The Last Contested Election in America

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In the most recent statewide election for North Carolina superintendent of public instruction, Democrat June Atkinson defeated Republican Bill Fletcher by a vote of 93 to 21.

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That 72-vote margin was actually the second round of voting on the two candidates. In the first round, in the general election of 2004, the voters of the state cast 1,655,719 votes for Atkinson and 1,647,184 for Fletcher, a margin of about 8,500 votes.

How a margin of 8,500 votes out of 3,300,000 became a margin of 72 out of 114 is an unprecedented story of North Carolina constitutional law. Seldom do citizens participate in such a moment of constitutional history. This article looks at its lessons and explores what they tell North Carolinians about their electoral future.

A Vote of 93 to 21

On ceremonial occasions, extra chairs are brought into the chamber of the state House of Representatives so that the 50 members of the Senate may join the 120 members of the House for a joint session.

How Does the General Assembly Determine Contested Elections?

The North Carolina Constitution says that the General Assembly is to decide contested Council of State elections "in the manner prescribed by law." Prodded by the state supreme court's February 2005 ruling that the statutes contained no "manner" that would apply to the contested 2004 election of the superintendent of public instruction, the General Assembly put a new procedure in place in March 2005.[1]

Initiation of the Contest

The new procedure applies to the ten Council of State offices: governor, lieutenant governor, secretary of state, auditor, treasurer, superintendent of public instruction, attorney general, commissioner of agriculture, commissioner of insurance, and commissioner of labor. Under the procedure a candidate for one of these offices who wants to contest an election may appeal the final decision of the North Carolina State Board of Elections directly to the General Assembly. He or she begins by filing with the clerk of the House of Representatives a notice of intent to contest the election. The notice may be based on either of two grounds: (1) that the opponent is ineligible or unqualified or (2) that there was error in the conduct or results of the election. The opponent may, if he or she chooses, file an answer to the notice of intent. During a period specified in the statute, the parties may take depositions and prepare for proceedings before a special committee. If the contesting candidate wishes to continue with the contest, he or she may then file a petition, and the opponent may file a reply.

Appointment and Work of the Special Committee

The speaker of the House and the president pro tempore of the Senate then each appoint five members of their respective chambers to the special committee, with no more than three of the five being of the same political party. The committee is authorized to adopt rules, oversee investigations of fact, conduct hearings, compel the testimony of witnesses, and, if appropriate, order the recounting of ballots. At the conclusion of its efforts, the committee reports its findings regarding the law and the facts and makes recommendations to the General Assembly for action.

Determination by the General Assembly

With the report of the special committee in hand, the two chambers of the General Assembly meet in joint session, with the speaker of the House presiding. Each of the 170 members (120 representatives and 50 senators) has one vote. A majority of those actually voting is needed for the General Assembly to declare one of the candidates elected. If the issue is the eligibility or the qualifications of the candidate who is the subject of the contest, the General Assembly determines whether that candidate is ineligible or unqualified. If he or she is, then the General Assembly orders a new election. If the issue is alleged error in the conduct or the results of the election, the General Assembly determines which candidate received the most votes. If it can make that determination, then that candidate is declared elected. If it cannot, then the General Assembly may order a new election or other appropriate relief.

Abatement of Judicial Proceedings and Prohibition of Judicial Review

On initiation of a contest in the General Assembly, any judicial proceedings regarding the election abate. The decision of the General Assembly is not reviewable in the courts.

Note

1. Found in new N.C. GEN. STAT. §§ 120-10.1 through -10.14 (hereinafter G.S.), new G.S. 163-182.13A, and amended G.S. 163-182.14 and -182.15.

Perhaps the governor is about to deliver the State of the State address. Perhaps the Wolfpack, the Tar Heels, or the Blue Devils are being honored for yet another national championship in basketball.

