, out of necessity she split the pollbooks. She started running low on ballots at 2 pm and was out 6 pm. Voters at her precinct voted on pieces of paper. About 100 additional ballots were delivered to the precinct and lasted about fifteen minutes. When she ran out of ballots she got blank paper from a parent and cut it up. She instructed the voter to write the pollbook number, their name and the candidate's name. She even gave them her phone number so the voter could contact her regarding verification of the vote. Even though she was promised additional ballots, the ballots never arrived.
- c. Precinct 308- The deputy chief for this precinct stated that everything went well and the only difficulty was running out of Democratic ballots at the end of the day. All the workers had been well trained. We spent an extended period of time after the polls closed, making sure we accounted for every single ballot that was issued to the precinct. The officer of election stated that the votes that were hand written in the precinct should have been counted. They had 5 handwritten Democratic ballots. The voters wrote their name on a blank sheet of white paper and wrote the name of the candidate they were voting for on the paper.
- d. Precinct 408- In our precinct I called for additional ballots and 100 were delivered by Mr. Clifford of the Electoral Board. Mr. Clifford told me that they were printing additional ballots as fast as they could and that they were having to deliver them all over Chesterfield County. When I called the registrar's office I was informed that more ballots would be coming. It was at that time that I was told that in the event we ran completely out of the printed ballots, we were to use plain paper on which the voter would be instructed to write down his/her choice. They were to be placed in the emergency ballot box and hand counted after the election was over and before the results were called in. The process to check in was slowed down by the necessity to keep separate poll books. The voter stated: I am deeply ashamed of the decision of the State Board of Elections to disqualify the handwritten votes that were cast in my precinct.
- e. Precinct 409- We ran out of ballots for the 1st time ever in my 20 years of experience. I realized early in the morning that there could be a problem because there were fewer Democratic ballots than Republican ballots to start with. A major problem was allowing only one line. For additional comments from officers of election, see Exhibit 6.

Moreover, some documents revealed that on the day of the election officers of election did not always indicate that a voter who voted on a handwritten ballot had been checked off on the pollbook count form. One officer of election even devised an original way of identifying the voters, using handwritten ballots instead of using the prescribed pollbook count form.

Electoral Board members with the assistance of State Police transported ballots after 7:00 pm. As other polls closed, some offered to transfer some of their extra ballots to neighboring

precincts. Chesterfield voters continued voting until after 9:00 pm – two hours after the polls closed.

## **Post Election**

**February 13:** The Chesterfield County Electoral Board conducted its canvass, where they approved the Statements of Results for all precincts within Chesterfield County. At that time they counted the 299 handwritten ballots and included those ballots in their abstract which was subsequently submitted to the State Board of Elections. (Exhibit 7)

**February 19:** The Democratic Party of Virginia filed a formal complaint with the State Board of Elections related to the election in Chesterfield County. (Exhibit 1)

**February 20:** The State Board of Elections' Review Team met in the Chesterfield Circuit Clerk's Office on February 20<sup>th</sup> to unseal and inspect the pollbooks, and other documents related to the February election. The Review Team also included representatives from the Office of the Attorney General: Attorneys Jasen Eige and Jim Ingold. There were observers from both the Democratic and Republican Parties.

Prior to arriving, the Review Team requested the Clerk to make available the election materials from the nine precincts alleged to have handwritten ballots. The Clerk provided those along with one large, unofficial envelope marked "Additional Counted Ballots."

Inside the "Additional Counted Ballots" envelope were handwritten ballots from several precincts. Further inspection of election materials confirmed the use of handwritten ballots in other precincts. The ballots ranged from note paper, blue paper ripped in half, copier paper ripped in quarters, reel to reel computer paper, and a sample ballot. The ballots were in various different containers including the "Additional Counted Ballots" envelope, one envelope labeled "votes that were written when we ran out of ballots," and others were in the envelope provided by SBE for counted ballots.

On these scraps of paper the handwritten ballots were quite diverse in the information written on the ballots. Some ballots simply contained the name of the candidate, either the last name only or the first and last name. Some scraps of paper contained the name of the party, along with the candidate's name, a number in the upper left hand corner, and what appeared to be the name and address of the voter. A question was also raised as to whether any of the names affixed to these handwritten ballots were not registered voters.

Some scraps of paper were folded and it appeared that they affixed an "I voted" sticker to the unofficial ballot. Some other scraps of paper contained additional language such as "please, please," "I hope this counts," and one even contained a stick figure drawing of a female.

Moreover, the Statement of Results in Precinct 408 revealed that the election officers were unsure of the quantity of ballots provided, while another precinct's Statement of Results revealed that there were more ballots counted than voters indicated on the total pollbook count. The discrepancy between these totals did not appear on the Statement of Results, from which a

conclusion can be drawn that certain procedures in completing the Statement of Results were not followed. (Exhibit 8)

**February 21:** Following that review of the documents and unofficial handwritten ballots, the State Board of Elections issued an official statement concerning the findings of the Review Team. Staff emphasized that it is the Statement of Results, completed by the officers of election and used by the electoral board in arriving at the numbers on the locality's abstract, which is the document used to certify the election.

Copies of the Statement of Results from precincts 408 and 515 were distributed to the media to illustrate questionable procedures based on the review of the Statement of Results and other election materials of other precincts. (Exhibit 7)

**February 22:** The State Board of Elections sent a letter to the Secretary of the Electoral Board of Chesterfield County, Horace Mann III, requesting a corrected abstract and an explanation of the discrepancies on the Statement of Results. (Exhibit 9) The SBE believed that Chesterfield County had provided SBE with an abstract which included discrepancies that needed to be explained. Moreover, the SBE sent a letter requesting that they respond to a number of inquiries related to the election. (Exhibit 10)

**February 26:** The State Board of Elections met to certify the election. Secretary Nancy Rodrigues and Vice-Chair Harold Pyon were in attendance. The Chair of the Board, Jean Cunningham, was out of the country.

Deputy Secretary Valarie Jones advised the Board that SBE was aware that the abstract of votes submitted by Chesterfield County contained votes from unofficial hand written ballots. The Review Team was sent to Chesterfield County to review the paper ballots and the election process. The Review Team determined that there were 299 handwritten votes cast on pieces of paper or unofficial ballots. Ms. Jones explained that under §24.2- 665 of the Code of Virginia only official ballots can be counted. Therefore, on the advice of legal counsel from the Office of the Attorney General, the abstract submitted at the meeting was modified to reflect that only votes on official ballots would be included in the abstract of votes.

Secretary Rodrigues announced that there would be a public hearing on the entire election process in Chesterfield County on March 5, 2008. The meeting would allow the voters of Chesterfield County affected by the actions of the election officials to recount what they had experienced. Members of the Chesterfield County Electoral Board and the General Registrar were invited to participate in the discussion.

**February 27:** At the Chesterfield Board of Supervisors' meeting, Jack Clifford, then chair of the Electoral Board, spoke on behalf of Chesterfield County. He stated: "We screwed up. We make no excuses. It will not happen again. For the next election we will have 190,000 ballots".

He went on to state that the SBE had approved their ballot order and at no time did they tell us to order additional ballots. According to Clifford, usually Chesterfield voters vote Republican. "We just did not expect the large turn out. Mitt Romney dropped out. Some Republicans voted in the Democratic primary, which inflated the numbers for the Democratic primary". According

to Clifford, officers of elections informed him that they were aware of people known to be Republican voting in the Democratic primary.

The Chesterfield General Registrar looked at the prior race in November 2007 to gauge the number of anticipated voters for the presidential primaries.

Mr. Clifford stated that certain precincts spiked more than other precincts. "We will never know why it happened. Maybe some Ph.D student will write a paper on that election". Per Jack Clifford, the Electoral Board was informed via their officers of election that they were running short on ballots. "We were printing ballots at the registrar's office. Usually the evening spike is less than the morning spike. In this case, the evening spike was more than the morning spike".

Jim Holland, the Dale District Supervisor, wanted to know the process used to order ballots for the election. He asked if the County had considered the "Obama factor", the fact that Democrats were turning out in record numbers to vote. He concluded his remarks by stating that the integrity of the voting process must be maintained.

Mr. Clifford stated that it was his decision to count the ballots and let voters use paper ballots. He specifically stated that during the Ollie North and Jim Miller race for office, some hand written ballots were counted because they did not want voters to wait while additional ballots were being printed and delivered to polling precincts.

One supervisor strongly suggested that all of the Chesterfield delegation should go to the SBE public meeting on March 5, 2008.

Mr. Clifford asserted that they were not notified that SBE would go to Circuit Court to review the election documents on February 20th. "We learned about these issues through the media."

When asked about training of election officers, the response was that Chesterfield trains their election officers and they also go through re-training. Even the chiefs and deputies are re-trained the Saturday prior to the election.

On whether to count the 299 hand written ballots the response was that "the State and Federal Constitutions trump state law. Yes, the votes should have been counted." Clifford went on to say: "The SBE did what they did without contacting us and hearing from us as to why the ballots were counted."

When questioned about identifying personnel for the election, Clifford said: "We have a lower number of workers during a primary". When questioned by the independent supervisor, who is neither Democratic nor Republican, about underestimating the ballots, Clifford stated: "In some respect, it is tied to the equipment used in Chesterfield County. We do not use Direct Recording Electronic (DREs) equipment and using the optical scan machines increases the time each voter needs to complete the voting process. After all, they rely on paper".

