

Donald E. Showalter
Glenn M. Hodge
Gregory T. St. Ours
Charles F. Hilton
Daniel L. Fitch
Thomas E. Ullrich
Stephan W. Milo
Humes J. Franklin, III
Jeffrey R. Adams

WHARTON ALDHIZER & WEAVER^{PLC}

ATTORNEYS AT LAW

THE AMERICAN HOTEL
125 SOUTH AUGUSTA STREET
SUITE 2000
STAUNTON, VIRGINIA 24401
WWW.WAWLAW.COM

TELEPHONE
STAUNTON (540) 885-0199
HARRISONBURG (540) 434-0316

FAX (540) 213-0390

WRITER'S DIRECT DIAL: (540) 213-7445
WRITER'S E-MAIL: JADAMS@WAWLAW.COM

Lauren R. Darden
Derek J. Brostek
P. Marshall Yoder
Ginger T. Chapman
James L. Johnson
Ashley H. Waterbury
Alexandra E. Humphreys
Lucas I. Pangle
Briana A. Stevens

Reply to the Staunton office

May 23, 2019

Via email (jfindlay@rpv.org)

John Findlay
Executive Director
Republican Party of Virginia
Richard D. Obenshain Center
115 E. Grace Street
Richmond, Virginia 23219

Re: 97th House of Delegates Legislative District Nomination Process

Dear Mr. Findlay:

I represent Scott Wyatt for Delegate, and am writing you regarding the nomination process for the 97th House of Delegates District (the "District"), which he has contested. As you know, there has been great controversy within the party regarding the nomination process for the District and, in particular, the decision of the 97th Republican Legislative District Committee (the "97th LDC") to change the method of nomination from a convention to a party canvass after the mass meetings had convened, and after selection and certification of the convention delegates.

In particular, I am writing you with regard to meeting of the First Republican Congressional District Committee (the "1st CDC") held on Monday, May 20, 2019 (the "Meeting"). At the meeting the 1st CDC ruled that:

- (i) Mr. Wyatt's appeal to the 1st CDC was ripe, because as a matter of fact his contest had been disposed of by the 97th LDC, and
- (ii) the motion purportedly cancelling the convention was out of order and, therefore, the convention was valid and Mr. Wyatt is the Republican nominee for the District.

I would note that the vote on the merits of the appeal was an overwhelming 17-5, with the chairman abstaining.¹

Based on your public statements to the press, in particular as quoted in the *Richmond Times Dispatch*, you disagree with the ruling of the 1st CDC.² Your opinion is, of course, your own. However, when you purport to speak for the Republican Party of Virginia, you are acting under authority. In particular, you are acting under the authority of the *Plan of Organization* of the RPV. For the reasons I set out below, the ruling of the 1st CDC is valid and controlling unless and until it is overruled, not by one individual or one campaign, but by either the State Central Committee or a court of law. Accordingly, I insist that when speaking for the RPV or engaging in your responsibility as Executive Director of the RPV, you respect the processes and authorities laid out in the *Plan*, rather than openly defy those processes and authorities.

I. The Authority of the 1st CDC to Hear the Appeal.

In your comments to the *Richmond Times Dispatch*, you state your opinion that it was premature for the 1st CDC to hear Mr. Wyatt's appeal at the Meeting. You also intimate as much in your email of May 21, 2019 to the members of the SCC, in which you state that "an appeal cannot be heard while a contest/appeal is in front of another committee." However, you do not quote the text of the General Counsel's ruling. In it, Mr. Marston, who uses his words very carefully, stated that "where an LDC has disposed of a matter, an appeal lies with the Congressional District Committee."³ So the proper framing of the question is: had the 97th LDC disposed of the contest when the Meeting was convened?

That framing matters, as there are numerous ways to dispose of a motion without actually calling a vote on the underlying question. To give just one relevant example, *Robert's Rules of Order, Newly Revised* (11th ed.; "*RORN*") provides that a Motion to Postpone to a Certain Time can have the effect of killing a measure, if the time to which the postponement is made has the practical effect of rendering consideration of the motion impossible or otherwise moots it.⁴

In this case, Mr. Wyatt is appealing (among other things) the party canvass, to be held on June 1, 2019. In light of that fixed date, the Motion to Postpone consideration of the contest until June 5, 2019, has the effect of denying Mr. Wyatt any meaningful relief. Accordingly, that

¹ A video recording of the Meeting can be found at the following address:

<https://www.youtube.com/watch?v=rI2SyC85Wrg>.

