
Coates' Canons Blog: Our Messy Congressional Election and How We Got Here

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The candidate who appeared to win the election in North Carolina's Ninth Congressional district has not been officially declared the winner. He has not taken his seat in Congress. And the state elections board that might declare him the winner has gone out of business. How did we get here?

The story has five interrelated threads. The first thread begins in 1901 and would exist even if there was no Ninth Congressional district controversy, but it has made the controversy much messier and far more confusing.

First Thread—Reconfiguring the State Board of Elections

In 1901 the General Assembly created a system for the administration of elections that lasted for 115 years. At the top was a five-member State Board of Elections. The governor appointed the members of the state board, from nominees put up by the parties. By statute, no more than three members of the state board could be of the same party. The governor would, of course, appoint a majority from his own party—three Democrats and two Republicans when the governor was a Democrat, as he always was in the early days. But when, in 1972, a Republican (Jim Holshouser) was elected governor for the first time in the 20th century, he did the same and the majority on the state board shifted from Democrat to Republican. Then in 1976 (when Jim Hunt was elected) the majority shifted back to the Democrats. Then in 1984 (Jim Martin) it went back to the Republicans, 1992 (Hunt again) back to the Democrats, and 2012 (Pat McCrory) back to the Republicans.

Then, in November 2016 a Democrat (Roy Cooper) was elected governor. The same pattern would likely have been repeated, but the Republican-controlled General Assembly decided to change the 115-year old system. Between Cooper's election and his swearing-in, the legislature enacted a statute (which outgoing Governor McCrory signed) replacing the old five-member state board with a new eight-member state board, made up of four Republicans and four Democrats. In a suit brought by Cooper, the North Carolina Supreme Court ruled that the eight-member board violated the North Carolina Constitution's principle of separation of powers by depriving the governor of the degree of power necessary to carry out his duty to "take care that the laws be faithfully executed."

The General Assembly responded with new legislation setting up a nine-member state board, four Republicans, four Democrats, and one who is neither. That new board was sworn in and went to work. But Governor Cooper challenged the nine-member board as a similar violation of separation of powers, in that four Republicans and the one "other" could deprive him of the power he needed. In October of 2018, a three-judge panel of the superior court agreed. It ruled that the nine-member board was also unconstitutional and had to be dissolved. But the three-judge panel recognized that it was making its ruling very close in time to the 2018 election (which was in fact already underway, with absentee voting), and said that its ruling would be delayed until after the nine-member state board had finished conducting the 2018 election. Then the nine-member board would be dissolved.

So, in the normal course of things, after the state board had certified the results of all 2018 elections, it would have been dissolved, and the General Assembly would then come up with a new plan for the state board. So all of this has nothing to do with the Ninth Congressional district, except . . .

. . . except that in a couple of counties in the Ninth Congressional district, anomalies occurred (see Second Thread below). Allegations of fraud involving mail-in absentee ballots arose. By the regular procedures, the results of the Ninth Congressional district race came to the nine-member state board for certification. The state board refused to certify the results until it could hold a hearing and reach a decision on the allegations of fraud. It soon became clear that the matter

would take a while to sort out, so the three-judge panel further delayed the effective date of its ruling. The nine-member state board could stay in existence and deal with the Ninth Congressional district issues before it was dissolved. The nine-member board had said that it would conduct a hearing no later than December 21 and the three-judge panel said “OK” and set the date for the dissolution of the nine-member board at December 28. The nine-member board would have a week to conduct the hearing, make a decision, and resolve the matter.

But the matter got messier and more complicated (see Second Thread below), and the nine-member board delayed its hearing date to January 11. The parties went back to the three-judge panel for a further delay so that the nine-member board could do its business, but this time the three-judge panel said “No.” So, on December 28 the nine-member board was dissolved without having resolved (without even having conducted a hearing on) the allegations of fraud in the Ninth Congressional district election. At the last minute, the apparent winning candidate Mark Harris petitioned the board to certify his election before the board was dissolved, but it refused.

In the meantime, the General Assembly passed legislation calling for a return to a five-member state board, very similar to what had been established in 1901. The effective date of the new legislation was set at January 31, 2019.

As a result of all this, there is a current mess. The old nine-member state board went out of existence on December 28. The new five-member state board is not even authorized until January 31, 2019. And the issues in the Ninth Congressional district are still pending. What happens?

