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Elections -- Election Contests in North Carolina

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Voting irregularities, fraud and illegal conduct by election officials, candidates, campaign workers and voters can destroy the foundations of the electoral system in America. The election of a candidate to a public office supposedly represents the purest expression of the will of the participants in a representative political system.[1] Improprieties jeopardize the integrity of the selection process and destroy public confidence in the decisions of elected officials.

In a North Carolina survey of election board officials completed in 1971, over forty-one percent of the responding officials indicated they had encountered instances of election fraud.[2] A study of election administration difficulties in several American jurisdictions revealed that in almost half the districts surveyed litigation was instituted either during or after the tabulation of the election results by candidates challenging some aspect of the voting procedure.[3] Various difficulties such as broken voting machines, improper advertising and delayed results gave rise to charges of fraud, apparently even when none was involved.[4] The inconvenience caused by long lines and broken machines seriously impaired the right of many citizens to vote.[5] The purpose of this Comment is threefold: (1) to describe the North Carolina statutory scheme to control election irregularities, both the illegal and the simply accidental; (2) to examine the judicial supervision of the electoral process; and (3) to suggest areas of needed reform.

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1. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Id. at 561-62. In Luther v. Borden, 48 U.S. 1, 29-33, 7 How. 1, 29-34 (1849), Daniel Webster, arguing before the Court, gave one of the clearest and most concise statements of the theory of the American political system.

2. Letter from Thomas J. Harrelson, N.C. House of Representatives, to John Mitchell, U.S. Att'y Gen., February 10, 1972, at 3 (discussing a report on election reform prepared in 1970 by the Republican legislators in the North Carolina General Assembly) (copy on file in office of *North Carolina Law Review*).

3. OFFICE OF FEDERAL ELECTIONS, A STUDY OF ELECTION DIFFICULTIES IN REPRESENTATIVE AMERICAN JURISDICTIONS—FINAL REPORT at VII-2 (1973). This study, which dealt with the general election of November 1972, pointed up numerous legal difficulties encountered at the local level. In three of the seven jurisdictions studied (Ohio, Michigan and California) the courts both resolved and created election problems. *Id.*

4. *See generally id.* at VI-33 to -47 setting out the numerous problems Detroit, Michigan faced in the 1972 general election.

5. *See id.* at VII-4.

I. ADMINISTRATIVE FRAMEWORK

The State Board of Elections and one hundred county elections boards are charged with the duty of administering primary and general elections as well as most municipal and bond elections in North Carolina.[6] A few cities operate separate municipal election commissions. The State Board is composed of five members. No more than three members may be affiliated with the same political party.[7] The members of the State Board are appointed by the Governor on May 1 of the year following a general election.[8] In June, the State Board appoints the members of each county board to two year terms on the recommendation of the Democratic and Republican State Executive Committees.[9] The county boards consist of three members, no more than two of whom may be affiliated with the same political party.[10]

These boards are responsible for conducting registration, arranging for voting places, counting, canvassing, certifying the winners and hearing claims of irregular election practices or dishonest elections.[11] In performing the latter function, they constitute essentially an administrative trier of fact with judicial powers.[12] Generally, the administrative review procedures provided through the various boards of elections must be utilized before any access to the courts is allowed.[13] Consequently, the boards of elections bear the prime responsibility for resolving voting disputes.

II. ADMINISTRATIVE CANVASS AND CONTEST PROCEEDINGS

The canvassing responsibility placed on the county and state boards embodies more than just compiling the precinct results;[14] the process is quasi-judicial in nature and requires an examination of the accuracy and legitimacy of the precinct results as well as a consolidation

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6. N.C. GEN. STAT. §§ 163-22, -33 (1976).
7. *Id.* § 163-19.
8. *Id.*
9. *Id.* § 163-30.
10. *Id.*
11. *Id.* § 163-33.
12. *See* Bell v. County Bd. of Elections, 188 N.C. 311, 124 S.E. 311 (1924). *See also* note 15 & text accompanying notes 67-70 *infra.*
13. Garner v. Town of Newport, 246 N.C. 449, 98 S.E.2d 505 (1957); Ledwell v. Proctor, 221 N.C. 161, 19 S.E.2d 234 (1942). There are, however, instances in which an aggrieved party may bypass the administrative review process. *See* text accompanying note 25 *infra.*
14. *See* N.C. GEN. STAT. § 163-175 (1976).

of these returns into countywide (or, for the State Board, statewide) election results.[15]

A candidate protesting the results of an election must present his grievances to the appropriate elections board under the procedures spelled out by the State Board in the North Carolina Administrative Code, Title 8, Chapter 2.[16] A hearing must be conducted at which the board makes findings of fact and conclusions of law.[17] An aggrieved party has a right of appeal to the State Board from any county board. From an adverse ruling of the State Board a contestant may seek review in the Superior Court of Wake County in a multidistrict or statewide race or, in a county race, in the superior court of the county where the contest arose.[18] A certificate of election, if not already issued, will be withheld during the pendency of a contest.[19]

