

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

NORTH CAROLINA STATE CONFERENCE)
OF THE NAACP, et al.,)

Plaintiffs,)

v.)

Case No.: 1:13-CV-658

PATRICK LLOYD MCCRORY, in his official)
capacity as the Governor of North Carolina, et)
al.,)

Defendants.)

LEAGUE OF WOMEN VOTERS OF)
NORTH CAROLINA, et al.,)

Plaintiffs,)

v.)

Case No.: 1:13-CV-660

THE STATE OF NORTH CAROLINA, et al.,)

Defendants.)

UNITED STATES OF AMERICA,)

Plaintiffs,)

v.)

Case No.: 1:13-CV-861

THE STATE OF NORTH CAROLINA, et al,)

Defendants.)

**INTERVENORS' MEMORANDUM IN OPPOSITION
TO MOTION TO QUASH TRIAL SUBPOENA OF SENATOR BILL COOK**

The Duke Intervenor-Plaintiffs (“Duke Plaintiffs”) have served a subpoena on Senator Bill Cook for the limited purpose of questioning him regarding the accuracy of statements attributed to him in an April 10, 2013 *Lumina News* article. See PX0079 at 1 (attached as Exhibit 1) (quoting Senator Cook as stating that college students “live at home but they often will vote where they are going to school and their parents keep them on as a deduction, and also where they’re going to school and voting they don’t pay squat in taxes,” and stating that “[t]hey skew the results of elections in local areas . . . but they don’t have any skin in the game”). These statements, made outside of a legislative forum, are not protected by legislative privilege, and the other arguments raised in the Memorandum in Support of Motion to Quash Trial Subpoena of Senator Bill Cook (“Motion to Quash”) should be rejected. The Motion to Quash should therefore be denied.

As this Court has explained, “several cases have assumed that any legislative privilege is waived to the extent a legislator communicates with constituents.” *League of Women Voters of N.C. v. North Carolina*, Case No. 13-660, ECF No. 229 at 20 n.5 (Feb. 4, 2015); *id.* at 20 (“[S]everal courts have denied State legislators’ requests to extend legislative privilege to communications with third parties, including constituents.”); *see also id.* at 10 n.3 (“[S]ome courts have compared the legislative privilege to, or even described it as, a ‘deliberative process privilege.’”).

Indeed, the case law makes clear that legislative privilege does not apply to statements made outside of a legislative forum. In *Hutchinson v. Proxmire*, 443 U.S. 111

(1979), for instance, the Supreme Court held that allegedly defamatory statements by a Congressman in press releases and newsletters were not protected by the legislative privilege, as “only acts generally done in the course of the process of enacting legislation were protected.” *Id.* at 131 (citation omitted). *See also United States v. Brewster*, 408 U.S. 501, 512-13 (1972) (legislative privilege does not protect “so-called ‘news letters’ to constituents, news releases, and speeches delivered outside of Congress” because “they are political in nature rather than legislative”); *In re § 2703(d) Order*, 787 F. Supp. 2d 430, 441 (E.D. Va. 2011) (noting that in “the United States, [public ‘tweets’] are not regarded as part of the legislative function or process, and thus would not invoke the legislative immunity of the Constitution’s Speech and Debate Clause”); *cf. Gravel v. United States*, 408 U.S. 606, 617 (1972) (legislative privilege protects legislators and their aids from testifying about “[c]ommittee reports, resolutions, and the act of voting; in short, things generally done *in a session of the [legislature]* by one of its members in relation to the business before it”) (emphasis added) (citation, alternations, and internal quotation marks omitted); *Schlitz v. Virginia*, 854 F.2d 43, 46 (4th Cir. 1998) (noting that the “purpose of the doctrine is to prevent legislators from having to testify *regarding matters of legislative conduct*”) (emphasis added).¹ Thus, because the Duke Plaintiffs

¹ The Motion to Quash does not cite any authority for the proposition that a statement made outside of a legislative forum is protected by the legislative privilege. *See* Motion to Quash at 5-6 (citing, among other cases, *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (discussing legislators’ right to be free from “civil process for what they do or say *in legislative proceedings*”) (emphasis added)).

seek to question Senator Cook solely with respect to a statement he made to a newspaper reporter—and not based on any statement he made in a legislative forum—the legislative privilege does not shield him from testifying.