On August 23, 2005, the extra chairs were brought in, but the occasion was constitutional, not ceremonial. After a brief debate, paper ballots were distributed to all the senators and the representatives. Three choices appeared on the ballot: in the general election, Atkinson had received the most votes; in the general election, Fletcher had received the most votes; or it was not possible to tell. The galleries were full. Both candidates were present. The clerk of the House announced the result: 93 "Atkinson," 21 "Fletcher," 27 "can't tell," and

Table 1. **Elective Offices in North Carolina**

Offices Chosen in Partisan Elections	
President and vice-president	Commissioner of agriculture
U.S. senators	Commissioner of labor
U.S. representatives	Commissioner of insurance
Governor	State senators
Lieutenant governor	State representatives
Secretary of state	District attorneys
State auditor	County commissioners
State treasurer	Clerks of superior court
Superintendent of public instruction	Registers of deeds
Attorney general	Sheriffs
Offices Chosen in Nonpartisan Elections	
Supreme court justices	Most mayors
Court of appeals judges	Most city council members
Superior court judges	Most school board members
District court judges	Soil/water conservation board members

24 with none of those choices marked, in apparent protest.

Few would have envisioned this moment back in November, when candidate Fletcher challenged candidate Atkinson's 8,500-vote margin by questioning the legality of 11,000 out-of-precinct provisional ballots cast in the election, enough ballots to draw into question the outcome of the election and perhaps justify a court order for a new election.

The procedure followed by the General Assembly on August 23 was specially designed to fulfill the requirements of a provision of the state constitution that until then had escaped almost everyone's notice: Article VI, Section 5. It says that a contested election for any of the ten Council of State offices (for the offices involved, see the sidebar on page 44) "shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law."

The Initial Challenge

North Carolinians elect people to many offices (see Table 1). Sometimes elections are close, and the trailing candidate believes that something was wrong about the way in which the election was conducted or the way in which the votes were counted. The elections statutes permit the trailing candidate (or any other eligible voter) to file a protest with the county board of elections. After a hearing, the board may determine that (1) nothing was wrong with the way in which the election was conducted, (2) there was a problem but the problem did not "cast doubt on the results of the election," or (3) there was a problem and "it was sufficiently serious to cast doubt on the apparent results of the election."[1]

A candidate for sheriff may believe, for instance, that elections officials at Beaver Dam precinct accidentally threw away 100 ballots on election night. He may file an election protest. If the candidate trailed the apparent winner by fewer than 100 votes, and he can demonstrate that in fact the ballots were discarded, he may prevail in his protest. In that event the North Carolina State Board of Elections (SBOE) may order a new election on the grounds that "irregularities affected a sufficient number of votes to change the outcome of the election."[2]

What Is Out-of-Precinct Provisional Voting?

In resolving a contested statewide election, what is the authority of the courts, and what is the authority of the General Assembly? Those big constitutional questions were the focus of action in the courts and the legislature following the 2004 race for superintendent of public instruction. But the underlying substantive question that got the litigation off the ground concerned provisional voting—more specifically, out-of-precinct provisional voting.

Throughout North Carolina history until very recently, elections officials had full control over voter registration. The law required a person wanting to register to vote, to come in person before an elections official, typically an elections board member or an employee of that board. The elections official questioned the applicant to determine his or her eligibility to vote (establishing whether the person was eighteen years of age, a citizen of the United States, and a North Carolina resident). The elections official then administered an oath to the applicant, the applicant swearing that he or she would support the constitutions of the United States and North Carolina. Those actions fulfilled the eligibility requirements.

The procedure put the registration application automatically in the hands of an elections official. The county board of elections then directly reviewed the application, approved it, and entered the applicant on the voter rolls.

The Rise of the Need for Provisional Voting

Beginning in the 1990s, that direct control over voter registration slipped away from elections officials. In May 1993, Congress passed the National Voter Registration Act (NVRA), a goal of which was to make registering to vote easier.[1] The NVRA required states to permit voter registration by mail and at drivers' license offices, public assistance offices, and certain other public offices. In 1994 the North Carolina General Assembly passed the appropriate legislation to comply with this new federal law.[2]

With the new rules, elections officials were faced with applications for voter registration that had been filled out in many different kinds of places, totally without the supervision of elections officials. Three problems immediately resulted.