15. Prior to the beginning of this century, a separate board of canvassers met in each county to perform the function of examining and tabulating county totals. At first the county commissioners performed this function and Law of February 10, 1872, ch. 185, § 19, 1871-72 N.C. Laws 298 (formerly codified as PUBLIC STAT. OF N.C. ch. 52, § 21 (W. Battle rev. 1873)) required them to "proceed to add the number of votes returned, . . . the person having the greatest number of votes [to be] deemed duly elected." Subsequently, a separate body of canvassers, usually the justices of the peace, canvassed the returns and judicially determined the results under the authority of Law of March 12, 1877, ch. 275, § 25, 1876-77 N.C. Laws 525 (formerly codified as N.C. CODE § 2694 (1883)), which directed them to "open and canvass, and judicially determine the returns." In Peebles v. Commissioners of Davie County, 82 N.C. 385 (1880), the North Carolina Supreme Court held that the "judicially determine" language meant that the board had a limited duty to look at the authenticity of the totals. The court refused to sanction an inquiry into the composition of the aggregate vote. By 1919, the statute was changed to provide that "the [board of county canvassers] shall have power and authority to judicially pass upon all facts relative to the election, and judicially determine and declare the result of the same." Law of March 14, 1901, ch. 89, § 33, 1901 N.C. Pub. Laws 256 (formerly codified as N.C. CONS. STAT. § 5986 (1919)). As part of its judicial powers, the board was also granted the authority to examine both documents and witnesses. Today the County Board of Elections, with its presumed expertise in election matters, doubles as a board of canvassers when it performs that function two days after each election. N.C. GEN. STAT. § 163-175 (1976) now declares:

> [T]he county board of elections shall have power and authority to judicially pass upon all facts relative to the primary or election, to make or order such recounts as it deems necessary, and to judicially determine the result of the primary or election. The board shall also have power to send for papers and persons and to examine them, and to pass upon the legality of any disputed ballots transmitted to it by any precinct election official.

Additionally, the county boards are constituted inferior courts by *id.* § 163-34 for the purpose of maintaining order and enforcing its directives. This latter statute allows the county chairman to commit an offender to jail for up to 30 days on his written order. The charged person may have an immediate appeal to superior court by posting bond. In summary, the county boards have become essentially administrative tribunals with significant judicial powers when constituted as canvassers and engaged in examining charges of election irregularity.

16. N.C. ADMIN. CODE tit. 8, chs. 2-0001-.0009 (1976).

17. *Id.* ch. 2.0005.

18. N.C. GEN. STAT. § 163-278.26 (1976) governs statewide and multicounty district offices; *id.* § 163-181(b) deals with county races and statewide primaries.

19. *Id.* § 163-181(a).

A candidate or elector must protest an election irregularity in writing to the county board on or before the canvass date.[20] Chapter 2.0001 allows the county board to resolve the controversy during the canvass itself or at a later time. In order to be entitled to a recount after the canvass, the candidate must allege either errors in the tabulation of the votes or the counting of a sufficient number of illegal votes to change the results of the election.[21] The error-in-tabulation ground for a recount can be misleading in that the inclusion of any illegal votes results in an error in tabulation and, interpreting the requirements literally, the error-in-tabulation allegation need not further allege that the result of the election would be affected thereby. The remedy for the exclusion of valid votes is a recount based on the allegation of an error in tabulation. Unqualified voters must be identified by name and a specific cause for alleged disqualification must be assigned.[22] The county board must then hear the charges publicly and rule on them. It may call and subpoena witnesses or take evidence by affidavit or otherwise, amend its canvassing returns, order a recount or, with approval of the State Board, order a new election.[23]

On appeal to the State Board, that body has the power to hear the case on petition, hear it de novo or remand it to the county board for additional action.[24] Only after final action by the State Board may the contestant go into court. There are, however, two exceptions to this exhaustion requirement. When a voter is appealing a denial of registration under North Carolina General Statutes section 163-77, or when a primary candidate is contesting a result under North Carolina General Statutes section 163-181(b), the contestant is allowed to bypass the county and state boards and go directly to superior court.[25] This latter short-cut seems contrary to the main thrust of the administrative process and is virtually unused by primary candidates.[26] The apparent rationale behind this direct review provision is to take party affiliation decisions out of the partisan hands of the county boards. As a practical matter, the elections boards hear all protests whether they involve primary, special or general elections.[27]

20. N.C. ADMIN. CODE tit. 8, ch. 2.0001 (1976).
21. *Id.*
22. *Id.* ch. 2.0002.
23. *Id.* chs. 2.0004-.0005; *see* note 15 and text accompanying notes 14-15 *supra.*
24. N.C. ADMIN. CODE tit. 8, chs. 2.0006-.0007 (1976). The statutory authority for the promulgation of these regulations is found in N.C. GEN. STAT. §§ 163-22, -22.1 (1976).
25. N.C. GEN. STAT. §§ 163-77, -181(b) (1976).
26. No direct appeal cases have been discovered by the author.
27. Research has failed to elicit any case where this short-cut method was used;

Although a court cannot directly order a new election under any circumstances, it can void the results of a contested election and thus force a new election.[28] The State Elections Board, on the other hand, may order a new election, upon the affirmative vote of four members after public hearings, for "election contests, alleged election irregularities or fraud, or violations of election laws."[29] This flexibility is the chief advantage of the administrative process.

III. JUDICIAL PROCEEDINGS

The requirements for standing to challenge an election result are fairly lenient. While cases have indicated that only an aggrieved candidate had standing to challenge the result,[30] the law seems to be that anyone who alleges that he voted for a candidate who should have been elected may bring suit.[31] When dealing with constitutional, municipal charter or bond referenda, apparently anyone who alleges that he voted or was denied an opportunity to vote has an interest in the result sufficient to support litigation.[32] The standing of one who is merely an affected resident and not a registered voter is an open question; but, if he has a financial interest as a taxpayer, it seems reasonable that he has an interest in the election.[33] A non-resident should not be able to challenge a purely local result.[34]

Because election results are important for the orderly transition of power, the results of balloting as determined by the administrative agency are not to be overturned lightly by the courts.[35] Certified election results enjoy a high presumption of validity for a variety of

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however, numerous cases of county board rulings on primary election irregularities exist even after passage of this statute. *See* REPORT OF THE COMM'N ON ELECTIONS AND VOTING ABUSES IN NORTH CAROLINA (February 16, 1973), *reprinted in* 39 POPULAR GOV'T 26-27 (May 1973).