Jack Clifford concluded his remarks by stating that on that day 6,500 additional ballots were printed. They did not split the lines because of lack of personnel to assist the voters and lack of available ballots. His response to the voters was: "We screwed up and it will not happen again."

**March 3:** Members of the Review Team went to Circuit Court in Chesterfield County to obtain copies of additional statements of results. The Clerk of the Circuit Court requested the Review Team to return on the following day to obtain the requested statements of results.

While there, the Review Team spoke with Mr. Mann from the Chesterfield Electoral Board. Mr. Mann questioned why the Review Team would want to inspect documents outside of the nine precincts which used handwritten ballots.

**March 4:** There was a meeting in Chesterfield County's registrar's office with the General Registrar, Electoral Board members (Rea Hart, Earnest Harris and Horace Mann) and the Review Team (Valarie Jones, James Alcorn and Martha Brissette). Mr. Clifford who retired from the Board that morning also attended the meeting. The purpose of the meeting was to dialogue with Chesterfield County about circumstances related to the February 12<sup>th</sup> election, assessing the election process with an emphasis on improving processes and procedures for future elections in Virginia, especially the presidential election in November 2008. There was an informative discussion about the election on February 12 and the following issues were raised with recommendations proposed to improve the election in November 2008:

Mr. Haake stated that one problem was that he could not secure enough officers of election and had limited resources.

Mr. Haake and Mr. Clifford stated that SBE is partially responsible for the shortage of ballots because per the Code of Virginia they are to review the SBE 612 ballot order submitted by the locality, even though the SBE usually defers to the judgment of the locality in estimating ballots needed for an election. When questioned, Mr. Haake stated that the localities – and not SBE – are in the best position to determine how many ballots to order.

Mr. Clifford took issue with Valarie Jones calling him prior to the meeting on February 26 to inform him of the Review Team's recommendation related to not counting the handwritten ballots. Mr. Clifford argued strenuously that the handwritten ballots were not against the law and should be counted.

The group discussed some discrepancies on the SORs, specifically the difference between the number of voters checking in on that day, the number of ballots used that day and the number of votes cast in the election. Some officers of election on Election Day created their own poll book count numbers. These issues need to be addressed at training.

Mr. Haake explained that their ballot printer, although malfunctioning, did not hamper their ability to create additional ballots.

Mr. Clifford explained that ballots were not moved from one precinct to another because logistically it is difficult to move from one part of the County to another and it may make auditing ballots more cumbersome. However, it could occur slightly in Chesterfield but not on a large scale.

Mr. Haake explained that on February 12 there was a complete change in voting patterns in the 9 precincts which ran out of ballots. Typically, they experienced a rush of voters in the morning. However, this election showed a heavy turnout all day.

Chesterfield is proposing an evening auditor's position to assure that polls are properly closed. Mr. Haake explained that officers work a long 16 to 18 hour day, are tired at the end of the day, and thus make mistakes in procedures and paperwork. The evening auditor position would bring in fresh workers – possibly after they finish their normal jobs – to complete the paperwork at the close of polls. Specific training on these tasks would be provided to the evening auditors.

Mr. Haake explained that sometimes statements of results have to be corrected and signed by officers of elections after materials go to the Clerk of Circuit Court. In this case, Chesterfield made changes to the SORs in their office, failing to modify that same documentation secured at the Clerk's office. Mr. Haake admitted that the two sets of documents would not match. He stated that often times actions are not always made strictly by the book but this is reality.

### **March 5: Public Meeting in General Assembly Building**

The State Board of Elections held a public meeting at 10 am in the General Assembly Building. The purpose of the public meeting was to provide citizens and persons representing groups or organizations with an opportunity to make comments regarding the primaries on February 12, 2008, with the emphasis focused on the occurrences in Chesterfield County. The full board was present: Jean Cunningham, Chair; Harold Pyon, Vice-Chair; and Nancy Rodrigues, Secretary. The general registrar (Larry Haake) was present, along with Electoral Board members, Horace Mann, Earnest Harris and Jack Clifford. Other attendees included Senator John Watkins, Senator Henry Marsh and Delegate Roslyn Dance. Comments made by participants at the public meeting on March 5 include the following:

- a. Although running low on ballots, one precinct received additional ballots and provided surplus ballots to another precinct.
- b. The wait time to vote was approximately 1.5 hours. She observed an elderly person being assisted by an officer of election by allowing her to move to the front of the line. A lady in a wheelchair arrived and it appeared that she did not know what to do.
- c. Voter at Chippenham Henning Precinct had difficulty finding parking when she arrived at 6:00 pm. She voted around 8:15 pm. She did receive a ballot. While she was there she observed the state police bring additional ballots.
- d. The Democratic observer at SBE overheard calls from officials around the state and participated in discussions that day at SBE. Additional Democratic ballots were requested. Chesterfield County was the source of a disproportionate number of calls from voters. Voters were irate. The Secretary of SBE called the General Registrar in Chesterfield to report voter concerns about lengthy voting process at polls. The GR response indicated that help offered by SBE was not needed. The GR indicated that the early morning rush was normal. The GR was advised to plan for the evening rush by splitting the pollbooks. The GR stated that there would not be another rush because typically voters vote before work. The Democratic observer believes that Virginia needs to evaluate the use of separate pollbooks in that it makes the voting process very cumbersome and time consuming. (Exhibit 11)

- e. The focus needs to be on planning for the election in November. We need to increase the ballot order and we need to increase the number of poll workers. Special attention needs to be directed toward the complete voting process from parking to check-in to voting.
- f. The high national turnout in prior primaries makes insufficiency of ballots inexcusable. Channel 12 received complaints about Chesterfield County. For the November election we need to plan for 100% turnout. We need a simple process for busy people. No excuse absentee voting would reduce pressure on Election Day and burden of long lines on handicapped voters.
- g. This voter observed many people leaving because they did not want to wait in the long line.
- h. There was a systematic failure of the election machinery on February 12<sup>th</sup>. Citizens seeking to exercise the right to vote faced unnecessary burdens. Some of the problems included parking, inadequate staffing and training, inadequate supplies; lack of assistance for handicapped voters, and inadequate information to voters who used paper ballots.
- i. What happened in Virginia reminded the speaker of the Florida incident in 2000. The speaker, representing the Democratic Party of Virginia, was concerned that the incident in Chesterfield County had a disproportionate impact on minority precincts. The improvised ballots showed total disarray in the election process. Voters who arrived late found no ballots to use. One officer of election even went home and got more paper. The Code of Virginia addresses emergencies. The voter agreed with the SBE in that the handwritten paper ballots cannot count and per 24.2-665 to count the ballots would set a precedent that may pose problems in future elections. The proper improvisation is not resorting to using scraps of paper. The officers of election needed to have means for making copies. The speaker advised SBE to pay close attention to the Anderson affidavit, which was a microcosm of problems related to the election. The party's investigation will continue. They want to understand why votes exceeded the number of voters as indicated on the statements of results. Moreover, they wanted to know whether there was a contingency plan in place for a large voter turnout.
- j. The speaker representing the NAACP got calls as soon as the polls opened from voters with complaints of long lines in Chesterfield County. According to the speaker this was the locality that had previously placed police at black precincts. The General Registrar denied that this action intimidated voters. The action on February 12<sup>th</sup> had a disparate impact on black voters. They received as many as 65 calls that day regarding Chesterfield County. The NAACP has made complaints regarding February 12<sup>th</sup> to the Department of Justice.
- k. The voter thanked SBE for the meeting. The voter was upset about long lines and lack of ballots. His constituents were also upset. What happened in Chesterfield County was described as a screw up. It was a travesty. No other locality had problems. This voter represented the Dale District. The voter wants SBE to assure



that what happened in Chesterfield County would never happen again. It is paramount to honor the will of each voter.

- l. No one wanted what happened in Chesterfield County to occur. The Commonwealth has challenges for the November election and we are not ready. The incident in Chesterfield County was a warning. Local Electoral Boards need to look at planning for the November election. Let's use this time to make sure we don't deny anyone the right to vote. SBE should use this experience for the benefit of the voters.
- m. This speaker has spent 20+ years representing Chesterfield. He was thrilled at the high turnout, regardless of the political party. He hated to see the problems that arose. We should learn from this experience to benefit voters in the race in November. We need to look for positive solutions and suggestions.
- n. This voter believed that the interest and turnout history in primaries in past months should have been recognized. The voter believed that an unknown number of voters were deterred by what happened on February 12<sup>th</sup>. It could prevent voting in November. The voter wants the problem fixed so it doesn't occur again.
- o. This speaker requested that SBE hold a hearing during the evening hours or on the weekend to gather voters' comments. Also, he requested that SBE reconsider its decision not to count the handwritten ballots. The SBE should strive to protect voters from government error. Who was involved in process not to count the votes? The Democratic Party of Virginia should try to have a court of record rule on whether the votes are counted. The SBE should recall that the agency has had ongoing problems with Chesterfield County. They would not attend training, would not count valid provisional ballots, challenged identity of voters submitting valid identification documents and intimidated voters by stationing police at polling precincts. The voter requested that the Electoral Board and General Registrar resign. The Board of Supervisors should pass a resolution of no confidence in the Electoral Board and the General Registrar. This speaker received calls from others about Chesterfield County and referred those calls to SBE. He believes that SBE should err on side of voters and not penalize them for governmental mistakes.
- p. In the Falling Creek precinct there was a polling place change which caused the Chief to put up signs identifying the change. The Chief got 48 red, white and blue balloons to identify the change. Although instructed to use one line, the Chief instructed her team to split the pollbooks. They used a system to track pending copies. They also had to retrain officers of election on new procedures. Channel 12 arrived to observe the voting process. Their count was off by 13 due to transferring information from one pollbook to another. They did their very best under the circumstances. They checked on curbside voting and assisted a man who had recently undergone surgery. They began the day with 800 ballots and called hourly from 2 pm to 6 pm to report that they were running low on ballots. At 6 pm they got 100 ballots. At 6:30 pm they reported that they were almost out of ballots and were advised that some precincts were using paper. The school was locked. Hence, they did not have access to a copier. A person in line offered to help. The voter asked for