First, the error rate on the applications went up. People filled out the forms improperly more often.

Second, delays developed in transmittal of the application forms. In the past, elections officials had had custody of the applications from the moment they were filled out. With the change, elections officials were receiving applications from drivers' license offices, employment security offices, and others—applications they did not even know had been filled out until the applications were received, on whatever schedule they made their way to the elections office.

Third, people who filled out the forms were not always savvy about the difference between applying to register to vote, and actually being registered after the application was approved. They frequently thought of themselves as having registered to vote when they filled out the form at the division of motor vehicles, for example, unaware that the registration was not complete until the elections board reviewed and approved the application.

As a result, in increased numbers, people showed up at the polls on election day believing that they were registered to vote, only to find out that their names were not on the precinct registration books. Perhaps the applications had not found their way from the drivers' license office to the elections office in time. Perhaps the elections board, in reviewing the applications, had found mistakes and omissions and sent them back for revision.

Introduction of Provisional Voting

So what happens when a voter comes to a precinct to vote but is not in the poll book?

In years past, that potential voter would simply have been turned away: he or she could not vote. However, the North Carolina State Board of Elections (SBOE) responded to the difficulties created by the new voter registration rules by

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introducing provisional voting.[3] Under provisional voting, a person who believes that he or she should be on the voter rolls but is not, or who for some other reason appears to be ineligible, may vote a ballot that will be held separately and counted later only if the voter's eligibility can be subsequently established.

For years the regulations adopted by the SBOE identified particular categories of people eligible to vote by provisional ballot. The largest category was people who claimed to have registered to vote (perhaps by submitting an application for registration when they got their drivers' license or filed for unemployment compensation) but whose names did not appear on the registration books. A person who claimed to be in one of the categories was allowed to fill out a provisional-ballot application and cast a provisional ballot at his or her precinct polling place. The county board of elections then reviewed all the applications, determined which provisional voters properly fit one of the eligible categories, and counted their votes. All other provisional ballots were not counted.

Still, even if people were casting provisional ballots, they were expected to vote in their precinct of residence.

Introduction of Out-of-Precinct Provisional Voting

That was the status of North Carolina provisional voting at the time of the presidential election fiasco in Florida in 2000. Florida's virtual tie-vote between candidates George Bush and Al Gore was characterized by many problems. The most famous involved punch ballots and "pregnant chads." Another serious and highly publicized problem was the turning away of apparently eligible voters at the polls for the sole reason that the registration poll books did not contain their names. Florida had not followed North Carolina's lead and did not have in place any procedures for provisional voting. Tens of thousands of votes were simply not cast.

Congress responded to the Florida election by passing the Help America Vote Act of 2002.[4] Among its many provisions, the act mandated provisional voting.[5] If a person went to a voting precinct and was not on the list of eligible voters, the person could provide a written affirmation stating that he or she was "a registered voter in the jurisdiction" and eligible to vote in that election.[6] Then the person could cast a provisional ballot. In 2003 the North Carolina General Assembly codified similar language.[7]

For the 2004 elections, the SBOE interpreted these two enactments to require that elections officials allow a registered voter of the county to vote a provisional ballot at any voting place in the county—interpreting the term "jurisdiction" to mean "county." That is, an eligible voter of a county was permitted to vote not only at his or her precinct of registration (where the voter would cast a regular ballot) but alternatively at any other precinct in the county (where the voter would cast a provisional ballot). Such out-of-precinct provisional ballots would be counted for all the races in which the voter would have been eligible to vote if he or she had voted in his or her home precinct.

These out-of-precinct provisional ballots became the subject matter of the challenge in the race for superintendent of public instruction.