The other arguments raised in the Motion to Quash should also be rejected. Defendants’ contention that the Duke Plaintiffs “sat on [the subpoena] and waited until a Friday afternoon in the middle of trial” to serve the subpoena, Motion to Quash at 4, must be considered in the context of Defendants’ agreement that PX0079, which contains the statements at issue, would “be incorporated into the trial record” as a trial exhibit. *United States v. North Carolina*, Case No. 13-861, ECF No. 259 at 1 (Joint Stipulations Regarding Preliminary Injunction Record) & No. 259-1 at 1. It was not reasonably foreseeable to the Duke Plaintiffs prior to trial that PX0079 would not be admitted pursuant to that agreement.

Likewise, while the Motion to Quash refers to the fact that the North Carolina General Assembly is in session, the Senate Calendar for July 22, 2015, posted on the General Assembly’s website, states that “Senate policy committees will conclude their business by July 23, 2015,” *see* Senate Calendar, July 22, 2015, at 5, *available at* <http://ncleg.net/Calendars/CurrentCalendars/CurrentSenateCalendar.pdf>, indicating that Senator Cook will likely be available to testify on Friday, July 24, 2015. And, of course, Senator Josh Stein has already testified this week.

Finally, the assertion that the subpoena should be quashed because Senator Cook is not on the Plaintiffs’ Joint Good Faith Non-Binding Witness List, Case No. 13-660,

ECF No. 303-1, is without merit. Plaintiffs' Joint Rule 26(A)(3) Pretrial Disclosures, to which its witness list was attached, states, "In addition to the witnesses identified on that list, Plaintiffs also reserve the right to call additional witnesses as may be necessary to authenticate evidence, establish the circumstances and content of public statements made by current or former elected officials, or otherwise address evidentiary issues, in the event that appropriate stipulations cannot be reached." Case No. 13-660, ECF No. 303 at 2. As noted above, moreover, it was not reasonably foreseeable, in light of the Joint Stipulations Regarding Preliminary Injunction Record, that the Duke Plaintiffs would need to call Senator Cook.

For the reasons set forth above, the Motion to Quash should be denied.

Dated: July 22, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **INTERVENORS' MEMORANDUM IN OPPOSITION TO MOTION TO QUASH TRIAL SUBPOENA OF SENATOR BILL COOK**, with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 22nd day of July, 2015.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.

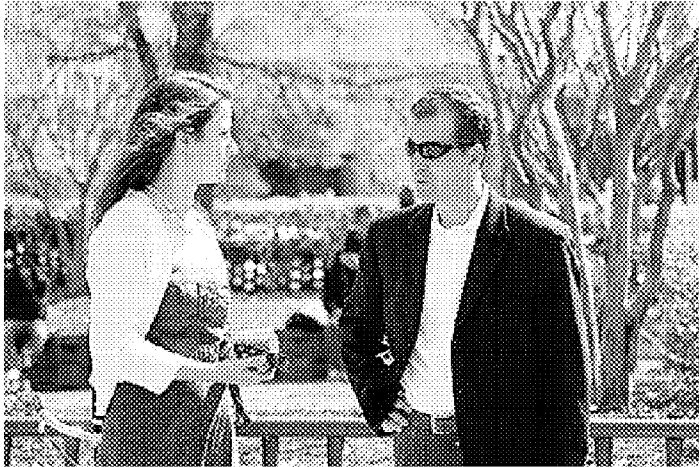
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NC bills could cut early voting, affect college students

by **Michelle Saxton**
Wednesday, April 10, 2013



Staff photo by Allison Potter

Carter Jewell, a student voter at the University of North Carolina Wilmington, and Gerrick Brenner, executive director of Progress North Carolina, talk about proposed election-related bills recently filed by North Carolina lawmakers following a press conference outside the New Hanover County Library in downtown Wilmington on Monday, April 8.

Proposed election-related bills recently filed by North Carolina lawmakers could create longer lines for voting and discourage some college students from casting ballots, some college students, parents and elections officials say.

But the bills, which include proposals to cut some early voting days and ban dependency tax deductions for children registered to vote at a different address than their parents, would save money and equalize the playing field for state voters, Senate bill sponsors argue.

Under Senate Bill 667 parents could not claim a personal tax exemption on a child who registers to vote at a different address, such as college students.

