

**Say NO to HB 1281 and the further centralization and politicization of the voting process. An open letter to state legislators and administrators of North Carolina Elections.**

J. Eric Elliott; Chair, Forsyth County Board of Elections

May 4, 2009

**PLEASE REJECT HB 1281 (introduced April 15) which opens the door to an unprecedented level of centralized control of elections in Raleigh. HB 1281, under the guise of effectively implementing a "uniformity project," further takes away the local accountability of election decision-making and insulates it from the public.**

**PLEASE INTRODUCE LEGISLATION TO LIMIT the State Board of Elections ability to make *changes to election procedures during the course of an election*. By bi-partisan unanimous voice vote at its April 21 meeting in Nags Head, the Elections Boards Association of North Carolina ("EBANC"), whose members - the three-person local boards of elections in our one hundred counties - are appointed by the State Board of Elections, asked the General Assembly to incorporate the following resolution into the General Statutes governing elections:**

**"Be it resolved that once an election begins, defined as the start of mail-in absentee voting, that the State Board of Elections and its county boards may not during the course of the election change its rules, procedures, instructions, voting locations, or hours of voting."**

**I wrote that resolution. Resolving true emergencies in election administration affecting the ability of counties to conduct elections can still be handled by staff and court order. This requested language attacks the real danger to the integrity of an election resulting from actions by a partisan board once an election has begun.**

**PLEASE RECONSIDER THE MANNER IN WHICH EARLY VOTING IS ORGANIZED. As both a partisan representative on a local board of elections, and the chair of that board trying to ensure the fairness of the elections process for all citizens, I implore the state legislature to reconsider the manner in which early voting is organized. Much needs to be improved by standardizing and de-politicizing the locations and opportunities for early voting before the 2012 election. Local state legislators, county commissioners, and county boards shouldn't have to lobby in Raleigh for how to conduct every election. Whether by accident or intention, the system has been pushed to its breaking point by this last election.**

The document below details the lessons learned from our experiences in 2008, how each of these three issues was highlighted in that election, and outlines some proposals for improvements.

### *Personal experience as an early voting decision-maker*

Early voting was hailed as a great success in North Carolina in 2008. Precedent-setting advertising of early voting opportunities by the Obama campaign, in both its primary and general election victories, plus high interest in voting generally after a nearly two-year presidential campaign season, led to a little over fifty percent of eligible voters voting early in Forsyth County in the fall. Less than thirty percent voted on Election Day. Since my appointment to the local elections board in 2003, I personally have been very open to the possibilities for outreach to potential voters through early voting expansion and appreciative of the legislature's flexibility to experiment through it. For example, Forsyth has been one of the first counties with Sunday voting on the last Sunday of our early voting. In the 2008 primary we experimented with early voting with bus patrons and the downtown community at the Winston-Salem Campbell Transit Center. We were criticized in the press in the spring for adding extra sites in predominantly Democratic areas, a move I agreed to because election boards have been allowed to consider political factors where appropriate, and in this case that's where the presidential primary race turnout was going to be. In the fall we had a record number of early voting sites balanced in geographic and political distribution, and a higher per capita number of sites than even Wake County. Our volume of voters stayed high and fairly constant in early voting until the last several days where it followed traditional patterns of more than doubled volume by the last day.

In my view, we argue over the rules and procedures for an election prior to an election, but once the rules and locations are set, we should not change them once an election has started. The analogy is if early voting is an extension of Election Day, and you wouldn't add precincts or change locations on that day, you certainly shouldn't do it in early voting. What is there to guide my decision to add precincts after the election starts other than what can be interpreted as partisan interests? There is no constitutional right to an amount of time at any particular location to early vote; and the early voting experience and opportunity has, to date, varied widely from county to county and election to election. The State Board of Elections currently funds early voting sites beyond the one required per county paid by that county (at BOE offices) with one-time federal funds from HAVA (the Help America Vote Act). This is money that could also be spent on capital equipment, like electronic poll books which would increase our efficiency and cut costs. It is also money that is skewing control of election administration decisions from the county level to those being made at the state level. But once counties submit requests for sites and a plan is approved, the SBOE has - until fall 2008 - always told us there will be no more early voting sites added.