28. Tucker v. State Bd. of Alcoholic Control, 240 N.C. 177, 81 S.E.2d 399 (1954); *see* text accompanying notes 106-109 *infra*.

29. N.C. GEN. STAT. § 163-22.1 (1976).

30. *E.g.*, Freeman v. Board of County Comm'r, 217 N.C. 209, 7 S.E.2d 354 (1940).

31. It is not required that a relator be a contestant for public office to challenge the result because any qualified voter and taxpayer has a direct interest in having the office occupied only by the person entitled to it. State *ex rel.* Associated Cosmetologists v. Ritchie, 206 N.C. 808, 175 S.E. 308 (1934) (dictum).

32. *See* Annot., 51 A.L.R.2d 1306-36 (1957).

33. *See* State *ex rel.* Barlow v. Benfield, 231 N.C. 663, 58 S.E.2d 637 (1950).

34. One who is neither ar esident nor a candidate will have no interest in an election other than an academic one. He should not be able to intervene in purely local affairs. *Cf.* Yett v. Cook, 115 Tex. 205, 281 S.W. 837 (1926) (interest of member of general public inadequate).

35. *See* Collins v. Emerson, 236 N.C. 297, 72 S.E.2d 685 (1952).

reasons. First, close supervision of the legislative, executive and judicial elections can thwart the separation of powers doctrine.[36] Secondly, since the transition of official power from hand to hand necessarily entails public uncertainity, unrest and significant public cost, society should not be subjected to this turmoil too often. Finally, the entire problem of supervising elections is a detailed process best left in the hands of those with expertise in the area—an administrative agency.[37] For these reasons, and simply out of a reluctance to try to referee political quarrels, the courts have very infrequently overturned duly certified election results.

At common law, the courts allowed a quo warranto proceeding—a high prerogative writ of inquiry instituted as a challenge to the authority lying behind the actions of a public official.[38] In theory, a private citizen, acting in the interest and on the relation of the state, sought to try title to an office held by another by looking at the validity of his certificate of election.[39] As an alternative common law remedy, an unsuccessful contestant could bring a writ of mandamus to force an official body, normally a board of canvassers, to perform the ministerial duty of certifying him as the proper winner.[40] Early decisions of the Supreme Court of North Carolina contained considerable discussion of the relative appropriateness of one remedy versus another.[41] Today the distinction is inconsequential, although the proceeding that emerged is derived from the writ of quo warranto. The modern action to try title to public office is allowed under North Carolina General Statutes sections 1-514 to 1-532.[42] The action is on the relation of the state and

36. For a brief statement of the principle, *see, e.g.*, Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833, 835-36 (D.D.C. 1971), *aff'd mem.*, 495 F.2d 1075 (D.C. Cir. 1972) *rev'd sub nom.* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

37. *See* note 15 and accompanying text *supra.*

38. *See* G. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS § 393, at 294 (4th ed. 1897) [hereinafter cited as MCCRARY]. The McCrary treatise, first published in 1875, is still the leading authority on the substantive law of election contests. Judge McCrary, who chaired the House Committee on Elections at the federal level for many years in the 1880s, compiled a very complete but, in many areas, outdated work. Legal scholarship would be greatly advanced by an updated work.

39. Harkrader v. Lawrence, 190 N.C. 441, 130 S.E. 35 (1925).

40. MCCRARY, *supra* note 38, § 385, at 290.

41. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910); Lyon v. Board of Comm'rs, 120 N.C. 237, 26 S.E. 929 (1897); MCCRARY, *supra* note 38, §§ 397-400, at 295-98.

42. N.C. GEN. STAT. §§ 1-514 to -532 (1969 & Cum. Supp. 1975). The writs of *scire facias* and quo warranto are abolished. However, the civil suit replacing them is conducted like an action to try title to property. *See, e.g.*, State *ex rel.* Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951); Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

certain statutory formalities must be observed including the posting of a bond in sufficient amount to secure the state from any expense.[43]

The authority of an elected official cannot be challenged in a collateral suit.[44] Thus, a criminal defendant may not claim his conviction was invalid due to an improperly elected judge or his arrest was tortious due to a holdover sheriff, provided that these officials act under color of a duly issued certificate of office.[45] To allow such collateral attacks would unnecessarily complicate the legal process and render the statutory electoral challenge process meaningless. On such policy grounds the certificate of election is held inviolate. The elections boards and the courts deal with election irregularities in a proceeding directly and exclusively aimed at eliciting the "true" results of the balloting.[46]

A. Burden of Proof

Because of the presumed validity of a challenged election, the judicial burden of persuasion in any proceeding is an extremely difficult one to meet. Election results will not be disturbed for irregularities that are insufficient to affect the result.[47] The necessary showing of irregularity to justify relief has been characterized in two different ways. Most North Carolina cases require that the aggrieved party show that sufficient illegal votes cast for the declared winner were counted or that sufficient legal votes cast for a loser were excluded to have changed the result of the election in controversy.[48] In effect, someone other than the declared winner must be shown to have received a plurality of the votes.[49] If a candidate shows only that more illegal votes were cast than votes separating him from the winner, he

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43. N.C. GEN. STAT. § 1-517 (1969); State *ex rel.* Cooper v. Crisco, 201 N.C. 739, 742, 161 S.E. 310, 312 (1931); Midgett v. Gray, 158 N.C. 133, 135, 73 S.E. 791, 791 (1912).

44. Collins v. Emerson, 236 N.C. 297, 72 S.E.2d 685 (1952).

45. *See, e.g.*, English v. Brigman, 225 N.C. 402, 404, 35 S.E.2d 173, 174 (1945).

46. MCCRARY, *supra* note 38, §§ 415-416, at 305-06.

47. Gardner v. City of Reidsville, 269 N.C. 581, 585, 153 S.E.2d 139, 144 (1967); State *ex rel.* Owens v. Chaplin, 228 N.C. 705, 47 S.E.2d 12 (1948); State *ex rel.* Cohoon v. Swain, 216 N.C. 317, 5 S.E.2d 1 (1939).