The attorney general of the state opined that the 1901-vintage five-member board that went out of existence in 2016 enjoyed a revivification. It was revived since the statutes that replaced it were declared unconstitutional. It would stay in effect, the attorney general opined, until the new five-member state board would become effective. So Governor Cooper said that he would appoint a state board under the 1901 statute to conduct the investigation and hearings in the Ninth Congressional district election and, hopefully, resolve the Ninth Congressional district matter.

But the state Republican Party said that this resolution by Governor Cooper created an uncertain situation subject to future challenge and refused to nominate short-term members.

Governor Cooper decided, in light of that refusal, not to go forward, but instead to wait for January 31 and the creation of the new five-member state board.

For the moment, there is no state board of elections, although the need to certify the election in the Ninth Congressional district election is still pending before its ghost.

In early January, apparent winner Harris brought a lawsuit in state court, asking the court to order that Harris be certified the winner. On January 22, the state court ruled that it would not make such an order. Resolution would have to wait for the appointment of the new five-member board.

The upshot of the First Thread: a struggle over control of the elections administration in North Carolina that had nothing to do with the Ninth Congressional district has become entwined with the problems in the Ninth Congressional district election. If the Ninth congressional district controversy had not come up, the elections administration legislation and litigation would have passed unseen by virtually everyone except students of the electoral process.

That leads us to the Second Thread.

Second Thread—Allegations of Fraud in the Election

Independently of everything happening in the First Thread above, reports of significant irregularities in the 2018 elections arose in a couple of counties in the Ninth Congressional district.

There seem to be two different kinds of irregularities, perhaps related.

The first irregularity had to do with allegations of fraud in mail-in absentee ballots.

(Background: There are two ways to vote by absentee ballot. You can do “early voting” by going to an early voting site in the county. That is an in-person way to do absentee voting. It is hugely popular. The other way is to request that the

county board of elections send absentee ballots to you in the mail. You then mark the ballots and return them, usually by mail. There are significant numbers of this kind of mail-in absentee ballots cast, but nowhere near the number of early-voting absentee ballots.)

For mail-in absentee ballots, there are several steps. First Step: the voter or his “near relative” submits a request form, asking to be sent an application and the ballot itself. Anyone can provide the request form to the voter. Second Step: the county board of elections mails the application and the ballot to the voter. Third Step: the voter fills out the application and marks the ballot, in the presence of two witnesses. Fourth Step: the voter mails the application and ballot back to the county board of elections (or delivers it personally or a near relative delivers it personally). Fifth Step, the county board of elections approves the application and, at the appropriate time, counts the ballot.

Here is my limited understanding of the allegations of fraud in the Ninth Congressional election. (Let me say it again: these are allegations. What actually happened is the subject of current investigation.) A political operative was hired by the Harris campaign to do get-out-the-vote work with mail-in absentee ballots. The operative had a history of involvement with mail-in absentee ballot activities. After the 2016 election, concerns about mail-in absentee ballot fraud in that part of the state were turned over by the state board to the U.S. Attorney for the Eastern District of North Carolina, but no criminal charges resulted. Referrals were also made to the state district attorney in Wake County, but her investigation also does not appear to have resulted in charges. The operative or those in his pay would, it has been alleged, acquire (lawfully) the mail-in absentee ballot request forms and provide them to potential voters and, perhaps, help the voter fill out the form and mail it in. When it would be time for the voter to receive the actual application and ballot, the operative or someone in his pay would show up and help the voter with the application form (again, seemingly lawfully), and then would take the ballot on the promise of mailing it in (an unlawful act). If the ballot was marked in a way that suited them, they would mail it in (unlawful). If the ballot was marked in a way that did not suit them (or, if they did not know how it was marked, but was from a household likely to vote the wrong way), they would destroy it (unlawful) rather than send it in.

Just what the operative did, and what impact it may have had on the election, remains to be determined.

In addition to this alleged fraud by a third-party political operative, there are allegations of a second kind of irregularity—misconduct on the part of officials of county boards of elections within the Ninth Congressional district, consisting of allowing the operative or those in his pay to see information about voters that would, potentially, help his efforts.