### *Three issues of SBOE overreach in early voting 2008*

In an unprecedented move, the SBOE made three changes during fall's early voting which, although made putatively in response to the demand of voters, instead showed the susceptibility of early voting to political manipulation as it currently stands.

a) After polling began, the SBOE said that counties could add early voting sites on a case by case basis. That led to the disastrous partisan-appearing decision by Cumberland County to open a last-minute early voting site adjacent to a partisan campaign rally. Locally we were pressured by politicians and campaign officials to add sites in heavily Democratic areas to handle large turnouts there. There were of course large turnouts everywhere. I am not surprised that we were asked by partisans (that's part of what we're there for); I am surprised the SBOE said we could

say yes. If we approved such a request how would it be different from having a precinct assigned on Election Day to a used library bookmobile which we could then direct be driven to the area where my side needs extra votes? We did add extra computer voting machines at several early voting sites and reconfigured traffic flows, as we would administratively at any site during an election. But because the state has mandated a single supplier of voting machines, we were unable to get extra machines as volume increased during the election.

b) After polling began, the SBOE asked counties to distribute printed reminders to voters telling them that a straight party ballot was not sufficient to vote for president; that they must vote separately for president for that ballot to count. That information is already printed on every ballot. We were criticized locally for not following that request (in the end our Forsyth voters voted in the exact same proportions as statewide in the presidential race - 99% casting an effective ballot). The reason we didn't follow SBOE's request is because it was counter to advice we had previously received from SBOE, when a candidate in a multi-seat race wanted specific instructions about the effect of a vote for a non-partisan candidate on a straight-party vote in her race. Once the race has begun we would create by our "state action" two classes of voters, one given extra information, one not. Now, of course, any voter confused about the issue could ask in person, and our poll workers would help. But highlighting one instruction is coaching a vote. That's the job for partisans doing "get out the vote," not the board of elections administering the process. For example, the Obama campaign made effective signs highlighting at polling places the need to vote for president, then straight-party offices, then for non-partisan offices. A histrionic *New York Times* editorial calling this issue the "butterfly ballot of 2008," and the fact that this notice requesting the additional instruction from counties was sent to all county BOE directors simultaneous with a copy to the head of a major voting rights lobbying group, highlighted the political nature of the additional instruction.

c) The most problematic call of the SBOE was in voting to extend early voting hours statewide only two days before the end of early voting and one day after rejecting a request from Guilford County to extend voting hours. Counties that had not in their initial early voting plans agreed to have such voting end at 5pm on the Saturday prior to Election Day – and most had not, setting a closing time of 1pm given the long backlog to process whenever closing is on the final early voting day – those counties now were required to extend early voting's closing time until 5pm. The only way they could opt out of this extension was with a unanimous vote. Polling places already stay open after closing time as long as it takes to vote those voters in line at the stated closing time. There would still be opportunity for others to vote on Election Day the following Tuesday. The issue about extending early voting hours was not about avoiding voter disenfranchisement. There was no expectation by voters prior to Thursday's SBOE vote that they could arrive later than a scheduled voting closing time and still early vote. The unique thing the extension did was give four more hours to bring in previously unregistered voters to the polls.

When the SBOE issued its order on Thursday for counties to hold "an emergency meeting" (with no definition of a timetable for what would satisfy that requirement), within the hour I was meeting with our county attorney Davida Martin and county elections director Rob Coffman. Our attorney's advice was we could not hold a meeting without 48 hours notice to comply with public meetings law. We therefore set a meeting time for noon Saturday, an hour before polls were set to close, and advised the director to have his staff prepared to work a longer day if we voted to so do. But the following morning we were presented with a "show cause order" from SBOE to meet by noon Friday or be removed from office. I personally coupled the heavy-

handedness of that order - knowing that other county boards did not meet by that Friday deadline to consider, and were being pursued by SBOE regional directors to meet Friday afternoon - as a clear signal of the political nature of this request as opposed to it being to meet a "crisis of voter demand." The fact is, it was widely known that the state was a battleground state in the presidential race, and many in the media had said the outcome was dependent on turnout in urban counties.

The ruling of SBOE also set the terrible precedent of county board action in effect being determined by a single vote, not a majority. And though SBOE reserves the right by statute to settle a county's early voting plan if it is not unanimously agreed to by a local board, here they did so before any review of the facts of each county's particular case. In Forsyth, our board did preserve majority rule at least: I was the only board member voting against the Saturday extension. The GOP board member said he was voting for the extension only because his local party leader said it was politically advantageous to them (partisan machismo is always on both sides of a political cause). The *Winston-Salem Journal* ran an editorial the following Sunday saying the board ought to extend voting times "when demand necessitates it" - but who makes that demand? how is it measured? and isn't that what we used to call "mob rule" rather than the rule of law? I love Carolina-Duke basketball games. I wish they could go on forever. But I'm glad they don't change the rules for game length during the game when my team needs some extra points, or wants to pile on some extra victory margin. It wouldn't be fair play. And such changes make our voting system susceptible to charges of manipulation for a result. Whether or not they are caused by such an intention, the appearance of such an intention can not be avoided.