48. Starbuck v. Town of Havelock, 255 N.C. 198, 120 S.E.2d 440 (1961); Deloatch v. Rogers, 86 N.C. 358 (1882).

49. State *ex rel.* Phillips v. Slaughter, 209 N.C. 543, 183 S.E. 897 (1936). The official count for the mayor's race was 81 to 68. Plaintiff alleged various counts of election fraud which, if true, would have changed the count to 73 to 69. Since the fraud would not affect the outcome, the court could offer no relief.

cannot get judicial relief under the majority rule. He would also have to show that those illegal votes were all cast for his opponent and none for himself. However, Judge McCrary, the leading commentator in the area, suggest that a more meaningful standard would require the contestant to show merely that due to illegalities or voting irregularities, the true outcome of the election cannot be ascertained.[50] The elections board rules seem to adopt the more lenient standard.[51] Mere allegations that illegal votes were cast would not be enough in any event.[52]

As a further complication, relief may be denied even under the more lenient standard because of the manner in which improper votes may be presumed to affect the vote totals of the respective candidates. When a party can show that the number of improper votes exceeds the difference between the final vote totals of the candidates, a court has two options in determining if the result might be affected: it might deduct all the illegal votes from the person having the majority or it might deduct the number of improper ballots pro rata from both candidates, thereby leaving the result unchanged. According to McCrary, a court, having no power to declare a new election, should always apply the pro rata rule in the absence of specific evidence about the direction of the illegal votes, while an administrative body should avoid the problem by declaring a new election.[53] It will not be judicially presumed that all the illegal votes were cast for one candidate. Of course, neither is it logical that all candidates would be equal participants in the irregularities. McCrary's rule is probably the optimal solution—the policy should lean toward a new election if the administrative body finds real evidence of fraud or illegality since it is closer to the actual balloting process and is the appropriate authority to conduct a new election.

Although it is arguable that evidence of corrupt practices by elections board officials should suffice to invalidate the results of the balloting by itself, the North Carolina courts apply a standard that provides that the misconduct of election officials will not vitiate an election unless the results were affected thereby.[54] Indeed, the North Carolina Supreme Court has gone further and announced that

> honest mistake[s] or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross,

50. MCCRARY, *supra* note 38, § 396, at 295.
51. N.C. ADMIN. CODE tit. 8, ch. 2.0001 (1976); *see* text accompanying note 21 *supra*.
52. Starbuck v. Town of Havelock, 255 N.C. 198, 120 S.E.2d 440 (1961).
53. *See* MCCRARY, *supra* note 38, § 496, at 365-66.
54. Plott v. Board of Comm'rs, 187 N.C. 125, 131, 121 S.E. 190, 193 (1924).

> if not fraudulent, will not avoid an election, unless they affect the result, or at least render it uncertain. But if the irregularities are so great that the election is not conducted in accordance with law, either in form or substance, [and] there are matters of substance [that] render the result uncertain, or where they are fraudulent and the result is made doubtful thereby, the returns should be set aside.[55]

In *Penland v. Bryson City*,[56] the state supreme court suggested that if election officials are involved in the election irregularity, the standard of proof ought to be less stringent.[57] This is a logical conclusion since if election officials are parties to the misconduct, proof of the "true results" may be impossible to obtain.[58]

While an attack on the ballot totals themselves constitutes the most common electoral challenge, some elections have been overturned and the results voided when it was determined that no valid votes were cast or that the election was so fraught with illegality that the results were meaningless.[59] Challenges on these grounds have not been favored in the North Carolina courts[60] and have been virtually ignored by the boards of elections. However, if the election officials are themselves corrupt and simply alter the actual votes cast, there will be little direct evidence of fraud or irregularity. In this situation the introduction of compelling circumstantial evidence to show the complete failure of the electoral process should be held sufficient to support judicial relief. This would provide a needed complement to the more typical procedure for contest. The necessity for such an alternative method of proof was part of the rationale behind the Voting Rights Act of 1965.[61] Congress felt that discrimination in registration was so endemic to the system that only federal control and supervision could put an end to it.[62] Without an alternative ground for relief that does not require a direct showing of

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55. Hill v. Skinner, 169 N.C. 405, 412, 86 S.E. 351, 354-55 (1915) (quoting 10 AM. & ENG. ENC. OF LAW 766-67 (2d ed. 1899) (bracketed changes are the court's)) (the lenient standard of proof).

56. 199 N.C. 140, 154 S.E. 88 (1930).

57. *Id.* at 148, 154 S.E. at 92.

58. The courts often confuse this analysis with the substantive versus directory issue, discussed at text accompanying notes 75-81 *infra*. *E.g.*, Smith v. City of Wilmington, 98 N.C. 343, 4 S.E. 489 (1887).

59. Tucker v. State Bd. of Alcoholic Control, 240 N.C. 177, 81 S.E.2d 349 (1954); Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952); Rodwell v. Harrison, 132 N.C. 45, 43 S.E. 540 (1903); State *ex rel.* Van Amringe v. Taylor, 108 N.C. 196, 12 S.E. 1005 (1891); Perry v. Whitaker, 71 N.C. 477 (1874).

60. *See* Rider v. Lenoir County, 236 N.C. 620, 629, 73 S.E.2d 913, 920 (1953).

61. 42 U.S.C. §§ 1971-74 (1970).

62. When the Attorney General finds an affected state practicing registration discrimination, he is empowered to appoint federal observers to go into the non-complying

the correct results, such "intrinsic" election fraud would not be revealed in a contest.