Notes

1. 42 U.S.C. §§ 1973gg through 1973gg-10.
2. In fact, the requirement applied only to elections for federal offices—president, vice-president, U.S. senator, and U.S. representative—but having one set of rules for registering for federal elections and another for state and local elections was impractical, so the rules for all elections were changed. The 1994 legislation enacted a new Article 7A of North Carolina General Statutes Chapter 163 (hereinafter G.S.).
3. Provisional voting is sometimes referred to as "fail-safe voting." The terms are equivalent, but the latter term is not used as frequently.
4. 42 U.S.C. §§ 15303–15545.
5. As with the NVRA, the requirement of provisional voting applied as a matter of law only to federal elections, but in practical reality it was applied to all elections.
6. 42 U.S.C.S. § 15482(a) (emphasis added).
7. G.S. 163-166.11(5).

Candidate Fletcher followed this very procedure in the immediate aftermath of the 2004 election for superintendent of public instruction, filing election protests in all 100 counties.[3] He noted that at least 11,000 out-of-precinct provisional ballots had been cast statewide in the general election, more than the 8,500-vote margin by which he trailed. He argued that the SBOE had acted unconstitutionally when it adopted rules permitting people to cast provisional ballots in precincts other than their precincts of residence. (For a discussion of out-of-precinct provisional voting, see the sidebar on page 45. For an explanation of the distinction between provisional voting and early voting, see the sidebar on page 47.) Those 11,000 ballots were therefore illegally cast. That problem was "sufficiently serious to cast doubt on the apparent results of the election," he argued, and Atkinson should not be declared the winner. Either the votes should be recounted with out-of-precinct provisional ballots removed, or the SBOE should order a new election.[4]

The SBOE assumed jurisdiction over the protests filed in the 100 counties (since, after all, the issue was exactly the same in all of them) and denied them. In effect, it held that the out-of-precinct provisional ballots were lawfully cast and counted. Following the statutory protest procedure, Fletcher appealed the matter to the courts. The matter was under appeal, so the SBOE did not issue a certificateion of election to Atkinson. No winner was yet certified. Neither candidate took office.

The Supreme Court's Surprising Decision

Fletcher's election protest made its way quickly through the courts, and in February 2005, just three months after the election, the North Carolina Supreme Court issued an opinion that caught most observers by surprise.

Could the Supreme Court Even Hear the Case?

The first issue before the supreme court was whether it had the power to hear the case at all. Atkinson pointed to the special provision of the state constitution stipulating that contested Council of

State elections "be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law." Didn't that mean that the supreme court—all the courts, really—had no jurisdiction, she asked?[5]

The court held that it did have jurisdiction. It reached that conclusion on two grounds.

First, the constitution provides that the General Assembly is to determine contested elections in the manner prescribed by law. But no statute provided for a candidate in a Council of State race to take his or her protest directly to the General Assembly. Therefore, the court reasoned, there was "no manner prescribed by law."[6]

This odd statutory silence was the result of a puzzling action of the General Assembly in 1971. Before that year the election law did provide that in a contested Council of State election, the SBOE "shall certify to the Speaker of the House of Representatives a statement of whatever facts the Board has relative thereto, and the contest shall be determined by joint vote of both houses."[7] In 1971 that provision was repealed, and nothing replaced it. No current-day memory exists to explain the repeal.

Fletcher had followed the regular contest procedures set out in the statutes, the court noted, and in the absence of any other "manner prescribed by law," he properly brought the matter to the court, not to the General Assembly.[8]

Second, and more important, the court reasoned, the state constitution gives to the supreme court jurisdiction "to review upon appeal any decision of the courts below, upon any matter of law or legal inference." This matter had come to the supreme court on appeal from the superior court, so it had jurisdiction.[9]

Could the 11,000 Votes Be Counted?

Fletcher's substantive argument was that out-of-precinct provisional ballots violated the North Carolina Constitution. In his brief before the supreme court, he said, "This case concerns whether out-of-precinct provisional voting is allowed by our constitution for state offices."[10] The court did not rule on this constitutional question, however. It ruled instead that the statutes on which the SBOE relied in mandating out-of-precinct provisional voting did not in fact authorize such voting. The SBOE's interpretation of the statutes was in error. Its action in permitting out-of-precinct provisional balloting was "statutorily unauthorized." Those ballots could not be counted. The court expressed its regret at this outcome:

> *It is indeed unfortunate that the statutorily unauthorized actions of the State Board of Elections denied thousands of citizens the right to vote on election day . . . [But] [t]his Court is without power to rectify the Board's unilateral decision to instruct voters to cast provisional ballots in a manner not authorized by State law.*[11]

This ruling surprised most court watchers and elections officials. When the supreme court sent the matter back to the superior court for further action, a large question remained: What happens next?