*The effect of early voting on the law, the electorate, the parties, and the administrative voting process*

Early voting has not been designed to be the primary voting experience, but to supplement Election Day. It has been underused in eight years in North Carolina except during presidential elections, as those elections are the ones with strong voter interest. In 1845, Congress passed a law setting the first Tuesday after the first Monday in November of every fourth year as the day to appoint Presidential electors. Today, early voting is practiced in thirty-one states according to their respective election laws, although Article VI of the U.S. Constitution invalidates any state law that is contrary to the Constitution or federal law. Although federal law may be at some future point changed to clear up ambiguity *on the legality of early voting when a majority of votes cast are voted early*, I still think it is of value to have an election be a snapshot of the country's opinion, not an extended-survey-time poll. I believe reconciling the two positions necessitates that a majority of ballots need to be cast on Election Day or as near to that day as possible to be such a snapshot. I have voted to phase in early voting the last several federal elections, not opening all locations for the duration of the state-allowed early voting period, in part for that reason. And practically, we also have to prepare for Election Day in our county at 101 precincts, which up until this election with its extraordinary promotion of early voting, has been our primary election experience for voters. Fall 2008 was the first election in which the majority of ballots cast were not on Election Day. Indeed, in presidential years, I do not see us going back to electing by majorities "on the first Tuesday after the first Monday in November" without changes in our early voting law.

We don't have a 24-hour election day to accommodate a 24-hour society with work and rest schedules. We have had mail-in absentee voting for some time to reach those who can't or

choose not to visit the polls on Election Day. Early voting has been sold to legislators as another way to increase voting turnout; though so far - even after last year - what it has primarily done is given those who would vote greater flexibility in choosing the times they would vote. It has not, by and large, increased overall turnout. Candidate options and the desire for a change from status quo are still the biggest factors affecting turnout. But what are the effects on voters, having in short season gone from absentee with excuse voting to absentee no-excuse early voting to early voting with no prior registration needed (the new same-day registration option)? The "success" in volume of early voters has not made a better voting experience for voters. Those voting early - mostly in lines of an hour or two wait here, though on the last day some waits were four and five hours - feel rightly that they are waiting too long. But we have 101 precincts in my county on Election Day, only 14 for early voting at its peak. The same volume of voters can not currently fit comfortably into such a smaller number of precincts.

The press reported my comments for several weeks that the shortest lines for voting would be on Election Day, or that voters could request a mail-in ballot and send it in for two 42-cent stamps and have no wait in line. But neither of those options was stressed by the campaigns. A shrewd voter or media agent might wonder why parties would not want a more convenient experience for the voter. The data mine from early voting is too valuable. Election Day-only voting gives parties four opportunities at set times in the day to copy lists of voters who have voted at a precinct and run the information back to headquarters. This allows partisans to "flush the vote," targeting those who haven't yet voted with calls or rides to the polls. Early voting lists, starting with this presidential election, are now available statewide from Raleigh each night. As recently as 1992, the voter list was kept in poll books by hand at each precinct in our state. Then it was centralized in the county office. But now the official poll book is in Raleigh on computer. With all early voting places instantly (or in batches with slight delay) uploaded to Raleigh, partisans have a nightly list of who has voted where for three weeks running. It makes possible a very specific and targeted "get out the vote" effort. (This daily commentary is not possible with mail-in absentee votes, as they are approved and released weekly in the three weeks prior to an election - hence, perhaps, a reason this easy-on-the-voter option is not popular with some partisans). The three weeks of newspaper stories of long lines at the polls also build excitement: one day in and out at the precinct doesn't get free media for three weeks.