B. *Evidence*

The harshness of the changed outcome rule and the pro rata assumption underscore the importance of determining which candidate benefitted from the illegal votes cast. Generally, no special marks or identifying numbers are allowed on ballots to enable them to be traced to the voter.[63] If the voter who cast an illegal vote is allowed to testify for whom he voted, a golden opportunity for further fraud exists because the corrupt voter might well identify the opposing candidate as his pick and, if believed, the victimized candidate would be victimized again—the illegal vote would be counted twice. [64] For this reason, some commentators have argued that no voter should be allowed to testify about his vote.[65] Nevertheless, the general rule is that once a specific voter's lack of qualification is shown, he may testify as to how he voted and his credibility is a matter for the jury.[66]

The problem of admitting into evidence the testimony of a fraudulent voter has been somewhat relieved by the challenge and absentee voter procedures. If a voter is challenged by a poll watcher on election day the dispute is immediately heard by the registrar and judges before the challenged voter is allowed to cast his ballot.[67] Absentee ballots in North Carolina are received in numbered containers and the qualifications of the voter are passed on before his vote is opened and counted.[68] If it is alleged that some of the ballots are improper it is easy to prove for whom these votes were cast. Because of this ease of identification, absentee and challenged voters are commonly alleged by contestants to be irregular in order to facilitate proof at the hearing.[69] Nevertheless, if it is not known for whom an illegal voter voted, his testimony is properly admitted on that point.[70] Evidence of partisan affiliation and activities

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precincts and actually register minority voters if necessary. *Id.* § 1973(d).

63. Baxter v. Ellis, 111 N.C. 124, 15 S.E. 938 (1892); *see* N.C. GEN. STAT. § 163-170(5) (1976).

64. MCCRARY, *supra* note 38, § 485, at 356.

65. *E.g., id.* § 491, at 362.

66. *See, e.g.*, Thompson v. Cihak, 254 Mich. 641, 236 N.W. 893 (1931); Gallegos v. Miera, 28 N.M. 565, 215 P. 968 (1923).

67. N.C. GEN. STAT. § 163-88 (1976).

68. *Id.* § 163-89.

69. At least in successful contests. *See* Overton v. Mayor of Hendersonville, 253 N.C. 306, 116 S.E.2d 808 (1960); Baxter v. Ellis, 111 N.C. 124, 15 S.E. 938 (1892).

70. *See* MCCRARY, *supra* note 38, § 495, at 364-65.

may be admissible for impeachment purposes.[71] In most cases the actual ballots and tally sheets are admissible.[72] They may be better evidence of an altered vote total than the testimony of the voter.

IV. TYPES OF IRREGULARITIES AND ILLEGALITIES

Within this procedural framework the system must adjudicate claims of election irregularities. An irregularity can be placed within one of four categories depending on the point in the process at which it allegedly occurred. First, irregularities may occur before any election (primary, special or general) in the registration process or in the official method of notifying the public of the election time or place.[73] Also, the candidates may violate campaign finance laws or filing requirements.[74] Pre-election violations will usually result in reduced opportunities for legal votes to be cast. In these situations, the courts must confront the additional question whether the regulation violated is "merely directory" or is a matter of "substance" requiring the overturning of the election results.[75] While the question is bound up in the determination of whether such illegalities actually influenced the results of the election, there is another dimension to the problem. A court that finds an election void has in effect ordered a new election by vacating the office filled or nullifying the action taken as a result of the election. The theory is akin to the idea of "infectious invalidity" through fraud on the part of the election conductors.[76]

Certain violations of election regulations have been held not to be substantive; for instance, if a registrar is improperly qualified, sworn or maintains improper hours of registration, the votes cast by the voters he registers will still count[77] unless there was no chance to register at all.[78]

71. *See* People *ex rel.* Boyer v. Teague, 106 N.C. 576, 11 S.E. 665 (1890).

72. State *ex rel.* Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

73. *See, e.g.*, Annot., 44 A.L.R.3d 797 (1972); Annot., 121 A.L.R. 987 (1939).

74. N.C. GEN. STAT. §§ 163-278.6 to .35 (1976); *see* Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 N.C.L. REV. 349 (1974). While these violations may give rise to criminal prosecutions, there are no provisions calling for overturning the results of an election on the basis of illegal spending. Thus, if some candidate wished to "buy" an office with the accompanying risk of prosecution, there is no procedure to revoke that tainted office short of impeachment. N.C. GEN. STAT. § 163-278.27 (1976).

75. MCCRARY, *supra* note 38, §§ 225-229, at 168-73.

76. *See, e.g., In re* Contest of Election of Vetsch, 245 Minn. 229, 71 N.W.2d 652 (1955).

77. McPherson v. City of Burlington, 249 N.C. 569, 107 S.E.2d 147 (1959); Glenn v. Culbreth, 197 N.C. 675, 150 S.E. 332 (1929); Plott v. Board of Comm'rs, 187 N.C. 125, 121 S.E. 190 (1924); Davis v. County Board of Educ., 186 N.C. 227, 119 S.E. 372 (1923); State *ex rel.* Quinn v. Lattimore, 120 N.C. 426, 26 S.E. 638 (1897).

78. Perry v. Whitaker, 71 N.C. 475 (1874).

Similarly, if the polling place is moved without formally correct notice[79] or there are accusations of ineffectual intimidation,[80] the election result will not be disturbed absent proof that critical numbers of voters who wished to cast their ballots were kept from doing so by the activity.[81]

North Carolina courts and the elections boards have been hesitant to enjoin an election on the basis of pre-election irregularities.[82] Normally the irregularity surfaces too late to be resolved before the election proper. Consequently, the question becomes whether the pre-election misconduct has affected the results of the election. Evidence showing such an effect is usually either speculative or unobtainable and therefore insufficient. From a policy standpoint, it would seem appropriate for the tainted election to be rescheduled. Just as National Labor Relations Board elections not conducted under "laboratory conditions" are held void,[83] so tainted elections generally should be cleansed when necessary. Unfortunately, this action is rarely taken in North Carolina.