"They live at home but they often will vote where they are going to school and their parents keep them on as a deduction, and also where they're going to school and voting they don't pay squat in taxes," Sen. Bill Cook, a Republican from Beaufort County and one of the bill's primary sponsors, said in a phone interview Friday, April 5. "They skew the results of elections in local areas ... but they don't have any skin in the game."

"If you want to vote as a college student that's great, I applaud it and I encourage it, but let's do it right," added Cook, who also represents Camden, Currituck, Dare, Gates, Hyde, Pasquotank and Perquimans counties. "If you're going to live away from (your) parents and stand on your own two feet, fine - act like an adult."

But Carter Jewell, a University of North Carolina Wilmington political science major, argued full-time college students do not make enough money to go out on their own. Her family lives in Wilmington but she lives in a different voting precinct.

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Jewell said she has heard politicians speak on issues relevant to UNCW and wants to cast votes that affect her school.

"Some of them have been great proposals and some of them have been wildly outrageous, and I think if I hadn't been able to vote for or against this what they would just do to my school without the students' consent," Jewell said Monday, April 8, after a Progress North Carolina news conference outside New Hanover County's main library in downtown Wilmington.

The U.S. Supreme Court in the 1979 *Symm v. United States* case upheld a Texas district court decision to bar a tax assessor-collector from using a questionnaire that would ask those registering to vote if they are college students and where they live while in college.

"The Supreme Court has ruled you can't make students vote other than where they live," Gerrick Brenner, executive director of Progress NC, said just before the news conference. "How is the legislature trying to get around this? They're trying to impose a poll tax. They're trying to basically tax their parents \$2,500 more for their children voting where they're legally allowed to vote."

Cook said the bill has nothing to do with raising taxes but is about voter integrity. Cook, a former state House representative who was elected to the Senate last fall, said he won his Senate seat by a margin of 21 votes out of 87,000. He ran against Democrat Sen. Stan White.

"I became very aware very quickly of all the things that go into getting an honest and accurate vote," Cook said. "My election really points out the value of each individual vote."

College students living in dormitories who vote in their college localities may flip local elections, according to Voter Integrity Project of North Carolina information sent April 8 by the trans-partisan, volunteer organization's executive director, Ret. U.S. Air Force Lt. Col. Jay N. DeLancy.

College students should have voting rights equal to those serving in the military, states VIP-NC, recommendations that include allowing "federal-only" ballots for students who want to vote at college with no effect on residency.

Senate Bills 666 and 721 and House Bill 451, also filed recently, would cut early voting times from 17 days to six or 10, depending on the bill, and SB 666 also would eliminate satellite early voting sites.

"It gives the appearance of saying we want this to be a closed process, something that we can control totally," New Hanover County Board of Elections Secretary Geneva Reid said after the news conference. "If we lose the vote then we've lost the democracy."

Both Reid and Jewell voted early last year, and Jewell said other students texted her on Election Day with concerns lines were two to three hours long.

Cook, who also sponsored SB 666 and co-sponsored SB 721, said he campaigned during each day of early voting and said while it was busy the first week and last few days it was like a "desert" in between.

"Most places you can send an absentee vote," Cook said.

Cook and Sen. Ronald Rabin, R-Harnett, Johnston and Lee, and Sen. Norman Sanderson, R-Carteret, Craven and Pamlico, sent a news release April 3 on Senate Bills 666 and 667, saying one day of early voting in North Carolina costs \$98,000.

"In these tough economic times, we need to be proactive in finding ways to save money," the release said.

Brenner sent a 2011 memo from North Carolina State Board of Elections Executive Director Gary Bartlett that said savings from fewer early voting sites could be offset by costs for employing additional Election Day poll workers, transitioning to an increased level of by-mail absentee voting, finding larger polling locations and buying more equipment to handle more voters.

About 78 percent of North Carolina voters support early voting and 75 percent have voted early, Brenner said, citing results from a Public Policy Polling survey of 824 North Carolina voters in late March.

About 2.5 million North Carolinians voted early in 2012, Brenner said.

Steve Kelly, a New Hanover County unaffiliated voter, civil engineer and parent of a University of North Carolina "Tar Heel," spoke at the news conference against the bills, citing long voting lines in Florida as an example.

"I want to be able to go anywhere I want in this country wearing this Tar Heel shirt, being proud to be a North Carolinian and not have to answer for some of the really unconscionable things that our legislators might have done," Kelly said. "We all, regardless of our political affiliation, need to be behind an effort to make North Carolina a place where democracy works."

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General Information

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