paper and was instructed to include her/his name to create an audit trail. The officer of election gave the voter a receipt with the pollbook number and General Registrar's phone number. The officer of election apologized to the voters. The officer of election was skeptical about using paper ballots, but feared that voters might "string her up" from the basketball hoop. At that point, the officer of election needed a method to assure the voters that their vote would be counted. The officer of election had no written instructions to deal with the situation. She wants transparency at the Division of Motor Vehicles. She had a situation where the couple had gone together to DMV. One was registered while the other was not. Her polling place had construction in the area. She requested assistance regarding parking. The Chief stated that she did not arbitrarily make up rules; they were created out of need at the time. She suggested that we need public service announcements to urge voters to check their voting status and location of their polling place before the November election. This would greatly help officers of election on Election Day. She feels confident that we will not have this problem (lack of ballots) in November. She wants voters to feel confident about the election process for the November election. She also asked that SBE reconsider its decision not to count the ballots. After all, the voters relied in good faith on instructions from the officers of election.

- q. Another officer at Falling Creek suggested that we have more poll workers in November and that we split the books 4 ways.
- r. Worker at Falling Creek suggested that we recruit more poll workers; train them so that they could better serve the public. Officers of election have to work 16 to 20 hours on Election Day.
- s. This Electoral Board member from another county stated that he expected a 10% voter turnout. However, he realized that the turnout would be higher but it was too late to get more officers of election. His Electoral Board decided to monitor closely the election with visits to precincts. In some Republican precincts they had more Democratic voters. In some places the lines were very long. He stated that the process in the Commonwealth is getting close to a train wreck. The SBE is a locomotive in danger of running off the rails. There is a 20% deficit in staff at SBE which can not be filled. The Secretary of the agency is lowest paid agency head. Some General Registrars earn more than the Secretary of SBE. We need to make changes well before the November election.
- t. We need to expect a large voter turnout in November. Incident in February was deemed human error, poor planning, and lack of preparation. Absentee voting would help with long lines. Fairfax County will buy optical scan voting equipment to supplement equipment they currently have.
- u. This experience should help the Commonwealth prepare for the election in November.
- v. When this voter arrived at Falling Creek at 6:45 pm, the voter was told that they had run out of ballots. The voter was given the option to write on paper. The voter went

home and got 4 pads of paper. The voter suggested that SBE hold another hearing in Chesterfield in the evening.

- w. The Electoral Board member suggested that the party representatives need to help recruit poll workers for the November Election. Moreover, we need to increase compensation for poll workers. He noted that the District of Columbia had a similar ballot problem on February 12<sup>th</sup>.

The SBE also received comments from voters who did not attend the hearing and their comments are summarized in Exhibits 5, 6 and 12.

## **D. Election Management**

### **Ballot Orders**

The responsibility to order and produce ballots for elections is a local responsibility with some state oversight. (Exhibit 2) In Chesterfield County, the Electoral Board had the responsibility for determining the number of ballots to be printed for the February 12<sup>th</sup> election. It is a given that many Electoral Boards rely upon the recommendation of their General Registrar to determine the number of ballots to order. In some localities the authority to determine the number of ballots to be printed is delegated to the local registrar. However, while one can delegate authority, they can never delegate the ultimate responsibility.

### **Electoral Board Responsibility**

While the General Registrar is typically the administrator of elections in a locality, the Electoral Board is the entity which has primary responsibility for the creation and distribution of ballots. For example, the Electoral Board is responsible for determining the number of ballots to order, order the printing, design and lay out the ballot, cause the seal to be affixed to the ballot, count and deliver the ballots. See §§ 24.2-612 – 621 of the Code of Virginia.

In their General Registrar and Electoral Board Handbook, the State Board of Elections issued the following guidance regarding to the number of ballots to order:

#### **15.6 Quantity Ordered**

You must order enough paper ballots to:

1. Supply each precinct, if any, using only paper ballots;
2. Supply each precinct using voting equipment with paper ballots to be used if equipment fails and to be used by voters who are physically unable to enter the polling place; and
3. Assure an adequate supply for absentee voters.

Chesterfield submitted their form SBE-612 to SBE on January 29, 2008. At that time, Chesterfield stated that they planned to prepare and order ballots equal to 15% of the total number of registered voters in Chesterfield for the Democratic primary and 15% for the Republican primary. (Exhibit 3) Chesterfield is one of only four localities in Virginia which relies solely on optical scan ballots. (The other three localities which do not have any DREs are Hanover County, Wythe County, and Fredericksburg City.) The remaining 130 counties and cities all have at least one DRE (electronic or touch screen voting device) in each polling place. In 2007 legislation was enacted by the General Assembly prohibiting localities from acquiring more DREs for voting. DREs do not require use of printed ballots and have prevented ballot shortages in other areas. Hence, those localities having a combination of optical scan equipment and DREs do not have to face the issue of running out of ballots. If they run out of ballots, they simply direct all voters to the DREs.

Locality	Ballot Order	Date of Order
Chesterfield County	15%	1/29/08
Hanover County	30%	12/21/08
Wythe County	16%	12/26/08
Fredericksburg City	68%	12/28/08

Chesterfield County waited until January 29 to submit their ballot order to the

	Democratic Primary	Republican Primary
First Ballot Order	30,000	35,600
Second Ballot Order	12,000	12,000
Ballots Produced on Election Day	4,500 <sup>4</sup>	0

State Board of Elections and had the benefit of seeing the first six states conduct their Presidential nomination. In those first four states, there was record turnout in the Democratic race and the results were split between the two top candidates. With less than a week before “Super Tuesday,” many pundits predicted that the race would continue for quite some time. The traditional thinking when the other three localities submitted their ballot orders (in December 2007) was that the races would be over after “Super Tuesday” and since Virginia would not impact the choice of nominee there would not be heavy turnout in Virginia.

Records received from Chesterfield indicate that on February 6, they decided to order an additional 24,000 ballots distributed evenly between the Democratic and Republican primaries. This equates to roughly 5.5% of the registered voters in Chesterfield. The table shows the total ballot order for each primary as a percentage of the registered voters in Chesterfield. Chesterfield would have 20.6% turnout in the Democratic primary. Overall, the number of ballots produced was sufficient; it was the allocation among precincts that proved deficient.

### State Board of Elections’ Responsibility

The State Board of Elections has oversight responsibility for elections and this includes the ordering and production of ballots. Sec. 24.2-612 of the Code of Virginia states, “If the State Board finds that, in its opinion, the number of ballots ordered to be printed by any local electoral board is not sufficient, it may direct the local board to order the printing of a reasonable number

<sup>4</sup> Estimated by Mr. Haake.

of additional ballots.” This is further indicated in the General Registrar and Electoral Board handbook.

From GR Handbook:

15.6 Quantity Ordered

You are required to certify to the SBE the number of paper ballots ordered. (§ [24.2-612.](#)) (See form [SBE-612.](#))

If the SBE determines the quantity you have ordered to be insufficient, you will be required to order an additional quantity.

When the ballot order is sent to the State Board of Elections, it is filed, without comment, as part of the necessary paperwork, receiving no analysis by staff within the SBE. The State Board does not have any staff assigned to review and comment on local ballot orders.

Chesterfield election officials stated multiple times that the State Board is partially to blame because they did not dictate a minimum ballot order to Chesterfield. However, Chesterfield County stated that the locality is in the best position to determine the proper number of ballots to order. During the Review Team’s discussions with Chesterfield officials on March 4, the team specifically asked who was in the best position to make the determination and Mr. Haake responded that he was. After all, there is the commonly held belief that it is the General Registrar who is most knowledgeable about the demographics within his locality and looks at this factor when determining the number of ballots to order. Additionally, one would presume that ballot ordering although not an exact science, it must be based upon a careful analysis of factors internal to the locality and those outside of the locality such as looking at national trends and prior voter turnout percentages in similar elections. The team also asked if Chesterfield had ever received any feedback from SBE regarding the number of ballots to order and Mr. Haake said that he had never received any feedback.

	Minimum Turnout	Maximum Turnout
General	30.8%	85.5%
Primary	0.1%	17.3%
Special	3.4%	37.8%

The Review Team believes that Chesterfield’s exclusive reliance on past turnout as a predictor for future voter turnout was flawed. Elections in Virginia can be classified into several categories such as general, primary and special. The turnout in each election

category can be quite different and overlap each other significantly. Roughly speaking, general elections garner more interest than primaries and special elections. However, turnout in primary and special elections can spike or dip widely depending on the particular race, candidate, or time.