The next category of irregularities are those that occur during the balloting process. Such schemes as chain balloting,[84] manipulating voting machines, defacing proper ballots,[85] having partisan "helpers" mark ballots,[86] fixing the beginning tally of voting machines[87] and outright physical intimidation are all too common in precincts accustomed to corrupt politics. The result may be the inclusion of illegal votes as well as the exclusion of legal votes. In order to prevent the occurrence of such problems, poll watchers, two judges and a registrar

79. Town of Hendersonville v. Jordan, 150 N.C. 35, 63 S.E. 167 (1908).

80. Roberts v. Calvert, 98 N.C. 580, 4 S.E. 127 (1887).

81. Deloatch v. Rogers, 86 N.C. 357 (1882).

82. The North Carolina courts have never enjoined the conduct of an election. The primary reason would seem to be that such an extraordinary remedy demands a showing of irreparable harm that is usually impossible to demonstrate until the election results are tabulated.

83. *See, e.g.*, General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

84. The violator acquires an unmarked ballot. He then marks it and gives it to a voter who gets a fresh ballot, secrets it, deposits the marked ballot in the box and then returns the fresh ballot to the violator for his payment. The process is then repeated with other voters. *See* State v. Abernathy, 220 N.C. 226, 17 S.E.2d 25 (1941).

85. The traditional defacing scheme involves the participation of a judge or counter who normally places votes in the proper ballot boxes. He has a pencil lead inserted under his fingernail and marks in the appropriate party circle on each ballot as he deposits it in the box. Under the counting rules of N.C. GEN. STAT. § 163-170 (1976), the ballots will all be counted as either a straight ticket vote or a spoiled ballot.

86. For many years the presence of large numbers of illiterate voters allowed a party to garner numerous votes by furnishing interested "helpers" when needed in each precinct.

87. A voting machine is advanced numerous times before the polls open and the figures taped over with zeros for the opening count. The names of deceased persons and absentees are then used to balance the poll books.

are stationed at the polls.[88] The involvement of these officials in illegal activity may be hard to discover and harder to prove.[89]

Election day irregularities are difficult to remedy. The ability of a court or an elections board to correct such an irregularity depends on ease of communication and swiftness of action. Ordinarily, no official action is taken until the irregularity emerges at canvass. Some method should exist for isolating the tainted precinct and remedying the effects of corruption. Courts in other jurisdictions regularly enter numerous orders during the polling period requiring extended hours or changes in location.[90] The elections board also needs stronger tools to effect immediate changes when tampering is discovered during balloting. At a minimum, they should have the authority to remove summarily all election officials and replace them with others.[91] Ideally, they should be able to alter polling hours and other details of administration, as well as to order a new election in the affected precinct immediately. The entire canvassing and certification process should be delayed until the revised results are obtained.[92] Presently, the elections boards' authority is restricted to keeping order on election day.[93] The courts usually do not get involved until after the fact. Occasionally a court may intervene and extend polling time in a crisis situation. The judicial system, however, is too slow to supervise the polls on election day. Mechanical failures of voting machines may distort the results so much as to render them indeterminable. Problems with the hours or location of the polls[94] may surface during the course of balloting. Only immediate intervention can remedy the situation.

The poll challenge process formerly caused many problems on election day.[95] Courts were occasionally pressed into service to rule

88. N.C. GEN. STAT. §§ 163-41, -45 (1976).

89. *See* text accompanying notes 60-62 *supra.*

90. *See* OFFICE OF FEDERAL ELECTIONS, *supra* note 3, at VII-3.

91. The State Board, and by implication the county boards, have a duty to investigate fraud by election officials. *See* Ponder v. Joslin, 262 N.C. 496, 138 S.E.2d 143 (1964). A precinct official, however, can only be removed before the end of his tenure by criminal conviction for an election law violation under N.C. GEN. STAT. § 163-276 (1976).

92. The purpose is to avoid tainting the results in the affected precinct by sealing off the final count from other precincts. Of course, secrecy of precinct results would be difficult to enforce.

93. *See* N.C. GEN. STAT. § 163-34 (1976).

94. *See* Town of Hendersonville v. Jordan, 150 N.C. 35, 63 S.E. 167 (1908).

95. The cumbersome procedure of convening a panel to hear the challenge and taking evidence gave some precinct manipulators a chance to mire down the election process while other frauds were under way.

whether a certain person could legally vote before the polls closed. Now the assigned judge and registrars will hear the challenge immediately.[96] If the challenge is sustained, the barred voter has a right of appeal to the superior court.[97] If the challenge is rejected, the voter may proceed to vote.

Probably the largest category of alleged illegalities are those occurring during the counting and canvassing of the votes.[98] These problems during the post-election tabulation process most often relate either to the results of incidents that occurred during balloting or to illegal activities by the vote counters or precinct personnel. A detailed procedure for opening ballot boxes is provided by statute.[99] The statutes also set out rules for deciding when ballots are spoiled and when a straight ticket vote overrides inconsistent vote-splitting.[100] The judges and registrars are responsible for making judgments on whether a ballot is proper or spoiled.[101] They must also ensure that all ballots are preserved for possible recounts.[102]

The tabulation totals are probative evidence in a tabulation error contest.[103] These figures, compiled on election night, may be presumed to be more accurate than the certifications made several days later. Discrepancies between precinct tally sheets and canvass totals are generally resolved in favor of the tally sheets.[104] Furthermore, the courts could utilize the tally sheets as grounds for altering an election on the theory that they are requiring the elections board to make its certification conform with the "true results" regardless of the canvassing process.[105]