² "John Findlay, executive director of the Republican Party of Virginia, said he agrees with the Peace campaign that it was improper for the 1st District GOP panel to take up the issue Monday night because the 97th Legislative District Committee has not yet ruled on the Wyatt appeal. 'As far as we're concerned, the June 1 canvass is still on,'" Findlay said." Mel Leonor, "Wyatt Claims Victory in 97th as GOP Panel Backs Appeal; Peace calls Vote Improper", *Richmond Times Dispatch* (May 20, 2019) accessed at https://www.richmond.com/news/plus/wyatt-claims-victory-in-th-as-gop-panel-backs-appeal/article_45d1cfa6-2cf5-576e-befc-f8ec314e36c1.html on May 23, 2019.

³ *RPV General Counsel Letter Ruling* (May 21, 2019), accessed at <https://virginia.gop/wp-content/uploads/2019/05/2019-05-21-Congressional-District-Consideration-of-Appeal-from-LDC.pdf> on May 23, 2019.

⁴ *RORN* § 14, p. 184.

Motion was, in effect, a Motion to Postpone Indefinitely, which is a motion that kills⁵ or, to use the formulation of Mr. Marston, disposes of the matter.⁶

Moreover, Mr. Marston made it clear at the Meeting that the 1st CDC had the authority to determine whether the 97th LDC had in fact disposed of the appeal. Specifically, at the Meeting, he stated as follows:

So, the question before you is really I think a factual one as to what a legislative committee did. If their actions constituted a rendering of a decision the matter would be appealable. If their actions did not constitute rendering a decision, that means it would not be appealable. That's all I have.⁷

It is important to note several things about Mr. Marston's statement. First, he states that whether the 97th LDC had disposed of Mr. Wyatt's contest is a factual question. Which means it is a question that is not answered merely by reference to some authority, such as the *Plan* or *RONR* or the minutes of the 97th LDC. The decision is made in light of all of the facts and circumstances.

Second, the General Counsel states that the question is one that is "before you", i.e., before the 1st CDC at the Meeting. In saying this, he is affirming the 1st CDC's legitimate authority to answer that factual question, i.e., to determine whether the 97th LDC had disposed of the contest and, therefore, whether the appeal was ripe. Note that the General Counsel does not try to influence, much less override, the decision-making authority of the 1st CDC on that point. To the contrary, after providing the members of the 1st CDC with advice as to the proper framing of the question, he properly commits the matter to their considered judgment.

After deliberation, the 1st CDC exercised that judgment and found as a matter of fact that the 97th LDC had disposed of Mr. Wyatt's contest. On the basis of that factual finding, they concluded that his appeal to the 1st CDC was ripe and proceeded to rule on it.

II. The Substance of the Appeal.

I have found this matter to be eerily similar to the litigation challenging the Incumbent Protection Act. In that case, we spent virtually all of our time and effort dealing with procedural roadblocks put in our way by the Attorney General, precisely because he had no interest in discussing the substance of that law, given its obvious constitutional infirmities.

⁵ *Id.*

⁶ It is also worth noting that pursuant to the *Plan*, the 97th LDC is under an affirmative obligation to hear the matter and render a decision within fourteen days of receipt of the appeal. *Plan*, Article X, § 5. The appeal was received by the Chairman of the 97th LDC on May 9, 2019. Accordingly, the 97th LDC's decision to defer consideration of the appeal until June 5, 2019, represented not only a decision to effectively kill the measure by dilatory tactics. It also represented an affirmative refusal to fulfil the 97th LDC's clear obligation under the *Plan*.

⁷ A video recording of the comments of Mr. Marston at the Meeting can be found at the following address: <https://www.youtube.com/watch?v=kcvseiddX28>.

Similarly, in this case there has been much ink (virtual and otherwise) spilled on procedural questions, but little interest in the fundamental question, which is: can a nomination process be changed after votes have already been cast and counted? And the reason for that disinterest in the fundamental question is, to my mind, the same. It is patently clear, both as a matter of basic fairness, and pursuant to *RONR* and the *Plan*, that a committee cannot change the nomination method once the nomination process is ongoing. Those in the Peace campaign and elsewhere who find that answer unwelcome have chosen to ignore that fundamental question. But, thanks to the 1st CDC, that question can no longer be ignored.