Numerous indicators suggest that a higher than normal turnout could be predicted for the February 12, 2008 Presidential Primary. Turnout in other states can be somewhat helpful and in 2008 it indicated an exceptionally high turnout for a Presidential primary. Predicting voter turnout is predicated on several factors: prior voter turnout in the locality, the demographics in that locality, voter absentee rates, prior voter trends, especially in a presidential race; and conferring with political parties in the locality.

## **Distribution of Ballots**

Records from the Chesterfield Electoral Board and General Registrar indicate that they had barely enough ballots for the eventual turnout on Election Day but that they were not distributed properly. Early impressions were that only nine precincts had ballot shortages. A review of documents related to the distribution of ballots indicates that ballots were not properly distributed across the 63 precincts. (See Addendum, Ballots Delivered 2-12-08). Democratic ballots delivered before Election Day ranged from 14 – 33% of the registered voters in each precinct. (See Addendum, Ballots Delivered 2-12-08)

There were far more precincts that required additional ballots on Election Day than just the nine that resorted to handwritten ballots. Thirty-five of sixty three precincts required additional Democratic ballots on Election Day. One more precinct required additional Republican ballots for a total of 36 out of 53 precincts.

Some persons alleged that the distribution of ballots and the eventual shortage of ballots were racially motivated. As evidence, they point out that the precincts which ran out of ballots had a disproportionately high percentage of African American residents. When questioned about this, Mr. Haake responded, “I deliberately do not go to any effort to know the racial demographics... Votes have no color, they’re just voters.”<sup>5</sup> Moreover, because the minority candidate prevailed, there is no basis for action under § 2 of the Voting Rights Act.

## **Creation and Delivery of Ballots on Election Day**

As ballots run low in precincts on Election Day, localities should deliver more ballots to those precincts in need. Many localities produce extra ballots to hold in reserve at a central office in case they need extra ballots on Election Day. Officers in Chesterfield began reporting shortages about noon, and continued to do so throughout the day. One precinct reported calling hourly starting at 2 p.m. with a television station witnessing the scene. Receipt of additional ballots was sporadic.

Mr. Haake reports having two backup plans that were both implemented but insufficient to meet the demand. According to Mr. Haake, he planned to use the ballot printer located in his office to create additional ballots if needed on Election Day. His ballot printer was malfunctioning the weekend before the election and continued to do so on Election Day. Mr. Haake stated that starting in late-afternoon he began copying ballots on a photocopier. Mr. Haake reported that printing new ballots was easier than copying ballots due to needing the timing marks read by the scanner and the seal placed on the reverse side of the ballot. However, those are not necessary in certain situations and the Code of Virginia has a provision which allows electoral boards with the approval of the State Board to make copies of ballots on Election Day. (See § 24.2-613).

Furthermore, the Code of Virginia has a provision which allows officers of election to make copies of the ballots in the case of a machine failure. (See § 24.2-642.) The Election Assistance Commission (EAC) recommends establishing procedures for ballot shortages and making

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<sup>5</sup> *County Election Officials Blasted*, Richmond Times Dispatch, Wesley. P. Hester, Mar. 6, 2008.

photocopies.<sup>6</sup> To the best of our knowledge, the Electoral Board never authorized officers of election to make copies of ballots. One officer made copies of ballots and used them as instructional samples for people to handwrite their own ballots.

Chesterfield has stated that they had difficulty printing and delivering ballots and at other times stated that they did not have any problems printing or delivering ballots.<sup>7</sup> Around 6:00 pm on the night of the election, Secretary Rodrigues and James Alcorn spoke with Mr. Haake on the telephone to discuss the ballot shortage. The State Board of Elections offered assistance printing or distributing ballots. Mr. Haake indicated that he did not need any help, a statement that is contrary to Mr. Haake's recollection of this discussion. The State Board offered to have State Police deliver ballots to which Mr. Haake declined. Sec. Rodrigues stated that the State Police were on their way. Secretary Rodrigues called the Colonel of the State Police at 6:06 pm. Mr. Alcorn followed up with an email to Mr. Haake at 6:09 pm which Mr. Haake confirmed at 6:17 pm. Subsequent to Election Day, Mr. Haake expressed appreciation for the State Board's assistance from the State Police's delivery of ballots.

### **Handwritten Ballots**

Handwritten ballots have a history in American election administration but have been generally superseded for several decades.<sup>8</sup> Virginia statutes have set forth formal requirements for printing of ballots for more than a century, and the Code of Virginia § 122(h) (1904 ed.) included a prohibition on counting "unofficial" ballots.

### **Responsibility for Creation of Ballots**

While the form of ballots is set by the State Board of Elections, the creation and distribution of ballots is a local responsibility. The State Board of Elections is charged with ensuring the uniformity and purity of all elections in Virginia. (§ [24.2-103](#).) The Constitution and Code of Virginia both require uniform ballots to be used in elections. ([Art. II, § 3](#) of the Constitution of Virginia; § [24.2-613](#) of the Code of Virginia.) For each election, SBE requires localities to submit their ballots to be proofread against the Code requirements. These are to be done according to a schedule set for each election.

From General Registrar Handbook:

#### **15.4.1 Submit Proofs to State Board**

You or the printer must submit paper ballot proofs to the SBE. One copy of each proof must be submitted. The SBE will verify the accuracy of each paper ballot proof and, when approved, will fax a copy to either the Secretary of the Electoral Board or to the General Registrar for review and final approval. If the paper ballots are correct, the locality must sign the fax

<sup>6</sup> <http://www.eac.gov/election/practices/bpea/bp-welcome>.

<sup>7</sup> Compare *Board: Disputed Votes Do Not Count*, Richmond Times Dispatch, Feb. 27, 2008 ("The issue wasn't making ballots; it was the time it took to get them to the precincts.") to statements made to the Review Team on March 4, 2008 that Mr. Haake had difficulty producing ballots on his malfunctioning ballot printer.

<sup>8</sup> See *Burson v. Freeman*, 504 U.S. 191 (1992).

transmittal sheet and refax it to the SBE at 804-225-3706. Further, the locality immediately must notify the printer to print the ballot order.

#### 15.4.2 Deadlines

The deadlines for submitting paper ballot proofs and for having final official paper ballots ready for absentee voting will be set forth in the letter with which the SBE transmits the certification of candidates and ballot forms.

Under certain circumstances, the Code of Virginia §24.2-642C allows localities to copy official ballots when equipment is inoperable and cannot be repaired or replaced in time. The local Electoral Board approves this action and instructs officers of election to implement this action. The copies are then deemed to be official ballots. Moreover, §24.2-613 allows localities using optical scan ballots to use printed reproductions of the optical scan ballots in lieu of official paper ballots, subject to approval of the State Board of Elections. Hence, if one does not adhere to these procedures, action undertaken by the officers of election is unauthorized.

### **Purpose of Ballot Requirements**

The purpose of the Code requirements is to preserve the integrity of the election and to deter ballot stuffing, double voting and other voting irregularities. Primarily, each voter may vote in only one primary and their participation in the primary must be marked on the pollbook.

Applicable provisions include:

§ [24.2-530](#). Who may vote in primary.

All persons qualified to vote, pursuant to §§ [24.2-400](#) through [24.2-403](#), may vote at the primary. No person shall vote for the candidates of more than one party.

§ [24.2-531](#). Pollbooks and ballot containers.

There shall be pollbooks in the form set forth in § [24.2-611](#) and a separate ballot container provided for each party taking part in any primary. The ballot container for each party shall have plainly marked upon its top the words "Primary Ballot Container" and the name of the party. The officers of election shall enter on the cover of the pollbook, if not entered previously, the name of the party whose voters are recorded therein.

[Art. II, § 3](#) of the Constitution of Virginia. Method of Voting

In elections by the people, the following safeguards shall be maintained: Voting shall be by ballot or by machines for receiving, recording, and counting votes cast. No ballot or list of candidates upon any voting machine shall bear any distinguishing mark or symbol, other than words identifying political party affiliation; and their form, including the offices to be filled and the listing of candidates or nominees, shall be as uniform as is practicable throughout the Commonwealth or smaller governmental unit in which the election is held. (Emphasis added.)



## **Unauthorized Voters**

In reviewing the names of the ballots which have voter information on them, some of the names on the ballots do not match currently registered voters. There is no way to determine if the names on the ballots are the names of voters who voted on Election Day or who wrote them. The names could have been written by somebody else or the voter could have written a name other than their own.

The Constitution and Code of Virginia are clear in that only eligible voters are to vote in an election. See [Art. I, § 6](#) and [Art. II, § 1](#) of the Constitution of Virginia and § [24.2-400](#) of the Code of Virginia.

## **Secret Ballot: Voter Names on Ballots**

Some ballots were marked with the name of the voter who cast the ballot and some voters received a slip of paper indicating their pollbook number and the name and telephone number of the General Registrar's office.

A voter's name on a ballot is a violation of the Constitutional requirement of secrecy, although some voters may have voluntarily provided their names. The secret ballot is fundamental to modern elections. The secrecy of the ballot is required by both the Constitution and Code of Virginia. (See [Art. II § 3](#) of the Constitution of Virginia and §§ [24.2-607](#) and [24.2-638](#) of the Code of Virginia.)

Furthermore, § 24.2-650 prohibits officers of election from signing or marking any unofficial documents. Electoral Board Chair Jack Clifford stated that he authorized the use of handwritten ballots. Hence, instructions from officers of election to voters regarding the use of paper ballots would not violate the provision prohibiting officers from signing only official papers. No voters stated that any officers wrote on their ballots but one precinct had the words "Name" and "Candidate" written identically on each unofficial paper ballot, leading one to believe that they were following instructions from the officers of election as to the format of the paper ballot.