In general, a court will not reform the vote totals by ordering that an uncast vote be counted unless it is clear that a specific voter actually appeared at the polls, offered to cast his vote and was prevented from doing so without fault of his own and after the exercise of due diligence.[106] Mere speculation that many voters were unable to vote does

96. N.C. GEN. STAT. § 163-88 (1976).
97. *Id.* § 163-77.
98. This stage presents the greatest opportunity for illegal actions that directly affect the outcome. As Will Rogers once said—more elections have been won from dusk to dawn than have ever been decided from dawn to dusk.
99. N.C. GEN. STAT. § 163-169 (1976).
100. *Id.* § 163-170.
101. *Id.* § 163-169(g).
102. *Id.* § 163-171.
103. State *ex rel.* Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).
104. *See id.* at 305-06, 67 S.E.2d 301-02.
105. MCCRARY, *supra* note 38, § 412, at 303.
106. *Id.* §§ 527-527*b*, at 384-86.

not establish sufficient grounds for challenge.[107] On the other hand, if the election was held without any statutory authority or if a large number of the legal residents had no opportunity to register or vote, then the election is voided regardless of whether it can be shown the result would have been different.[108] In the more common case such irregularities affect only a limited number of votes. The inquiry in such cases is directed toward the strict standard of proof—would the outcome have been different if the illegal votes had not been cast or the legal votes not excluded.[109]

A final category of possible violations relates to the basic authority to conduct the election or the legal qualifications of the candidate. Such activities as forming new parties[110] or printing fair ballots[111] would fall within this general set of violations. Generally, such irregularities do not result in the invalidity of the result declared by the canvass.

Occasionally an elections board has been faced with a case where a candidate becomes ineligible for some reason, withdraws from the race or dies before the balloting.[112] There is a statutory procedure for appointing a stand-in candidate under some circumstances,[113] but normally the elections board must resolve the issue on an ad hoc basis. If the ballots have been printed the election may be allowed to continue with a new candidate receiving all the votes attributed to the ineligible name.[114] Alternatively, the board may require that the ballots be reprinted or the election delayed to insure fairness.[115] A reviewing court will evaluate the elections board's decision on the grounds of fairness to the candidates and proper opportunity for the electorate to express its true wishes.[116] Few guidelines can be established beyond an examination of all the circumstances and the effect of the irregularity.

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107. Rider v. Lenoir County, 236 N.C. 620, 73 S.E.2d 913 (1953).

108. Tucker v. State Bd. of Alcoholic Control, 240 N.C. 177, 81 S.E.2d 399 (1954).

109. *See* text accompanying notes 47-49 *supra.*

110. *See* States' Rights Democratic Party v. North Carolina State Bd. of Elections, 229 N.C. 179, 49 S.E.2d 379 (1948); N.C. GEN. STAT. §§ 163-96 to -98 (1976).

111. *See* N.C. GEN. STAT §§ 163-135 to -142 (1976).

112. *See, e.g.*, Baker v. Marcum, 216 Ky. 210, 287 S.W. 696 (1926); Black v. Board of Supervisors of Elections, 232 Md. 74, 191 A.2d 580 (1963).

113. N.C. GEN. STAT. §§ 163-112, -114, -294.1 (1976).

114. *Id.* § 163-139.

115. *Id.*

116. *See* Ponder v. Joslin, 262 N.C. 496, 138 S.E.2d 143 (1964). If the circumstances show a fair and free expression of the will of the people, the courts will not intervene. Burgun v. North Carolina State Bd. of Elections, 214 N.C. 140, 198 S.E. 592 (1938).

V. REFORM SUGGESTIONS

The statutory and administrative measures developed in North Carolina to prevent corruption of the electoral process are surprisingly effective considering that election officials are usually employed only on a part-time basis and that there may be a great temptation to reap the rewards of a political office through illegal means. It is safe to say that the state and local election machinery usually delivers a correct result. Major problems such as inequitable fund raising and campaign financing, the use of patronage to win votes and extensive media distortion of the issues are more often the result of the economic and political system than of the election machinery itself. There is, however, room for improvement both in the statutory mechanics of election conduct and in the judicial supervision of the administrative system.

A basic conflict exists between the independence and objectivity of the county and state boards of elections and the political cauldrons from which their memberships originate. The members of these boards are part-time officials and are usually old line members of local political organizations.[117] Appointment to an elections board is the reward for faithful party precinct service. There is a full-time professional staff headed by the Executive Secretary-Director at the state level and executive secretaries at the county level,[118] but these individuals are also political appointees with a vested interest in partisan policies.[119] Thus, the bodies in the greatest need of insulation from political tangles are selected from the most partisan source.

The Commission on Abuses of the Election and Voting Process filed a report in 1973 asking the North Carolina Legislature to stagger State Board membership terms and extend county board terms to avoid wholesale changes in personnel after elections.[120] Unfortunately, the proposal was not enacted. Longer terms with staggered appointments would aid significantly in depoliticizing the system. The development of a professional, nonpartisan staff is even more important. The electoral machinery should have no built-in partisan bias nor be subject to continual pressure from incumbent office-holders. Local party execu-

117. The local party chairman normally recommends his local precinct workers to elections boards for nomination.

118. N.C. GEN. STAT. §§ 163-26, -27, -35 (1976).

119. Note the substantial attempts to freeze these persons in office by altering the dismissing procedure during the 1972 Republican coup d'état in North Carolina. *See* N.C. GEN. STAT. §§ 163-27, -35(b) (1976) (as amended in 1973 and 1975).

120. REPORT OF THE COMMISSION ON ELECTIONS AND VOTING ABUSES IN NORTH CAROLINA 1 (February 16, 1973), *reprinted in* 39 POPULAR GOV'T 26 (May 1973).

tive committees now make recommendations for membership on local boards. Filling vacancies by executive nomination might well relieve some of the partisan influences.