A further bad development for voters, not experienced individually but collectively a threat, is the ballot is now a lot less secret than it has been. Facilitated by its centralized data collection, North Carolina's SBOE became a leading commentator on the horse race during early voting, giving extensive demographic breakdown of voters voting by age, gender, race, and party. Yes, this data has always been available from local absentee lists. But only with centralization has SBOE become not just an administrator but a commentator on an ongoing election. I believe it was over-zealous in providing that demographic breakdown; no other state provided that level of information on its voters to the media before Election Day. Let the parties crunch the numbers themselves. We learned in 2000 that releasing exit poll data when the polls were open was a bad idea to suppress or alter turnout, and SBOE does not comment on demographic trends during Election Day to the media. Why did SBOE choose to do so this time? Because they could isn't a good enough reason.

I know that in addition to the partisan interest in an extended "get out the vote" made possible by early voting, some election administrators favor strong early voting turnout because it enables them to lobby for "super-precincts" and "voting centers" - reducing dramatically the

neighborhood precincts. Although I think that would negatively affect the ability of the poor to have access to polls and detract from the civic community-building experience of voting, it would greatly reduce the number of non-professional election workers involved in the process. In the eyes of some, those are the people "messing up procedures;" but in my opinion, those citizen poll workers help insure - independent of a standing bureaucracy - that procedures are followed in an election. After all, my own job on a county board of elections is premised on the fact that some at one time thought it of value that each county have its own independent set of citizen judges to ensure that voting procedures are administered fairly. Although our boards are partisan in their appointment, almost always I've experienced boards working together to do the fair thing and not the partisan successful thing.

Finally, I know that in response to lack of local oversight in a small number of counties in 2004, the SBOE is trying to minimize any variations in procedures between rural and urban counties with its "uniformity project." A result of that long-term will be to reduce the independence of large numbers of one-day citizen poll workers, as precinct officials continue to lose responsibilities from the transfer of poll book record-keeping to the reduction of at-precinct voter challenges with expanded provisional balloting. But there remain areas that a strongly centralized SBOE itself can't insure, like the potential for out-of-state early voting fraud. With the expansion of time in early voting and ease of same-day registration, it is now possible to vote in early October in Ohio (or any number of states) and late October in North Carolina if you have a mailing address in both. Our statewide SEIMS voter database only bumps out voters trying to vote more than once in-state. We have no national database for voters. Students, seasonal homeowners, and any number of our mobile population, could vote in a federal election multiple times unchecked by anyone. I don't believe they are - yet. But a side effect of the good intentions of loosening up our early voting times and registration is that more will inevitably try to defraud the system; and when a state is "in play" electorally, the pressure to do so will be even greater.

*Common standards for procedures does not mandate centralized control*

The recent training by SBOE staff for EBANC members at its Nags Head meeting on April 20-21 began, not with a review of the extraordinary and unique actions of SBOE in 2008, but with a talk on the inevitability of centralization in the elections process. There is no inevitability about centralized control of elections. But the bold expression of central authority undercuts the seeming administrative innocuousness of the language of HB 1281, "*The specific duties and responsibilities shall include the duty and responsibility to comply with all orders of the State Board and all directives issued by the Executive Director under GS 163-132.4.*" HB 1281 continues a series of flanking actions on the local control of elections. It follows the overreach of the State Board of Elections in the failure of one brand of election equipment in one county in 2004, when, instead of ordering a re-election in Carteret County, it sought a state-wide solution (after months of wrangling, an obscure NC Constitutional reference was used to make a legislative solution to the election). SBOE then helped design a system of bidding for voting systems in response to that event with a \$7 million bond requirement based on the flawed reasoning that any local machine failure would lead to a state-wide revote. That resulted, not in a cafe of choices for local boards to choose from (which would insure the state having access to innovation and improvements in voting technology through competition), but in taking away local choice and the discretion to better serve its counties by having multiple vendors to service their needs. This unitary machinery vendor choice was then used a basis for a "uniformity

project" which, rather than providing just beneficial baseline practices which would be adhered to in counties, has slowed creativity, innovation, and responsiveness among county directors.

It now leads to HB 1281, which, under the guise of effectively implementing a "uniformity project," takes away the local accountability of election decision-making and insulates it further from the public. Imagine if tomorrow a bill was introduced that said all local superintendents of schools were no longer responsible to their local school boards but instead had to follow solely orders of the state's Superintendent of Public Instruction. The public would be shocked at such an overnight change and loss of local input to their schools. But because the SBOE has been doing so incrementally, the public has been unaware of the dangers inherent in the process of centralized control. HB 1281 would have eliminated the necessity of local boards to approve 2008's last-minute SBOE changes to the hours and local costs of the election schedule. It limits the ability of local boards to opt out of politicized changes to election procedures during the course of an election made in the stress of national campaign pressure in Raleigh.