One voter, a library manager, detailed the instructions given in her precinct (102—South Chester): "The Election Officials explained that we should write the name of our candidate on the blank paper, and not include our own names. They repeated the instruction to write our candidate's name only, as though this was a requirement from above, probably the Registrar's Office." (Exhibit 1, Supplement, Affidavit of Jen Shepley.)

## **Choice of Ballots**

A voter in Chesterfield precinct 405 alleged that officers of election did not give voters a choice of ballots. Specifically, this complaint alleged that if an African American entered a polling place they were given a Democratic ballot, whereas a white voter was given a Republican ballot. The voter further alleged that the voter was not able to declare the party ballot of their choice. The call was forwarded to Secretary Rodrigues who contacted Mr. Haake.

Such blatant racially discriminatory action, if proven, would violate federal and state laws. The Code of Virginia prohibits intimidating voters or making suggestions as to which party or candidate to choose. (See §§ [24.2-1005](#) and [24.2-1006](#).)

A related complaint received from multiple voters throughout the Commonwealth was that voters were required to choose a particular party's ballot in order to participate in the primary. The Code of Virginia only permits voters to vote in one primary. Furthermore, the Code requires separate ballots for each party, separate pollbooks (creating a separate list of who voted in each primary), and separate ballot boxes. (See §§ [24.2-529](#), [24.2-530](#), and [24.2-531](#).) By law the political parties decide whether to hold primaries and must notify the State Board of Elections of their decision (See § [24.2-545](#)). Local Electoral Boards must administer these primaries as separate elections. These laws require voters to indicate in which primary they want to vote, so that the officers will know which pollbook to mark and which ballot to give them. Because neither party closed its primary to nonparty members, both primaries were "open." Members of both parties and independent voters with no party affiliation could vote in either primary—but not both.

### **Long Lines at the Polls**

The SBE received several calls from Chesterfield County voters on the morning of the election related to long lines at the polls. Dozens of voters called to complain about waits that ranged from thirty minutes to over three hours. After one particular call, Secretary Rodrigues contacted Mr. Haake to inform him of an alleged 45 minute wait at one precinct. Mr. Haake responded that the delays were only 10-15 minutes. David Turetsky, a Democratic Party observer at SBE on Election Day, asked Mr. Haake to look into the situation. Mr. Haake called back and confirmed that lines were from 10-45 minutes long. Mr. Haake later stated that he does not believe a 30 minute wait to be too long.

The Code of Virginia does not prescribe a maximum length of time that a voter can be required to wait before voting. The issue is not unique to Virginia; legislation has been introduced at the United States Congress to study the issue and cap the wait time to one hour. (See [S.804](#), Count Every Vote Act.)

One of the most common reasons for a line at the polls is the check-in process. This is most pronounced during dual primaries where officers of election need to verify two sets of paper pollbooks. Before a person may vote, an officer of election must verify that the person is a registered voter and has not yet voted. During a dual primary, an officer must check two sets of nearly identical paper pollbooks because of the Code requirement that each party be provided a separate copy of the pollbook.

One of the ways in which lines can be controlled is by splitting each pollbook alphabetically. At training the Saturday before Election Day, an experienced officer of election urged splitting pollbooks alphabetically. However, they were instructed by Mr. Haake not to split the pollbooks. On Election Day, SBE also contacted Chesterfield via telephone, suggesting that the pollbooks be split in order to process voters more expeditiously. Moreover, the State Board of

Elections communicated via an email message to all localities advising them to split the pollbooks, if necessary, to alleviate the long lines.

During the March 5 State Board of Elections' hearing, the Chief Officer of Election for Precinct 205, Falling Creek, commented about long lines at the precinct. According to the officer of election, she was given only one table for checking persons in, even though she had asked for more. The instructions given from the general registrar were to use one and only one table. By 7:30 in the morning she had received numerous complaints about the lines. Even though she was instructed by the registrar's office not to split the pollbook she did so anyway. She had to quickly retrain her staff and audit the numbers on the pollbooks. (She believes that this may account for the discrepancies on her Statement of Results.)

Another reason for long lines can be attributed to a lack of staffing in each polling place. Reasons given for this lack of staffing were insufficient access to officers of election, poor turnout predictions and costs associated with compensating additional staff. This lack of adequate poll workers is related to Chesterfield County basing its staffing needs on past voter turnout statistics, which ultimately was of no use. Had they looked at that factor along with national voter turn out trends, that analysis could have resulted in a different staffing pattern at the precincts. Furthermore, the Commonwealth to the extent of funding provided by the General Assembly, would reimburse localities for expenses related to the Presidential Primaries; therefore, the costs associated with extra staffing should not have been a primary factor in identifying the number of officers of election in this election. Moreover, in past presidential primary elections localities had been reimbursed for their expenses related to the election.

Here it is noted that Mr. Haake stated that the reason they had one line was that they did not have sufficient officers of election on duty that day to manage having split lines. One voter reported that people in his community who offered to help at the polls were told to relax.

A Deputy Chief Officer of Election who attended training the Saturday before the election confirmed that Mr. Haake had no plans for recruiting backup workers. (Exhibit 1, Supplement, Affidavit of Jim Tromater), This officer points out a three-way pollbook split is the norm for his Chesterfield precinct (Midlothian), but Mr. Haake's training only allowed for one line on February 12. One voter reported that the ballot shortage in her precinct (404-Providence) resulted in splitting lines by party, a concern of many voters who do not wish to publicly exhibit a party affiliation. (Exhibit 1, Supplement, Affidavit of Stephanie Shield.)

It is quite possible that more voters left due to the long lines, the extended wait time, than the request to cast a vote on a handwritten ballot which could not be counted. One voter at Marguerite Christian Elementary School stated that she was in a line of 100 voters and twenty of them left without voting. Another first time voter from Virginia Commonwealth University went to vote after class at the Bailey Bridge School. She witnessed five people leave without voting because of the lines. One was a mother with children while another voter had a meeting they could not miss.

### **Accessibility Concerns**

The Help America Vote Act and the Code of Virginia require all polling places to be accessible. Voters with disabilities should have the same access to voting as any other voter. Voters with disabilities should not have burdensome impediments which hinder their ability to vote. Several voters expressed concerns that elderly and disabled voters could not stand in line and observed inadequate signage directing voters to the proper locations within the building. One voter attempted to enter the polling site through a door that was apparently closed. Hence, the voter had to find another entrance to the building. Then too, a voter commented that the sidewalk leading to the polling site was in such disrepair that persons with disabilities experienced difficulty in attempting to enter the polling site.

Also, a voter with a physical disability complained about access to the polls due to her disability. Another voter who was dependent on an oxygen tank did not vote because of the long lines.

These complaints emanating from persons with disabilities place unnecessary barriers on voters and could be eliminated if emphasis is placed on expanding in-person absentee, especially for voters with disabilities. These individuals have the option of voting on a day other than Election Day. Moreover, access to curbside voting must be easily accomplished and access to parking, compounded by school being in session and school activities, must not hinder the voting process.

Mr. Haake expressed that he is very willing to accommodate persons with disabilities. He went so far as to say that if the voter preferred, they could call him to set up an appointment to vote to ensure that somebody is there to help him.

## **E. Election Certification Process**

### **State Board Powers: Ability to Inspect Ballots**

Ballots and statements of results are sealed and delivered to the Clerk of Court following an election. Copies of the statement of results are available for public inspection in the local General Registrar's office. The pollbooks and ballots are sealed and kept with the Clerk of Court. The ballots can only be unsealed under certain circumstances which include by the State Board of Elections for the purpose of ensuring "the accuracy of the returns or the purity of the election." (See § [24.2-669](#).) The determination to unseal the ballots was delegated from the Board to the Secretary in 2004.

### **State Board Powers: Ability to Correct Results**

The State Board of Elections has ultimate responsibility for the accuracy of election results in Virginia. If irregularities are found in the election results reported by localities ("Abstracts") then the Secretary of the State Board of Elections shall require the local Electoral Board to correct any errors found on the abstracts. (See § [24.2-675](#).) These corrections generally are clerical and not substantive in nature. In this instance, the State Board via a letter dated February 22, 2008 requested that Chesterfield County correct its abstract. Absent a corrected abstract from Chesterfield County, the State Board, pursuant to its authority to certify the election, corrected the abstract to exclude the 299 votes cast on scrap pieces of paper. The State Board relied on 24.2-665 in making its decision not to count the handwritten ballots. The Code

provision specifically states that only an official ballot can be counted. The handwritten ballots were not official ballots; hence, they were not counted.

The Review Team found irregularities in the Statement of Results and corresponding Abstracts during their February 20, 2008 inspection of election materials at the Clerk of Court. Once irregularities were discovered in the Chesterfield Statements of Results, the State Board of Elections notified Chesterfield via phone and letter that irregularities existed in ten specific precincts and requested a correct abstract.<sup>9</sup> Chesterfield responded with some corrections.<sup>10</sup> At no time did Chesterfield submit an updated Abstract or request permission to unseal the Statement of Results to correct irregularities.