There are at least three reasons why the 97th LDC's motion to cancel the convention was clearly out of order. First, *RONR* provides that a motion cannot be rescinded “[w]hen something has been done, as a result of the vote on the main motion [i.e., the motion to adopt a convention as the method of nomination], that is impossible to undo.”⁸ In this case, the mass meetings were convened, and the delegates selected and certified, all of which were independent acts which the 97th LDC had no power to undo.

Second, both *RONR* and the *Plan* clearly provide that a convention is governed by its delegates.⁹ Once it is constituted, only those delegates can make final decisions regarding it, whether relating to credentials¹⁰, rules¹¹, programs¹², or otherwise. And the *Plan* is clear that the convention is constituted no later than the date that the delegates are certified, and the chairman who accepts those certifications does so on behalf of the convention.¹³

Finally, the *Plan* requires official committees to remain neutral in contested nomination processes,¹⁴ and further requires the members of such committees to act in good faith.¹⁵ The blatant intervention in the nomination process on behalf of the Peace campaign, based on its assessment that it fared poorly at the mass meetings, violates those provisions. There is a reason Lady Justice wears a blindfold. The 97th LDC pulled that blindfold off when it made the momentous decision to change the method of nomination, despite knowing to a reasonable certainty which candidate that decision would help and which it would hurt.

All of which is to say that there is ample authority in *RONR* and the *Plan*, as well as sufficient factual predicates, for the considered and overwhelming judgment of the 1st CDC to

⁸ *RONR* § 35, p. 308.

⁹ *Plan*, Article VIII §§ A, D and H and *RONR* § 58, p. 600f.

¹⁰ *RONR* § 59, p. 610f.

¹¹ *Plan*, Article VIII § J.1. and *RONR* § 59, p. 618f.

¹² *RONR* § 59, p. 624f.

¹³ *Plan*, Article VIII, §H.1.a. (“Delegates and alternates to a Convention shall be certified to that Convention by the permanent Chairman, and Secretary of the Mass Meeting, or Convention which selected them, or by the Chairman of the Official Committee which conducted the Mass Meeting, Convention or Party Canvass to select the delegates and alternates. The certifications shall be delivered to the Chairman of the Official Committee which called the Convention prior to the convening of the Convention.” (emphasis added).

¹⁴ *Plan*, Article VII, § I.

¹⁵ *Plan*, Article VII § J.1.

grant Mr. Wyatt's appeal, to affirm the convention, to disavow the party canvass, and to declare Mr. Wyatt the Republican nominee for the District.

III. The Ongoing Appeal Process.

The 1st CDC has ruled on this matter, both as to whether the appeal was ripe, and as to whether the appeal was meritorious. Only the State Central Committee has the power to overrule the 1st CDC.¹⁶ Unless and until it is overruled, the ruling of the 1st CDC is the final and definitive position of the RPV on the matter. The opinion of one person, whether that person is the General Counsel, the Executive Director, or the Chairman of the RPV, has no bearing on the legitimacy or authority of that ruling, and to act otherwise introduces chaos and confusion into the deliberations of the official committees of the party.

IV. Legal Implications.

Perhaps needless to say, there is a possibility, perhaps even a likelihood, that this matter will result in litigation. At this point, I have only two things to say on that front.

First, I commend to you the only case we have found that is relevant to this matter, *Chichester v. Reamy*, 157 Va. 55. *Chichester* is uncannily similar to this dispute. The defendants were the chairman and members of a democratic unit committee that changed the method of nomination shortly before the nomination process was to commence. The congressional district committee overruled the unit committee and ruled that the change was out of order, but the unit committee persisted. Litigation inevitably ensued. The court ruled that the rights of both the candidates and the voters in initial method of nomination chosen had attached, and the unit committee was compelled to revert to the method of nomination originally selected. In short, the only relevant case law is significant inasmuch as it:

- (i) held that late-breaking changes to the method of nomination are subject to be challenged in and overruled by the courts, and
- (ii) affirmed the congressional district committee's decision that the late-breaking change was improper.