Response of the General Assembly

In early March, just a month after the supreme court decision, the General Assembly responded with two pieces of legislation. The first reasserted its intent to permit out-of-precinct provisional voting, and the second established a new procedure for resolving contested Council of State and legislative races.

Did the General Assembly Really Mean to Authorize Out-of-Precinct Provisional Voting?

The first of the two pieces of legislation took direct aim at the supreme court's statutory ruling: "The State Board of Elections and all county boards of elections were following the intent of the General Assembly when they administered [relevant portions of the elections laws] to count in whole or in part ballots cast by registered voters in the county who voted outside their resident precincts" in the 2004 elections.[12]

The new law amended several provisions of the elections law to make clear that out-of-precinct provisional voting was permitted and had been permitted.[13]

The new law contained a big kicker: its provisions were applicable to the 2004 elections, bringing the content of

Early Voting vs. Provisional Voting

In recent years, many North Carolinians have become accustomed to voting in the weeks ahead of an election at any of several sites in their county. One or more of the sites might well be elsewhere than their precinct residence. This kind of out-of-precinct voting is different from the out-of-precinct *provisional* voting that was at issue in the 2004 election of the superintendent of public instruction.

Early voting is not provisional voting at all. It is a form of absentee voting.

Until the early days of the twentieth century, voting in person on election day was the only option. Then the introduction of absentee voting made it possible for people who were ill, would be away on election day, or had one of a few other excuses, to cast a vote.

For many years, voters could request and submit absentee ballots only by mail. In 1977 the General Assembly amended the absentee ballot laws to permit a person to go to the county board of elections office and, in one procedure, apply for an absentee ballot and mark it. This one-stop absentee voting, like all absentee voting, applied only to people who were eligible under the law to vote by absentee ballot.

In 1999 the General Assembly began a series of steps that have resulted in no-excuse absentee voting. That is, anyone now may vote by absentee ballot for any reason.

Early in the twenty-first century, the General Assembly began to permit boards of elections to set up one-stop absentee voting sites at locations around the county, not just at the board of elections office. The transition to early voting was complete.

the new statute into direct conflict with the ruling of the supreme court.

So How Does a Candidate Appeal to the General Assembly?

The second piece of legislation addressed the concern of the supreme court that the statutes contained no procedure for a candidate to take his or her protest of a Council of State election to the General Assembly for determination. The new statute put such a procedure in place (see the sidebar on page 44). It called for a committee of the General Assembly to look into a contested election and make a recommendation to the full legislature, which would then meet in joint session to "determine" the election.

This new law contained two big kickers: it too would be applicable to the 2004 elections, and all judicial proceedings already begun were to cease. The General Assembly had asserted its jurisdiction, and the courts were to stop.

The stage was set for a constitutional showdown between two coequal branches of government: the legislature and the judiciary.

Avoidance of a Showdown

The supreme court ruling came on February 4, 2005, and the General Assembly's response came with the governor's signatures on the two new statutes a month later. In the meantime the court matter had been remanded to the superior court "for further proceedings consistent with this opinion." The superior court found that the new statutes, passed in 2005 but made applicable to the 2004 elections, controlled, and that, because Atkinson had filed her notice of intent to contest the election in the General Assembly under the new statute, Fletcher's election protest abated. The superior court dismissed it.[14]

Application of the New Procedures in the General Assembly

When candidate Atkinson, following the steps set out in the new legislation, filed a notice of intent to contest the election, the General Assembly invoked the new procedure. First, it notified the courts that the procedure had begun in the General Assembly, so the abatement provision could be applied. The speaker and the president pro tempore appointed members to a Joint Select Committee on Council of State Contested Elections.