The Code of Virginia required the State Board to certify the results of the primary within fourteen days of the election. (See § [24.2-534](#).) The certification process by the State Board of Elections entails a review of abstracts submitted by the localities. The abstract is submitted to the State Board of Elections following the canvass. If there are discrepancies in the abstract between the results on the web page and the abstract, the SBE confers with the locality to resolve the discrepancy. (Exhibit 13.)

### **Ability to Count Handwritten Ballots**

The most public controversy surrounded the question of whether or not to count the handwritten ballots used in Chesterfield County. Ultimately, the State Board on the advice of legal counsel from the Attorney General's office decided not to count the 299 handwritten ballots. There were several groups, including the Chesterfield Electoral Board and General Registrar, who believed that the State Board of Elections could and should count the handwritten ballots. They argued the handwritten ballots were "official" because they were authorized by the Chesterfield Electoral Board and distributed by officers of election to voters who relied upon them. Mr. Haake stated multiple times that "the Constitution trumps all and [SBE is] going to count the votes."<sup>11</sup> Mr. Clifford stated, "I think they had it within their discretion to count them, and I think they should have counted the votes."<sup>12</sup> Some of the arguments for counting the ballots were:

1. The handwritten ballots were official because they were authorized by the Chesterfield Electoral Board and distributed by officers of election to voters who relied upon them.
2. Localities had used handwritten ballots in the past which were counted by the State Board of Elections.
3. Case law supports that deviations from the Code may be permissible in emergencies.

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<sup>9</sup> See letter from Nancy Rodrigues to Horace Mann on Feb 22, 2008.

<sup>10</sup> See letter from Horace Mann to Nancy Rodrigues on Feb. 25, 2008.

<sup>11</sup> *Chesterfield, Election Board bicker over ballots as deadline approaches*. Jola Szubielski. NBC 12 News. Feb. 25, 2008.

<sup>12</sup> *Board: Disputed Votes do not count*. Wesley P. Hester. Richmond Times Dispatch. Feb. 27, 2008.

4. There is a policy not to punish voters due to errors by government officials.

Each of the above arguments was analyzed by the State Board of Elections before making the decision not to count the handwritten ballots.

1) This first argument is one of equity that is best made before a Court of competent jurisdiction. Where the Code of Virginia is explicit, the State Board of Elections has no authority to deviate from the Code. The Code of Virginia was neither silent on this issue nor granted explicit discretion to the State Board; the Code of Virginia defines official ballots and explicitly stated that unofficial ballots were not to be counted. A Court of competent jurisdiction with powers of equitable relief might be able to supplement the strict rules of law and count the ballots.<sup>13</sup> It is not that a Court would have overruled the actions of the State Board; it is that the court would have different powers with which they can make their decision. No parties ever went to court to require the State Board to count the ballots or to overturn the decision of the State Board.

2) On several occasions and in multiple forums, Chesterfield has stated that they used handwritten ballots in the past and they were counted by the State Board. Jack Clifford stated that they ran out of ballots during the 1994 Republican primary between Oliver North and James C. Miller III.<sup>14</sup> During the March 4 meeting with the Review Team, Mr. Clifford elaborated that Chesterfield ran out of punch card ballots and resorted to handwritten ballots. Records indicate that there was no primary between Oliver North and James C. Miller III. There was a Republican state convention between the two candidates in 1994 and a Democratic primary for U.S. Senate in 1994. The notes from the Board meeting where the primary was certified (June 24, 1994) make no mention of any handwritten ballots. Furthermore, Michael Brown, the Secretary of the State Board of Elections from 1991 - 1995, does not recall the State Board of Elections ever counting handwritten ballots during his long relationship with the State Board. When the Review Team informed Chesterfield of these facts and asked for a clarification, Mr. Clifford's only response was that the records at the State Board are not very good.

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<sup>13</sup> For example, federal courts have required the counting of absentee ballots, which were held invalid under state law, because they were cast under the direction of election officials. *Griffin v. Burns*, 570 F. 2d 1065 (1<sup>st</sup> Cir. 1978) ("When a group of voters are handed ballots by election officials that, unsuspected by all, are invalid, state law may forbid counting the ballots, but the election itself becomes a flawed process. Given the closeness of the election here, and the fact that the "right of suffrage is a fundamental matter," *Reynolds v. Sims*, *supra*, 377 U.S. at 555, 84 S.Ct. at 1378, we are unwilling to reject appellees' claim merely on the fiction that the voters had a duty, at their peril, somehow to foresee the ruling of the Rhode Island Supreme Court invalidating their ballots.") Likewise, the Supreme Court of Virginia has also recognized a limited principle that voters should not be penalized for errors of election officials. *Xippas v. Commonwealth*, 141 Va. 497, 512 (1925) ("Every qualified elector has the right to cast his ballot for the candidate of his choice, untrammelled by the mistakes, misdeeds and irregularities committed by those charged with the preparation of the ballot and the conduct of the election. Such acts on the part of the officers must not be permitted to disfranchise a voter, or deprive a candidate of a vote for the office to which he aspires. Otherwise the right of suffrage would be made to depend upon the whim, caprice, bias, prejudice or corruption of those entrusted with the duties relative to elections and primaries.").

<sup>14</sup> See Richmond Times Dispatch, Feb. 28, 2008.

3) While the Code delegates certain emergency powers to specific individuals, there is no carte-blanch ability to deviate from the Code during emergencies. When exceptions are given, they remedy specific problems, are limited in scope, are granted to specific persons, and require additional assurances. For example, Courts have held that improperly issued absentee ballots may be counted. Also, the Code of Virginia provides that when voting equipment becomes inoperative, the Electoral Board may authorize officers of election to make copies of official paper ballots. See § [24.2-642](#).

4) Mr. Clifford and Mr. Haake have stated that the State Board has adopted a policy not to punish voters due to errors by government actors. This is a highly generalized depiction of a State Board policy regarding certain voter registration applications and certification of candidate petitions. The State Board adopted a policy to count provisional ballots by voters who could prove that they submitted a voter registration application at the DMV but whose application was subsequently lost before being approved.<sup>15</sup> Mr. Haake disagreed with this policy and lobbied against it when the policy was codified in the General Assembly. Mr. Haake's recollection of this issue does not coincide with others who were involved in this matter. The State Board of Elections feels strongly that applying this principle in this instance would seriously undermine the integrity of elections in the Commonwealth, nullifying security measures and safeguards as codified by election laws.

Ultimately, the State Board agreed that they had to follow the letter of the Code of Virginia. The Code provides that only official ballots are to be counted.

§ [24.2-665](#). How paper ballots counted.

B. Only an official ballot prepared as provided for in this title shall be counted. If any unofficial ballot is found among the official ballots, the unofficial ballot shall be put aside, not counted and appropriately noted on the statement of results.

There are many Code sections which describe official ballots and their requirements. The Code dictates the form of official ballots (§§ [24.2-529](#) Primary ballots and [24.2-613](#) Form of ballot) and security precautions for ballots (§§ 24.2-616 – 624) which must be followed for all official ballots. Specific precautions for the handling of ballots are established in order to combat voter fraud and promote uniformity in election administration. For example, if the number of ballots created is unknown, it is impossible to reconcile the number of ballots cast with those remaining at the end of the night. This process is an important check against double voting and counterfeit ballots. (See § [24.2-1008](#).) Furthermore, handwritten ballots lack uniformity because they do not list all of the candidates, a feature which is important for those voters who have difficulty reading or with disabilities.

### **Discrepancies in Statement of Results: Number of Ballots Received**

.Comparisons between the Statement of Results and records received from Chesterfield indicate several discrepancies regarding how many ballots were received in each polling place.

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<sup>15</sup> This policy is now codified in § 24.2-653.

<b>8. TOTAL BALLOTS USED - IN-PERSON</b> [SUBTRACT LINE 7 FROM LINE 3]		<b>A. 795</b>
<b>PART B: BALLOT COUNTER and MANUAL COUNT</b> <sup>125</sup>		
9. NUMBER ON BALLOT COUNTER – BEFORE POLLS OPEN	0000	
10. NUMBER ON BALLOT COUNTER – AFTER POLLS CLOSE	796	
11. NUMBER OF MANUALLY COUNTED BALLOTS (DOCUMENT IN PARTB-ADDENDUM) <sup>126</sup>	87	
<b>12. TOTAL BALLOTS COUNTED</b> [ADD LINES 9, 10, & 11]		<b>B. 883</b>
<b>PART C: POLLBOOK COUNT (PBC)</b>		<b>NUMBER</b>
13. POLLBOOK COUNT: DIVISION <u>A</u> THROUGH <u>Z</u>	797	
14. POLLBOOK COUNT: DIVISION ___ THROUGH ___		
15. POLLBOOK COUNT: DIVISION ___ THROUGH ___		
<b>16. TOTAL POLLBOOK COUNT</b> [ADD LINES 13, 14, & 15]		<b>C. 797</b>

**Describe the discrepancy here:** (USE BACK IF ADDITIONAL SPACE IS NEEDED.)  
*-2 in back of pollbook (VCM)  
 32 manuals  
 1 spoiled manual,  
 & unsure of quantity provided*

If a precinct receives extra ballots, they are to record it on their Statement of Results. There were several precincts in Chesterfield that received ballots

and recorded them properly. Unfortunately, the records received from the Chesterfield Electoral Board do not match the records created by the officers of election in each precinct. In one precinct that used unofficial ballots, the officers stated that they did not even know how many ballots they received on Election Day.<sup>16</sup> Uniformity was lacking in the distribution and accounting for voters and votes cast using unofficial handwritten ballots. This lack of established procedures created opportunities for fraud.

