
Coates' Canons Blog: Provisional Voting in North Carolina

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UPDATE February 2017: In 2013 the North Carolina General Assembly enacted legislation requiring voters to show photo ID at the polls and providing for provisional voting by voters who failed to do so. In July 2016 the federal Fourth Circuit Court of Appeals issued an injunction against elements of the 2013 legislation, reinstating voter identification requirements to the status described in this post. The matter is before the United States Supreme Court.

Throughout North Carolina history, until very recently, elections officials had full control over the voter registration process. The law required that a person who wanted to register to vote had to come in person before an elections official—typically an elections board member or employee. The elections official would question the applicant to determine eligibility to vote (that the person was 18 years of age, a citizen of the United States, and a North Carolina resident). The elections official would then administer an oath to the applicant, the applicant swearing that she was eligible and would support the constitutions of the United States and North Carolina. This procedure put the registration application automatically in the hands of an elections official, and the county board of elections could then directly review the application, approve it, and enter the applicant on the voter rolls.

Then, beginning in the 1990s, that direct control over the voter registration process slipped away from elections officials.

In 1993 Congress passed an act requiring states to permit voter registration by mail and at drivers' license offices, public-assistance offices, and a few other public offices. In 1994, the North Carolina General Assembly passed state legislation to comply with this new federal law.

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. The forms were simply filled out improperly more often. Second, delays developed in the transmittal of the application forms. Whereas in the past elections officials had custody of the applications from the moment they were filled out, now elections officials received applications from drivers' license offices and employment security offices and others—applications they did not even know about until received—on whatever schedule they made their way to the elections office. Third, people who filled out the forms were not always savvy to the difference between applying to register to vote, on the one hand, and actually being registered after the application was approved, on the other. Individuals frequently thought of themselves as having “registered” to vote when they filled out the form at DMV, for example, unaware that the registration was not complete until the application was reviewed and approved at the elections board.

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

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

In years past, that potential voter would simply have been turned away and her vote would have been lost. But North Carolina responded to the new difficulties with “provisional voting.” An individual who believes that her name should be on the voter rolls, but is not, or who for some other reason appears ineligible, can vote provisionally. On the spot, the voter

fills out an application for a provisional ballot, marks the ballot, and seals it in a special envelope. In the days between the closing of the polls and the announcement of the official vote totals, county elections officials review the application and determine whether in fact the voter was eligible. If the determination is that the voter was not eligible, the application is denied, the ballot remains in the sealed envelope, and that person's votes do not count. If, however, the determination is that the voter was in fact eligible, the envelope is opened, the ballot is counted, and the votes count.

There are eight circumstances in which provisional votes will count.

First, the review by the board of elections may reveal that the voter was in fact registered but through some error did not appear on the precinct records. That is the classic problem that served as the impetus for provisional voting in the 1990s.

Second, the voter may have moved to a new precinct within the county more than 30 days before the election. Before the advent of provisional ballots, that voter's right to vote would have expired at the 30-day mark. Now, she may vote a provisional ballot at either the new or old precinct and her votes will count in the races applicable to the new precinct.

Third, the voter may have been removed from the registration rolls by the county board of elections under old removal provisions that no longer apply. The review will disclose this, the voter will be restored, and her provisional ballot will be counted.

Fourth, a voter may have been offered the wrong ballot (for example, a ballot for county commissioner District One, although she lives in District Two) but she asks for and votes the correct ballot provisionally. If the review shows she was right, her provisional ballot will be counted.

Fifth, the voter on election day has gone to a precinct within the county other than her assigned precinct and wishes to vote there. She will be given a provisional ballot and her votes will count, but only for the races she would have been eligible to vote in her assigned precinct. The constitutionality of this "out-of-precinct" voting was challenged in court after the 2004 elections, but the constitutional issue was not decided.

Sixth, the voter may have been given the ballot of the wrong party in a primary election. She may vote provisionally the ballot of the other party and it will count if the review determines that the record at the precinct was wrong.

Seventh, the voter may have voted after normal closing time of the polls. Polls close at 7:30 p.m. A voter who is in line at that time may vote, even if it's after 7:30 before she gets to the voting booth. But sometimes problems at the polls may result in an order from a court or the elections board to keep the polls open after 7:30. A voter who gets in line after that time and then votes because the polls have been kept open late will be given a provisional ballot, and that ballot will count as long as it is not subsequently determined that the order to keep the polls open was unlawful.

And eighth, unlike most voters who are not required by current law to show identification at the polls, some voters are required to. They are voters who registered to vote by mail and have never yet voted in person. If such a voter comes to the polling place to vote without proper ID, she will be allowed to vote a provisional ballot, which will count if she subsequently provides proper ID to the county board of elections.

This last category of voters may be about to grow. Right now, two bills are pending in the North Carolina General Assembly that would require all voters (with a few specific exceptions) to show photo ID at the polls. Both bills provide for provisional voting if a voter comes to the polls without the ID.