What Procedure Did the Joint Select Committee Follow?

An initial issue for the chairs of the Joint Select Committee—Sen. Dan Clodfelter and Rep. Deborah Ross—was the procedure that the committee should follow. The new statutes provided the backbone for a procedure, but they also permitted the committee to "adopt supplemental rules as necessary to govern its proceedings."[15] The chairs decided to follow a procedure much like a Congressional hearing. That is, at the hearing itself, counsel for the committee would question witnesses, and members of the committee would question witnesses.

What Did the Committee Do?

The statute directed the Joint Select Committee to "report its findings as to the law and the facts and make recommendations to the General Assembly for its action."[16] In so doing, the committee focused on the ultimate question to be answered by the full General Assembly in joint session: "which candidate received the highest number of votes" in the 2004 general election?[17]

In formulating its recommendations, the committee faced a fascinating legal issue: (1) was it bound by the 2005 statute, which provided that out-of-precinct provisional ballots were to be counted, even in the 2004 election, or (2) was it bound by the supreme court's decision that the counting of out-of-precinct provisional ballots in the 2004 election was unlawful? The parties, Atkinson and Fletcher, fully briefed the committee on this issue.

How Did the Committee Resolve the Issue?

The report adopted by the Joint Select Committee resolved the issue of controlling law—and took a big step toward avoiding a constitutional crisis between the legislature and the court—by acknowledging the supreme court's decision but deciding that it should not be applied to an election that already had been concluded by the time the supreme court had made its ruling. The report said,

> *The retroactive application would result in the disenfranchisement of at least 11,310 innocent voters who exercised their franchise in accordance with the good-faith instructions of elections officials . . . [The Supreme Court's decision] does not compel the ordering of a recount or a new election. Its ruling should be given prospective-only effect.*[18]

In effect, the report finessed the constitutional showdown. It applied neither the supreme court decision nor the new statute retroactively to the 2004 election. It allowed the election to stand as conducted—in good faith by the elections officials of the state and the voters.

Timeline of the Last Contested Election in America

November 2, 2004	November 30, 2004	December 17, 2004	February 4, 2005
In the general election for superintendent of public instruction, June Atkinson appears to receive about 8,500 votes more than Bill Fletcher. Fletcher files protests and a court action in the following days, on the grounds that at least 11,000 out-of-precinct provisional ballots counted in the election should not have been counted.	The State Board of Elections denies Fletcher's protests. Fletcher appeals. Because of the ongoing appeal, the State Board of Elections does not issue a certificate of election to Atkinson.	The superior court affirms the State Board of Elections' holding. Fletcher appeals.	The North Carolina Supreme Court holds that the out-of-precinct provisional ballots were unlawful, bringing the outcome of the election into question. It remands the case to the superior court.

What Did the General Assembly Decide?

So on August 23, 2005, in an unprecedented procedure, the House and the Senate met in joint session and, after brief debate, voted. Atkinson received a majority of the votes cast and was declared elected. She took the oath of office shortly thereafter.

The last undecided statewide election from the 2004 election in the entire country was finally decided.[19] (For a timeline of the events leading up to this action, see page 48.)

The Nature of the Role of the General Assembly

In its joint-session vote, the General Assembly undertook a role that it had not exercised in a century and a half. It acted not as a court in resolving a controversy, not as a legislature in passing a law, but as a part of the electorate—as a direct participant in the "election" of a statewide elected official.

At one time in North Carolina's history, such a role for the General Assembly was not unusual. Before 1835 it elected the governor. There was no popular vote at all. Until 1868 it elected the Council of State officers other than governor.

The constitutional provision at issue in the Fletcher-versus-Atkinson election—that contested Council of State elections "shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law"—is the remaining vestige of that role of the General Assembly as the electorate. The heading of the constitutional provision is "Elections by people and General Assembly." By its very words, the constitution speaks of this determination of a contested race as an "election" by the General Assembly.