It is very common for mathematical errors to occur on these forms. Some of the problems could be normal human error since officers of election work over fifteen hours on Election Day. Some of the problems could be due to the shortage of ballots on Election Day. The situation in some polling places was very hectic to the point where two officers of election expressed concern for their safety. Due to the high demand for ballots, it is likely that the ballots were not properly counted upon arrival in each polling place. Finally, it does not appear that Chesterfield County election officials gave very much direction when they delivered additional ballots or authorized handwritten ballots.

### Discrepancies in Statement of Results: Number of Voters

In reviewing the Statement of Results (SORs), some of them indicated that there were more votes cast than persons who appeared to vote. This is indicated on the SOR by having more total ballots counted (line 12) than persons on the pollbook count (line 16). For example, Precinct 515 indicated that 797 persons appeared to vote on Election Day and cast 883 ballots: 86 more ballots than voters.

According to Mr. Haake, the basic voter check-in process in Chesterfield is as follows:

1. All voters get in one line;
2. There is one table with the pollbook and officers of election. When a voter approaches the table, he is asked his name and which primary he would like to vote in;

<sup>16</sup> See Precinct 408 – Reams (Democratic Primary SOR). VCM means “Voter Changed Mind” as to their party ballot as is their right.



3. The pollbook officer checks to see that the voter's name is in each pollbook and not marked as having voted in either primary or by absentee;
4. The pollbook officer marks the next number in the pollbook count form to indicate that another voter has voted;
5. The pollbook officer records the number from the pollbook count form next to the voter's name in the pollbook;
6. The ballot officer hands a ballot to the voter.

It appears that in some precincts, persons who used handwritten ballots were not marked in the pollbooks, a fact disputed by the General Registrar. In one precinct, the officers created a separate pollbook count sheet and used those numbers to mark off voters. In others precincts, there is no indication to determine which or how many voters received handwritten ballots. The danger is that unregistered voters received handwritten ballots or voters received multiple ballots. While there is no evidence of foul play, it is impossible to determine.

Not marking a person off on the pollbook also means that the person will not receive voter credit. To many people, failure to receive voter credit does not mean anything more than an administrative mistake. To some people, failure to receive voter credit can result in their disenfranchisement. Voter credit is important to persons who are inactive because without it, their voter registration could become cancelled. Voter registrations cannot be cancelled simply for failure to vote. However, when combined with an inactive status, voters can be cancelled if they fail to vote in two successive federal general elections. Voter credit is also important to first time voters.<sup>17</sup> If the voter had not previously supplied identification, they are not eligible to vote absentee until they do so.<sup>18</sup> If such a voter appeared at the polls, showed their identification and was not marked off in the pollbook, then they would not be allowed to vote absentee by mail even though they legally fulfilled the requirements.

### **Differences Between Statement of Results**

The Electoral Board admitted that its Statement of Results on display for public view at the General Registrar's office did not match the statements on file with the Circuit Court Clerk. When the Review Team visited the Clerk of the Court, Horace Mann questioned why SBE would want copies of the SORs at the Court and not copies of the SORs at the Registrar's office. The same issue was raised again during the Review Team's discussions with the full Electoral Board and General Registrar. The General Registrar stated that the Review Team was "accusing [Chesterfield] of election fraud" and again questioned why the Review Team would want those particular copies. At the end of the visit, Mr. Haake informed the Review Team that the Statements of Results in his office may not match the copies received from the Clerk of Court. Mr. Haake explained these discrepancies are due to corrections made by officers of election after the election materials were transmitted to the Circuit Court as required by § 24.2-668. Mr. Haake explained that he views the SORs available for public inspection as the official copies.

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<sup>17</sup> See § [24.2-428.2](#) of the Code of Virginia.

<sup>18</sup> See 42 U.S.C. 15483 for exceptions.

Hence, greater attention is given to the publicly available copies as opposed to the copies sent to Circuit Court. Also, he went on to admit that “this is not strictly by the book but that is reality.”

The Electoral Board acknowledged the SORs in the Clerk’s office did not include corrections that had been made after the originals were signed by the officers of election and forwarded to the Circuit Court as required by §§ 24.2-659 and 24.2-669. In the event of a contest or a recount, making such corrections is of paramount importance.

### Impact on Election

A number of people have asked what effect these issues could have on the outcome of the election. There are three situations to consider: 1) a recount; 2) a contest; and 3) the allocation of party delegates.

A recount is not a concern in this race because the margin of victory was 28.19% which is greater than the limit allowed under the Code of Virginia. A recount can only be requested by a candidate who lost by no more than 1% of the difference between his vote total and the winner’s vote total. The [Standards for Recounts of Virginia Elections](#) are controlling when counting ballots in a recount. The standards, as adopted in July 2007, only allow official ballots to be counted in a recount.

Candidate	Vote Totals	Percentage
Barack Obama	627,820	63.66%
Hillary Clinton	349,766	35.47%
John Edwards	5,206	0.53%
Dennis J. Kuccinich	1,625	0.16%
Bill Richardson	991	0.10%
Joe Biden	795	0.08%

A contest of a primary may be filed under either § [24.2-805](#) for “an election of electors for the President and Vice President of the United States, or a primary for the United States Senate or any statewide office” or § [24.2-806](#) for “a primary for the United States House of Representatives, the Virginia Senate, the House of Delegates, or any county, city, town, or district office, or an election to any county, city, town, or district office[.]” Neither the contest laws, nor the laws authorizing the holding of presidential primaries (§§ [24.2-544](#) and [24.2-545](#)) provide for the filing of a contest in state courts over a presidential primary, even though the primary, which can select or bind delegates to the party’s national convention, “shall be considered to be equivalent to a primary for the nomination for a party’s candidate.” (§ [24.-545](#))

If a state court were to find that a presidential candidate had standing to file a contest over a presidential primary (most likely in the Circuit Court of the City of Richmond where other statewide and federal primaries may be contested), then the normal grounds for such contest would be those specified in § [24.2-807](#), namely:

The provisions of this section and §§ [24.2-808](#) through [24.2-813](#) govern contests conducted pursuant to §§ [24.2-805](#) and [24.2-806](#). The contest shall be initiated only by a written complaint of one or more of the unsuccessful candidates. The complaint shall contain (i) objections to the eligibility of the contestee based on specific allegations, (ii) objections to the conduct or results of the election accompanied by specific allegations which, if proven true, would have a probable impact on the outcome of the election, or (iii) both. (Emphasis added.)

An argument for a contest likely would not survive because there are not enough allegations to change the overall outcome of the election. The 299 handwritten ballots are not enough to change the outcome of the race which was decided by over 200,000 votes. There are allegations that some voters were turned away at the polls or given incorrect ballots but those allegations do not account for 200,000 votes.

Congressional District	Barack Obama	Hillary Clinton	Difference
1	59,080	30,367	28,713
2	48,344	25,795	22,549
3	89,607	21,721	67,886
4	64,367	23,462	40,905
5	49,021	25,519	23,502
6	32,925	27,266	5,659
7	59,643	30,352	29,291
8	77,484	46,612	30,872
9	17,377	34,621	17,244
10	58,686	39,116	19,570
11	62,035	41,378	20,657

A candidate might argue a narrower contest claim that the allocation of delegates to the national convention was impacted by these election errors. The allocation of delegates to the national conventions is determined by the state parties. The Republican Party allocates their delegates on a winner take all scheme<sup>19</sup> whereas the Democratic Party allocates a portion of their delegates according to Congressional District.<sup>20</sup> Portions of Chesterfield are in both the Fourth and Seventh Congressional Districts and the outcome of neither region is in question.

## F. Conclusion and Recommendations

While no election is perfect, there are many lessons to be learned from the February 12<sup>th</sup> dual Presidential Primaries in Virginia. Analyzing all aspects of what occurred on February 12<sup>th</sup> in Chesterfield County, it is quite apparent that accomplishing an election with a minimal level of issues takes a consistent and rigorous approach to preparing for planned and unplanned occurrences. Because we want to ensure that all eligible voters have a right to participate in the process and have their votes counted, our level of preparation must be accurate in every detail.

For if we fail to adequately prepare for the known and challenging circumstances, we run the risk of negatively impacting the integrity of voting in this Commonwealth. Hence, our review of this election illustrates that conducting elections in the Commonwealth is a multilayered and very complex process, requiring the collaborative efforts of all parties: the General Registrar, the Electoral Board and the State Board of Elections.

In this instance, the election officials in Chesterfield County improperly assessed voter turnout trends in anticipation of a large voter turnout in Virginia. Hence, the number of ballots ordered prior to the election did not reflect an adequate assessment of the anticipated number of voters in Chesterfield County. Moreover, it did not appear that they had thoughtfully planned and assigned the distribution of ballots ordered for the election.

<sup>19</sup> <http://www.rpv.org/?q=node/337>.

<sup>20</sup> [http://www.vademocrats.org/pages/democratic\\_party\\_of\\_virginia\\_adopts\\_selection\\_plan/](http://www.vademocrats.org/pages/democratic_party_of_virginia_adopts_selection_plan/).

Unable to fully understand the depth of voter interest in the election, as reflected by prior primaries, Chesterfield County also failed to fully staff their precincts. It was clear that the number of officers of election identified to work on February 12<sup>th</sup> was well below those needed to adequately manage the election. Had there been more officers of election the spitting of the pollbooks could have been easily managed.