So this Second Thread consists of assertions of unlawful mail-in absentee voter fraud by third parties and assertions of malfeasance by elections officials.

Because of these allegations, the nine-member state board of elections refused to certify Harris as the winner, pending an investigation. And that board now does not exist.

Third Thread—How Many New Elections?

Under state law, the State Board of Elections (if it in fact existed, which, for the moment, it does not—see First Thread) may order a new election in either of two circumstances. One is when there are enough votes at issue—because ineligible voters voted or eligible voters were prevented from voting or for some other reason—“sufficient in number to change the outcome of the election.” The second is where “irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness.”

It may be that the state board (when one is in operation—see First Thread) will find that one or both of those standards are met and will order a new election in the Ninth Congressional district race.

There is one more oddball consideration, however. If the state board orders a new election, should it be only for a general election rematch between the apparent winner Harris and his opponent Dan McCready? Or, should the board order a new set of primary elections among Republican candidates for that party’s nomination and among Democrats for that party’s nomination?

After the May primaries, in which Harris defeated two Republican primary opponents and McCready defeated his Democratic primary opponent, the state board certified the results. The winners received their certificates of nomination

and proceeded to the general election. But, as we have seen, the state board decided not to certify the results of the general election contest. There has been no official closure of that election. In the normal course of events, no new election would be ordered after the results of an election have been certified, so, it might be expected that the state board in this case, if it orders a new election, would look only to a general election rematch.

On December 12, however, the General Assembly passed a statute saying that if a new election is ordered by the state board following the protest of a congressional general election (as between Harris and McCready), then there is to be a new primary election as well. A legal challenge to such a change in the rules at this point of an election can be expected. The matter is unprecedented.

So, under the Third Thread, it is possible that sufficient indication of fraud and official misconduct exists for the state board to order a new general election (and, perhaps, a new primary). But there is no state board, at least for the moment. It will be up to a new board to conduct hearings, make a determination, and, if indicated, order a new election. When will North Carolina certify a winner in the Ninth Congressional district election? Not immediately.

And that brings us to the Fourth Thread.

Fourth Thread—What if the New State Board Does Not Order a New Election

The new five-member state board of elections may determine that it cannot find irregularities affecting enough votes to change the outcome of the election or irregularities or improprieties sufficient to “taint the results of the entire election and cast doubt on its fairness.” In that case, it will issue a certificate of election to Harris and the matter will be closed.

The new board will, however, have the authority to order a new election (see Third Thread), if it finds that such irregularities or improprieties did in fact occur.

But the order for a new election requires the votes of four board members—four out of the five. It is not beyond imagination that by a three-to-two vote the board finds that there are sufficient grounds to order a new election, but cannot secure the fourth vote to actually order the election.

What happens then? Another entry into uncharted waters. Perhaps the state board would decide that at that point it has done all it can and will issue a certificate of election to Harris. Or perhaps the three-member majority would refuse to do that, leading, it could be, to a lawsuit by Harris for a court order for a certificate of election.

Perhaps the Governor could order a new election. There is a statute that authorizes the Governor to call a new election any time there is a “vacancy.” That usually happens, of course, when a sitting member of the House of Representatives dies or resigns. What about the current Ninth district circumstance? Is there a “vacancy” within the meaning of the statute?

If the new state board issues a certificate of election, then surely there will be no vacancy. What happens if the board does not reach that point for a long time? Is there, at some point, a “vacancy?” More uncharted territory.

And that brings us to the Fifth Thread.

Fifth Thread—the Power of the United States House of Representatives

The United States Constitution says, with respect to the United States Senate and the House of Representatives, “Each house shall be the judge of the elections, returns and qualifications of its own members.” In the normal course of events, the House and the Senate each take the word of the states as to election results and they seat the ostensible winners sent there by the states. But, it is quite clear, they don’t have to. Between 1933 and 2007 (according to a study by the Congressional Research Service), there were 107 contests presented to the House. Of those, the House seated the challenger in three cases and in one case it declared a vacancy, refusing to seat anyone. In all the rest, it seated the ostensible winner.

For now, the House is waiting for the North Carolina process to play out—a new state elections board to be appointed, an investigation to be completed, perhaps new elections to be held, and, eventually a certificate of election to be issued. But,



ultimately, the House of Representatives may upend any resolution reached at the state level.