The report of the Joint Select Committee summarized the General Assembly's role this way:

> *The General Assembly's constitutional responsibility is to determine the will of the people in the election. The Constitution settles this responsibility on the legislature as the body closest to the people and most directly accountable to the people for actions on their behalf . . . In a case where there is disagreement about what the electorate has decided, the General Assembly acts constitutionally as the direct representative of the electorate itself.*[20]

Establishment of a New Procedure for Contested Legislative Elections

In the new legislation, the General Assembly took a further step, defining the role of the General Assembly in an area that has many more elections and therefore many more opportunities for protests. It made the new legislation applicable to contested races for seats in the General Assembly itself, in addition to Council of State races.

The new legislation does so in light of another part of the state constitution providing that each house of the General Assembly—the House of Representatives and the Senate—"shall be judge of the qualifications and elections of its own members."[21] There are a few differences in the procedure when the contest concerns a legislative seat as opposed to a Council of State office. The most significant one is that the contest is determined by the chamber at issue: if the contest is for a House seat, the House determines the winner; if for a Senate seat, the Senate determines the winner. In other principal aspects, the procedures are the same.

Now that the General Assembly has resolved a contested Council of State race once, is the door open for many more such challenges, especially in general elections for legislative seats?

Meaning for the Future

Now that the General Assembly has resolved a contested Council of State race once, is the door open for many more such challenges, especially in general elections for legislative seats? For the Council of State, there are 10 elections every four years. For the General Assembly, there are 170 elections every two years.

In the Fletcher-versus-Atkinson matter, the apparent winner of the general election (Atkinson) was a Democrat. When the General Assembly took its historic vote, a clear majority of the 170 members was Democratic. Despite the care with which the procedures were devised and followed, a number of Republicans apparently felt that something was wrong—evidenced by twenty-four ballots being cast as blanks.

Will Election Protest Become a Partisan Affair?

Imagine now a Senate race somewhere in the state, in which the vote is close. The apparent winner is of the Ocean Party, and the trailing candidate is of the Mountain Party. A majority on the local board of elections that hears the initial protest is of the Ocean Party and rules

March 2 and 10, 2005	March 10, 2005	March 17, 2005	July 14, 2005	August 9, 2005	August 23, 2005
The governor signs bills passed by the General Assembly that ratify the use of out-of-precinct provisional ballots, stop the court action, and set up a procedure for election contests to be determined by the General Assembly.	Atkinson files with the General Assembly a notice of her intent to contest the election in the General Assembly.	Citing the new legislation, the superior court dismisses Fletcher's lawsuit protesting the election. Fletcher appeals that action to the court of appeals.	The General Assembly's Joint Select Committee on Council of State Contested Elections conducts a hearing on the election contest.	The Joint Select Committee recommends that the General Assembly find Atkinson to have been elected in the general election in November 2004, reasoning that the supreme court's February 2005 decision did not compel a recount of the ballots or a new election.	In a joint session of the House and the Senate, the General Assembly determines that Atkinson won the 2004 election. She is issued a certificate of election and sworn into office the same day.

for the Ocean Party candidate. So does the SBOE, also with an Ocean Party majority. A majority of the Senate is of the Mountain Party, and when the matter comes to the General Assembly, the Senate votes in favor of the Mountain Party challenger. The cries of partisanship in the process, both before it reached the General Assembly and once it arrived there, are loud.

The 2005 experience of the courts and the General Assembly following the 2004 election of superintendent of public instruction was a fascinating exercise in constitutional law. North Carolinians should hope that future elections do not routinely turn into partisan fights or manipulations that undermine the vote of the people in the general election.

Is the grant of power to the General Assembly under the North Carolina Constitution, to "determine" contested elections, sufficient to support the provision?

What Questions Remain Open?

The course of Fletcher's protests leaves two open legal questions. First, Fletcher premised his protests on the argument that provisions of the North Carolina Constitution, read together, prohibit out-of-precinct provisional voting. The supreme court avoided ruling on that matter when it determined that out-of-precinct provisional voting was unauthorized by the statutes and therefore unlawful. One week after the governor signed the new legislation reaffirming out-of-precinct provisional voting, Fletcher asked the supreme court to reconsider the constitutional issue, but in May 2005 the supreme court denied the motion for reconsideration.[22] Where does that leave the constitutional argument—waiting for a new lawsuit? Dead?