Second, in light of the probability that this matter will be litigated, and the probability that you would be a witness in and a party to such litigation, you are hereby directed not to destroy, conceal, or alter in any manner whatsoever any or all evidence, documents, information, paper or electronic data and/or other tangible items pertaining to or relevant to this matter. In addition, do not turn off or otherwise inactivate any audit or metadata recording system applicable to such records.

¹⁶ *Plan*, Article X § B.3.

V. Political Implications.

While my brief in this matter relates to legal and quasi-legal processes, I would be remiss if I did not say a final word about the political implications of your actions. The 1st CDC has spoken, and spoken clearly. Even if we assume for the sake of argument that the appeal was not ripe at the Meeting, it will be ripe no later than June 5, 2019. It is clear how the 1st CDC would rule on the merits at that time. Moreover, at that point there will not be sufficient time for the SCC to hear the matter before the certification deadline of June 16, 2019. Thus, the decision of the 1st CDC would be the final decision on the matter. In short, it is clear that Chris Peace has no legitimate path to the Republican nomination for the District. Which leads to the question: why is he pursuing this punishing fight within the RPV?

There are, to my mind, two plausible reasons. The first is that Chris Peace hopes that a rogue chairman of the 97th LDC will certify the winner of the party canvass as the nominee, in the face of a ruling of the 1st CDC that the convention was the legitimate nomination process. In short, he is counting on defiance to the 1st CDC and, ultimately, the *Plan*. Such a course would necessarily result in costly and divisive litigation, litigation that we believe the 1st CDC and Scott Wyatt would ultimately win.

All of which brings us to the second reason, which actually has nothing to do with the nomination. Chris Peace intends to contest for his seat (and he assuredly thinks of it as HIS seat) as an independent. Part of the narrative he is creating for that independent campaign is the claim that he was unfairly cheated out of the Republican nomination, as ironic as that might seem in light of his transparent attempt to change the method of nomination after the delegates were selected and seated. In order to convince otherwise faithful Republicans to support an independent candidacy, he needs to attack the integrity, not of Scott Wyatt, but of the 1st CDC and, by extension, the RPV and the *Plan*.

Chris Peace is an incumbent with an adamant sense of entitlement. His rationale for damaging or even leaving the party to advance his personal interests is obvious, and, if not laudable, at least understandable. What is less obvious is: why would the Executive Director of the RPV so blatantly assist him in a strategy that is likely to end either in defiance of the authority of the RPV and the *Plan*, or an independent candidacy against a Republican nominee?

CONCLUSION

The RPV is a large and diverse party. Its members disagree on everything from policies, political strategies, and personalities. It is the nature of the party—with its internal elections and nomination contests—that we have to contend with our allies before we can contend with our opponents.

What allows such a diverse and competitive community to remain united is the knowledge that there are rules that we all follow. If we all follow those rules, at the end of the day everyone will all know that—whatever the outcome in a particular controversy—he or she has

May 23, 2019
Page 7

been heard and had the benefit of a fair process. As a result, that outcome will be legitimate and will be seen to be so, even by those who disagree with the result.

In this case, the 97th LDC tried to change one of our most fundamental rules in the middle of the game. In an effort to protect that outrageous decision, you are attacking the authority of the 1st CDC and the legitimacy of its decisions. You are usurping the sole and unique authority of the SCC to hear an appeal of the 1st CDC's rulings and rule on their correctness. And you are providing aid and support to a candidate whose endgame is, at best, defiance of the RPV and the *Plan*, and may well result in independent opposition to the party's candidate.

Unless and until the ruling of the 1st CDC is overruled by the SCC or the courts, we request that, in your conduct and comments as Executive Director of the RPV, you acknowledge that the ruling of the 1st CDC is the definitive and final ruling of the RPV on the matter. In particular, in light of the ruling finding that the party canvass is illegitimate, we request that you remove that event from the RPV website, unless and until the 1st CDC is overruled by the SCC or a court of law.

I am happy to discuss this matter with you at your convenience. In the interest of fairness, a representative of the Peace campaign also should participate, and in the interest of clarity Mr. Marston should as well.

Very Truly Yours,

s/ Jeffrey R. Adams

Jeffrey R. Adams

P.S. To the members of the State Central Committee:

I strongly encourage you to view the video of the entire 1st CDC Meeting. You will find that their sober deliberations command your respect.

JRA

cc: Scott Wyatt (via email)
Members of the State Central Committee of the Republican Party of Virginia (via email)