*Tellingly, while not all local board members in EBANC are opposed to a more centralized control in Raleigh - though I clearly am, some remain genuinely suspect of the history of their local place to disenfranchisement, others may like the idea of less work for the same amount of pay, others have no philosophical problem with centralization as long as it is doing what their side wants - all EBANC members in attendance did agree on the dangers of politicization of results caused by an interfering SBOE after an election begins. And without local elections board "team members" assisting SBOE's ability to "resist the buffeting political winds" during an election, the temptation to such manipulation of the election process remains high. Local state legislators, county commissioners, and county boards shouldn't have to lobby SBOE in Raleigh for how to conduct every election. No political lobbying should have an affect on SBOE after an election has begun.*

#### *Some early voting improvement proposals*

While I am not against elections having results that are historic and unique - I liked the last election's results - I am vehemently against procedures for elections that uniquely change during an election, which is where we are now with early voting. There is no need for a repeat of these problems if we act now to standardize and de-politicize the locations and opportunities for early voting statewide. Yes, this is asking my friends in both parties to voluntarily disarm the gamesmanship elements of early voting. But I am charged by office to be someone more concerned with the means of an election. I understand the task of partisans to be concerned primarily with a result, and I have been criticized for not following the requests of some in my party to change procedures during an election. My goal in sharing these thoughts with you is not to bend the system until it breaks, but mend a system so that it better works.

1) Require all counties to have and fund multiple early voting sites during presidential years, and standardize the number of those per county on a per capita voter basis. Voters have spoken with their feet that they like more options for voting times in presidential years. But how many places I have to vote early shouldn't vary with county, and shouldn't be paid for with one-time off-budget federal monies. The state could require a county to have a voting place for every 12-15,000 voters. Or pick a number. Set the sites and keep them, adjusting their number every ten years as we adjust Election Day precinct lines. Voters should know early voting site locations as reliably as they do Election Day precincts. They should be as set as Election Day precincts and

not subject to manipulation by a given political cycle. Setting early voting sites has become, after choosing voting equipment a few years back, the most politicized thing county boards do.

2) Reduce and standardize early voting times statewide. Voter registration deadline times shouldn't vary from county to county as they do now with varied times of early voting closing. Confine early voting to the seven days ending on the Saturday before early voting. Have standardized voting hours across the state for early voting as you have for Election Day. By offering voting each day of the week the week prior, you give in-person opportunities for the largest variety of work schedules. Begin on Sunday, 1-5pm; Monday-Wednesday, 10am-7pm, for those needing an evening option; Thursday-Friday, 7am-5pm, for those needing a morning option; and Saturday, 9am-1pm, where stragglers will keep us busy until 4 or 5pm. This also limits the potential for out-of-state fraud.

3) Do not release official aggregate demographic data on voters during the early voting period. Just say no to affecting voter turnout and expectations, at least from an official viewpoint. Not releasing voter data in the middle of the election process also approaches the snapshot of voter will desired for an Election Day result announcement.

4) Limit statewide early voting opportunities in non-presidential election years to one site per county the last seven days before the Saturday before the election - just the site at county BOE offices. Our voter volumes and interest don't demand the extra sites at other times. An extra practical bonus is that for many local candidates, who as office-holders would be funding expanded early voting in presidential years, they would prefer having to worry about staffing campaign workers at only one location during early voting, since they lack the large teams of campaign support available from parties during presidential election years.

5) Someone introduce this language to G.S. 163: "once an election begins, defined as the start of mail-in absentee voting, that the State Board of Elections and its county boards may not during the course of the election change its rules, procedures, instructions, voting locations, or hours of voting."

6) Finally, please reject the language change of HB 1281; and look carefully at changes proposed in HB 1421 and elsewhere in existing legislation that limits our choices at the county level to just a single vendor approved by SBOE for election business. It is an unhealthy to not have competition for government contracts.

There may be other good ideas for improving the process that will address some of the issues I have tried to raise here. But I do think the joint House-Senate Committee on Elections is a good place to review our early voting procedures, and their effect on voters, the parties, administrators, and most of all, our collective confidence in the process of voting. I hope, even if you disagree with me on the importance of individual issues I have raised, that you share my concern that a transparent and fair election process is the main guarantor of confidence in our democracy.

Thanks for your time in reading this.

J. Eric Elliott

Chair, Forsyth County Board of Elections

May 4, 2009