The new statutes provide that the actions by the General Assembly in determining contested Council of State races or contested races for the North Carolina Senate or House of Representatives "may not be reviewed by the General Court of Justice."[23] Might there someday be a challenge to that provision? Is it consistent with North Carolina jurisprudence and the separation of powers? Is the grant of power to the General Assembly under the North Carolina Constitution, to "determine" contested elections, sufficient to support the provision?

Only time will tell whether answers will emerge.

Notes

1. N.C. GEN. STAT. § 163-182.10 (hereinafter G.S.).
2. G.S. 163-182.13(a)(3).
3. Fletcher simultaneously filed a lawsuit, called a "declaratory judgment action." The issue was the same as the issue in the election protests.
4. Brief of Appellant on Atkinson Motion to Dismiss, James v. Bartlett, 359 N.C. 262 (2005) (No. 602PA04-2).
5. Atkinson Motion to Dismiss, James v. Bartlett, 359 N.C. 262 (2005) (No. 602PA04-2), citing N.C. CONST. art. VI, § 5.
6. James v. Bartlett, 359 N.C. 262, 264 (2005), *reconsideration denied,* 359 N.C. 633 (2005), *appeal after remand dismissed as moot,* ___ N.C. App. ___ (2006).
7. A subsection of G.S. 163-191.
8. *James,* 359 N.C. at 264.
9. *Id.* at 264–265.
10. Brief of Appellant on Atkinson Motion to Dismiss, at 3, James v. Bartlett, 359 N.C. 262 (2005) (No. 602PA04-2).
11. *James,* 359 N.C. at 269–70.
12. S.L. 2005-2.
13. The act amended G.S. 163-55, -166.11, and -182.2.
14. Fletcher appealed that dismissal to the North Carolina Court of Appeals, which, after the election had been determined in the General Assembly, dismissed the appeal as moot. *In re* Election Protest of Bill Fletcher, ___ N.C. App. ___ (2006). Fletcher sought a ruling on the declaratory judgment action that accompanied his election protest (see note 3), but the superior court never issued one.
15. G.S. 163-182.13A(d).
16. *Id.*
17. G.S. 163-182.13A(f).
18. Joint Select Committee on Council of State Contested Elections, Report as to the Law and the Facts and Recommendations to the General Assembly for Its Act, at 10 (filed with the Clerk of the House of Representatives, N.C. General Assembly, Aug. 9, 2005).
19. *See* note 13. In fact, the last action came in 2006 from the court of appeals.
20. Joint Select Committee, Report as to the Law, at 6.
21. Article II, § 20.
22. James v. Bartlett, 359 N.C. 633 (2005).
23. G.S. 163-182.13A(k), 120-10.12.

Complicated IT Issues Laid Bare

Mary Maureen Brown

Review of
Public Information Technology and E-Governance: Managing the Virtual State

by G. David Garson

Although it is a bit dense for a casual read, *Public Information Technology and E-Governance: Managing the Virtual State*, by G. David Garson, offers meaty insight into a wide range of information technology (IT) topics that now dominate the public sector. IT has become a necessary component of service delivery in local governments, but adoption, implementation, and maintenance of IT initiatives can be a policy and managerial landmine. Garson attempts to lay bare many of the complicated issues that public managers often confront in their desire to leverage the benefits of IT.

Overall, the book is well written and has much to offer anyone who is either new to the field or steeped in its nuances. Probably recognizing that the average layperson usually has to resort to a dictionary to make sense out of IT's unnecessarily complex jargon, Garson offers some guidance on his subject by distinguishing among e-government, e-governance, digital government, IT, and information systems. The astute manager will quickly realize that in today's age the distinction is more academic than substantive. Call it what you like, the phenomenon is about employing IT to improve decision-making, streamline operations, and enhance services, all the while meeting demands for accountability, responsibility, and efficiency. A tall order indeed!

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