Additionally, the training provided by Chesterfield County, instructing their poll workers not to split the pollbooks, only exacerbated the check-in process, causing the voters to wait in long lines for more than 30 to 60 minutes. However, it was refreshing to hear that some officers of election were perceptive enough to split the pollbooks to speed up the voter check-in process and reduce the long wait time. Also, it was apparent that officers of election had not been adequately trained to deal with emergencies, unanticipated occurrences that arise during an election. Chesterfield County had not properly trained the officers of election to deal with ballot shortages. And when reports of ballot shortages reached their central office, they failed to promptly respond by using copiers instead of the ballot printing machine, which was purchased in 2005. Contrary to Mr. Haake's recollection of this conversation, Mr. Haake failed to accept offers of help from the State Board to print and distribute ballots. Hence, the response by the officers of election upon running out of ballots resulted in the use of scraps of paper and different variations as related to what was written on the scraps of paper. Unfortunately, when officers of elections ran out of ballots, Chesterfield County authorized handwritten ballots that could not be counted, failing to provide advice or assistance to protect the secrecy of the ballots. When discrepancies were found in Chesterfield's election results, they failed to follow proper protocol to amend them.

Parking at polling sites is another aspect of Election Day which requires greater scrutiny. While locating polling sites has its attendant problems, the parking capacity of polling sites, including entrances and exits, along with accessibility concerns for persons with disabilities, need to be more thoughtfully addressed. The sufficiency of parking and physical barriers related to parking cannot be allowed to impede voters' right to cast their ballot.

Lastly, the State Board of Elections is not without fault. They too failed to provide sufficient oversight as related to managing elections. Specifically, the SBE did not review the ballot order for Chesterfield County and they do not have in place a mechanism for predicting turnout in localities. Hence, it is apparent that SBE must work more closely with localities in looking at voter trends in predicting voter turnout. Moreover, when discrepancies were found in Chesterfield County's election results, the State Board of Elections did not use clear language and direct Chesterfield County to correct specific errors which were known. In preparing for future elections, our recommendations are as follows:

### **State Board of Elections**

- a. Establish a permanent post-election review program. The State Board, working with local electoral boards, registrars and officers of election should review actions from localities to determine what worked well and where, if any, improvements need to be made in the area of election management. Review complaints from voters and review comments from officers of election, Electoral Board Members and General Registrars. Determine where improvements need to be made for subsequent elections. This review

process highlighted the reluctance of some local election officials to coordinate with the State Board; thus, a permanent post-election review process could strengthen future reviews and relationships.

- b. Carefully scrutinize how ballots are ordered for elections in the Commonwealth. Require supporting justification for ballot orders (SBE-612 forms) for less than all of the registered voters in a precinct. Track, review and comment on justifications provided. Justifications must include some analysis of past and current performance to determine ballot needs. This will require a database to track the information and SBE must look independently at voting trends in evaluating these forms, although great deference will be given to the locality's recommendation.
- c. Clarify the duties and responsibilities of the Electoral Boards and General Registrars. At one time, the tasks required of Electoral Boards were relatively simple in nature; thus, the position grew into one of political patronage. However, the tasks now required of Electoral Boards have increased and are becoming more complex, especially with the new election administration technologies. Many tasks require much more than a part-time Electoral Board. For that reason, many Electoral Boards delegate much of their authority to their General Registrar or rely very heavily on the advice of their General Registrar. Efforts should also be made to recruit more active Electoral Board members.
- d. Explore a Board policy which would allow copies of ballots to be made in polling places with approval of SBE and Electoral Board if they run out of ballots. The Board policy would clarify the creation of ballots under § 24.2-613 and §24.2-642.
- e. Establish a minimum level of training necessary for officers of election. Expand training of Electoral Board Members and officers of election to deal specifically with unanticipated emergency situations. Officers of election need clear instructions regarding what to do when the lines are extremely long and the voters are upset; when ballots are running low and under what circumstances copies of ballots can be made from copiers inside or outside of the polling place; and under what circumstances handwritten ballots can be used when equipment is inoperable. The Election Assistance Commission has even stated that officers of elections should be trained in creating an audit trail to track and review procedures to document compliance with election laws and procedures. Any deviations from normal procedures will be included in this audit.
- f. Require contact information for Electoral Board Members on Election Day. Currently, the State Board works with the General Registrar to address all problems on Election Day. Because the Code places responsibility for many issues with the Electoral Board, the State Board should work with both the Electoral Board and General Registrar on those issues.
- g. Educate voters about absentee voting. Many voters have special needs and are eligible for voting absentee. In an effort to eliminate long lines on Election Day and to prevent voters with special needs from leaving the polls without voting, the locality and the State Board of Elections must make every effort to communicate to voters the benefits associated with absentee voting, if they are indeed eligible to vote absentee.

Additionally, it must be communicated to voters that the registrar's office is open on two Saturdays prior to the General Election in November for in-person absentee voting.

- h. Review and update the Statement of Results. Review the format and requirements to ensure that they are useable, user friendly and that discrepancies related to results can be accurately displayed.
- i. Review the State Board's delegation of certain action to the Secretary. For example, the ability to require Electoral Boards to correct their abstracts is delegated to the Secretary. This is applicable in non-controversial mathematical corrections, but not with controversial decisions such as whether or not to count handwritten ballots.

### **Local Electoral Boards**

- a. Should review ballot order one week prior to Election Day. Currently, the State Board requires notification of ballot orders several weeks in advance of an election. Because historical trends are a poor indicator of future turnout, localities should reevaluate those calculations closer to Election Day. Promising results have appeared in early analysis of the correlation between absentee ballots and voter turnout.
- b. Be prepared to print and distribute ballots as needed on Election Day in the event that voting equipment malfunctions, ballots are destroyed, or supplies become insufficient. This could include resources such as copiers or ballot printers in the registrar's office, agreements with local printers, and access to photocopiers at or near each polling place.
- c. Need to clarify and document delegated duties to General Registrar.
- d. Chesterfield should implement their Evening Auditor program.
- e. Should secure adequate parking at polling places.
- f. If schools are used as polling places, explore possibility of an in-service or parent-teacher day on Election Day.

### **General Registrars**

- a. Need to clarify and document delegated duties from Electoral Board.
- b. Educate voters about absentee voting. Many voters who are eligible for absentee voting are not aware of their eligibility or the procedures. Increased absentee voting could decrease the number of voters who appear on Election Day which may lessen the burden on officers of election on Election Day.
- c. Expand training of officers of election to deal with unanticipated emergency situations.

### **Officers of Election**

- a. Be careful to document any deviations from normal procedures.

- b. Read and attend training on developing an audit trail for the polling place. The Election Assistance Commission has comprehensive Election Management Guidelines to which a number of Virginia jurisdictions contributed, including Chesterfield County. In March 2008, the Election Assistance Commission (EAC) released a Quick Start Guide for Developing an Audit Trail that includes the following recommendations for officers:
- Appreciate your significance in creating a successful audit trail.
  - Consider each voting machine as a cash register containing dollar bills (votes) that must balance after polls closed.
  - Develop an audit checklist for your polling place.
  - Open supplies in an order that helps create the trail.
  - Sign your oath of office form.
  - Start with the form to verify voting machine serial numbers and protective counters and acknowledging that security seal numbers are intact.
  - Open zero tapes printed from each voting machine.
  - Confirm correct paper ballot styles and quantity.
  - Review closing verification form containing voting machine serial numbers, close of polls protective counter numbers and closing security seal numbers.
  - Print closing tapes from each machine.
  - Confirm remaining quantities of paper ballots by style and precinct.
  - Review closing balance form used to record total number of votes processed—balance to votes collected in all voting machines and/or paper ballots.
  - Designate experienced officers to serve as “rovers” with a checklist of setup procedures outside and inside the polling place. Both the rover and chief officer could sign off on the checklist.

### **Possible Legislation**

- a. Eliminate the need for two sets of pollbooks in a dual primary.
- b. Expand in-person absentee voting so that more citizens, especially those with disabilities, may vote other than on the day of the election.
- c. Consider mandating an officer of election to voter ratio similar to that mandated for equipment to voters.<sup>21</sup> Current law only requires three officers of election for an election – no matter the size of the precinct.
- d. Clarify the process to initiate a contest in a presidential primary. Currently 24.2-805 and 806 are unclear.

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<sup>21</sup> See § 24.2-727 for similar law related to voting equipment.

## **G. Exhibits**

1. Democratic Party of Virginia Complaint (with Supplement)
2. Delegation of Authority from Chesterfield County Electoral Board to General Registrar
3. Chesterfield County Ballot Order Form SBE-612
4. Pollbook Shipment Checklist
5. Calls Received by State Board of Elections on Election Day
6. Statements from Officers of Election
7. Chesterfield County Abstract and Statement of Results for Nine Precincts with Handwritten Ballots
8. Chesterfield County Election Review
9. February 22, 2008 Letter from State Board of Elections to Chesterfield County Electoral Board
10. February 25, 2008 Letter from State Board of Elections Requesting Information
11. Statement from Democratic Party of Virginia Observer
12. Statements from Voters
13. Sample Abstract

## **H. ADDENDUM**

Documents Produced by Chesterfield County Electoral Board and General Registrar  
(Includes Ballots Delivered)