Another method of insulating the electoral process from undue political pressure would be to revoke the jurisdiction of the elections boards to hear contests of elections. The present system of contest hearings often requires that an election board rule on the legitimacy of its own actions. A better method would be to create a new judicial body in the nature of an administrative law court, manned with professional administrative hearing examiners, to hear election contests. Appeal from this body would be to the superior court under the regular process of judicial supervision of the administrative system.[121] An added advantage to the use of administrative law judges is the expertise the judges can apply to contest proceedings. The cost of maintaining these officials solely for the purpose of hearing election contests could be prohibitive. Perhaps a combination of election duties with the hearing of other administrative appeals would justify the creation of this body.

There are numerous steps that can be taken to protect the balloting procedure against fraud and tampering. The use of voting machines is clearly superior to the use of paper ballots, which can be much more easily altered and destroyed.[122] The complex and often misinterpreted rules for counting improperly marked ballots[123] could be discarded if voting machines were used. Voters should be secured against intimidation and unfair pressure when they are within the confines of the polling location. The presence of public employees such as policemen, however, should be minimized. Restrictions on campaigning at the polling place[124] should be strictly enforced.

The present method of identifying voters is susceptible to corruption.[125] All voters should be required to present proof of identity and residence when voting and registering. Permanent registration cards should include either a physical description of the voter or a photograph. Special disabilities such as illiteracy or blindness that establish a need for ballot marking assistance should be stated and proved on election day

121. N.C. CONST. art. IV, § 3.

122. *See* OFFICE OF FEDERAL ELECTIONS, *supra* note 3, exhibits a, b, & c.

123. *See* N.C. GEN. STAT. § 163-170 (1976).

124. *Id.* § 163-147.

125. *Id.* § 163-150(a) requires only that a voter "at once state his name and place of residence . . ."; the judge will "announce the name and residence in a distinct tone of voice"; and then the registrar "shall state whether the person seeking to vote is duly registered."

and, when marking his ballot, the voter should have a choice of helpers available to him.[126] To prevent double voting, the voter should be required to sign the poll book. These signatures could then be preserved as a record of the voting population.

As previously noted, identifying a particular challenged ballot under the secret ballot system is usually impossible. Identification is always impossible when voting machines are employed. There is a trade-off between preserving the secret ballot which helps ensure freedom from intimidation and marking the ballot in order to provide information to reviewing authorities. No one should be denied the right to vote at the polling place. An equitable solution would simply be to isolate the challenged ballot in case an adverse finding of legality is reversed by some later action. One solution might be to number each ballot and correlate that number to the voter by the poll book. Nevertheless, the objections to such an infringement on rights of privacy seem to outweigh the advantages of swift and accurate resolution of contest proceedings.

The remedies presently available to an election contestant are somewhat limited. Whether a contest is heard by the elections boards or by an independent administrative law judge, any showing of irregularity should be enough to obtain at least a recount in the affected precincts.[127] If from the recount or other evidence it is shown that the results of the election are uncertain, then the remedy must be a new election. Only if results indicate conclusively that someone else is the winner should a court, administrative law judge or elections board declare someone other than the originally certified winner elected. There are strong arguments that the elections board should never be able to reverse its canvassing decision once it is completed.[128] This is a harsh but necessary restraint on the power of the administrative body to change declared results.

The timing of available relief is also important. The elections boards should have ample opportunity to canvass the election results before any contest is adjudicated. However, if pre-election misfeasances or election day irregularities are great enough to void the election, some form of immediate injunctive relief is also desirable. An application to an elections board with an immediate appeal to an administrative law

126. *Id.* § 163-152(a)(2), *as amended by* Law of May 10, 1977, ch. 345, § 2, 1977 N.C. Adv. Legis. Serv. 116 (Pamphlet No. 7); *see* Overton v. Mayor of Hendersonville, 253 N.C. 306, 116 S.E.2d 808 (1960).

127. Strickland v. Hill, 253 N.C. 198, 116 S.E.2d 463 (1960).

128. *See* Britt v. Board of Canvassers, 172 N.C. 797, 90 S.E. 1005 (1916) (dictum).

judge is the best method for making such relief available. The burden of showing irregularity sufficient to halt an election should be great and the remedy used sparingly.

Judicial review of the actions of an administrative law judge or an elections board should continue to be available only after exhaustion of all administrative remedies. The courts should, to the extent possible, stay out of the business of supervising the inherently political process of electing public leaders (including judges).[129] When the judiciary is properly asked to intervene, proof of the impossibility of determining who should be declared the winner of a disputed vote tally should be sufficient to overturn an irregular vote count. Election results are certainly entitled to a presumption of validity, but some recourse to the courts remains necessary. Under the present system, any judicial control over the counting of votes is mainly illusory and an administrative remedy is needed to fill the void.[130] The courts should not opt out of the arena when an arbitration role remains to be filled.

Finally, it is endemic that the most important factor in free and fair elections is honest and impartial administrators operating in full public view. Although any controls can be circumvented by a determined force, a completely open process lessens the chance of subterfuge. Citizen involvement in the electoral system must be encouraged and adequate avenues for effective administrative and judicial control must be provided. Legislative attempts to ensure the re-election of incumbents or to give one party an advantage over others must be struck down swiftly and completely. Only with the depoliticalization of the electoral process can the goal of an informed electorate making rational decisions be fulfilled without built-in distortion from the electoral system.

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129. For an example of direct political involvement, see *In re* Advisory Opinion, 232 N.C. 737, 61 S.E.2d 529 (1950).

130. Unless fraud exists the court looks at the action of the administrative body and not at the mechanisms of the election. *See* Ponder v. Joslin, 262 N.C. 496, 138 S.E.2d 143 (1964). *See also* text accompanying note 53 *supra*.