

# **National Center for State Courts Election Litigation Resources**

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The National Center for State Courts (NCSC) has several resources for judges facing election litigation. State judges are the NCSC's primary audience. The NCSC has an online [Resource Guide](#) that includes articles and reports, information of general interest, and specific case information. As part of the Resource Guide, there is an [Election Law Manual](#) (2008), the first chapter of which deals with federal regulation of state election practices. A featured link of the Resource Guide is to a series of video lectures presented by the [Election Law Program at William and Mary's Law School](#).

## **[Election Law Manual](#)**

Chapter 1 of the Election Law Manual discusses the relevant sections of the Constitution and the statutory provisions governing elections. The discussion includes the following:

- Help America Vote Act (HAVA)
- Voting Rights Act (VRA)
- National Voter Registration Act of 1993 (Motor Voter)
- Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)
- Americans with Disabilities Act (ADA)
- Voting Accessibility for Elderly and Handicapped Act (VAEHA)

The chapter also provides explanation as to which statutes have private causes of action and which do not. In addition to summarizing the relevant statutory provisions, the chapter includes a section on the provisions of the U.S. Constitution that are most litigated.

A final section of the chapter discusses considerations for federal judges when litigation is going on in both state and federal courts. Included in this section is a discussion of three key U.S. Supreme Court decisions:

- *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).
- *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).
- *Michigan v. Long*, 463 U.S. 1032 (1983).

The remaining chapters of the manual are for state judges.

## **[Election Law Program at William and Mary's Law School](#)**

Included in the webpage for William and Mary's Election Law Program are several videos discussing election litigation issues, generally divided into pre-election litigation, election-day litigation, and post-election litigation.

## **Video Series 1: A View from the Trenches: Advice for Judges Handling Election Related Lawsuits from Experts Bob Bauer and Ben Ginsberg**

Attorneys Ben Ginsberg and Bob Bauer discuss the issues that arise before, during, and after an election. Mr. Ginsberg and Mr. Bauer are both experts in campaign litigation. Mr. Bauer was White House Counsel for the Obama administration. Mr. Ginsberg worked on the Florida recount and the 2008 Minnesota Senate campaign.

### *Part I: Pre-Election Issues*

What are the key issues for judges to keep in mind as they deal with pre-election litigation?

- Judges will want to avoid getting swallowed up in partisan issues.
- Because of the nature of elections, different jurisdictions will be interpreting the same laws.
- Many people, including volunteers, are involved in the process, and this creates a lot of opportunity for human error.

What are the problems unique to pre-election litigation?

- There is a natural tension between deciding an issue before election day and allowing a case to develop.
- Judges may want to consider if a claim could have been brought sooner and if using the doctrine of laches is appropriate.
- Pre-election litigation, and its threat, has become part of the get-out-the-vote efforts by both political parties as a way to energize their bases. This fact may be a consideration when evaluating the validity of the claims.

What should judges do when dealing with partisan state officials? This is difficult for judges to address, because a number of state judges are selected through partisan selection systems, and that process may affect the response of state judges to the claims before them. While nonpartisan election officials would mitigate the appearance of partisanship, that is an issue of legislative rather than judicial response. The appearance of partisanship means that judges have to step outside of the partisan debate for their decisions to be viewed as legitimate. The issue of partisanship is becoming more pronounced as the state election officials themselves become more willing to bring the litigation.

What interests must be balanced in the pre-election litigation? There is a tension between access to voting and uniform standards for reviewing votes to prevent fraud. The statutory language is important in striking this balance, and most of the decisions are done on a case-by-case basis, making for a lot of unsettled law. There is some argument that the democracy cannon suggests the statutes attempting to limit voting rights should be read in favor of the voter. (Professor Richard Hasen, whose presentation is described below, makes this argument.) Additionally, there are concerns about who is a voter and what the right to vote means. Is it that people who are legally registered should not have their votes diluted by those who are not properly registered? What records should be provided to prove voter identification and prevent fraud? Are the concerns about fraud enough to keep voters from the polls or lose faith in the process? Although there

is little evidence of concerns about fraud keeping people from the polls, the idea has shaped the doctrine. (One only needs to consider the recent wave of voter identification laws and the Supreme Court's 2008 decision in *Crawford v. Marion County Election Board*.<sup>1</sup>) Provisional ballots were seen as a way around these concerns, but they have their own problems.

### *Part II: Election Day*

What are the considerations when a suit is filed on election day?

- Are all parties represented at the courthouse? Can they be?
- What is the remedy? Will the remedy be viewed as intending to influence the outcome of the election?
- Are different jurisdictions interpreting the same law differently?
- Keep in mind that it can be a rough day for voters, because of lines, delays, and enforcement of inappropriate rules. These are also relevant considerations in litigation.
- Polling place failure, such as running out of ballots and long lines, may be compelling reasons for judicial intervention.
- Do poll watchers, election judges, and the media have access to polling locations?
- Is there disparate enforcement of the rules? If there is a power outage, for example, parties should be able to agree to extend the hours, because it affects both parties equally. Bipartisan buy-in is important. If the voting patterns favor one party and the disaster is localized, there may not be party agreement.
- Parties can notify judges in advance that they want to be alerted if a particular issue arises. Both parties should always be present.

How can this litigation be handled expeditiously? The efforts in 2006 of Ohio's secretary of state are seen by some as good examples. It was expected in the 2006 midterm election that there would be long lines in Ohio. Before election day, the secretary of state got both parties on a conference call to discuss whether extending poll hours would be necessary if the lines were very long. Both parties agreed not to extend polling hours as long as the voters in line at closing were permitted to vote. While getting both parties to agree to procedures before an election is really a job for the state officials themselves, it can also be done by the courts in some cases, and doing so can smooth the litigation process.

How do you deal with developing a factual record on such short notice? In pre-election litigation, judges can give more scrutiny to the facts because they have more time. Parties should be given the benefit of the doubt when time is more of an issue, as it is on election day. There is less harm in handing out ballots when the facts are in question than in turning away voters.

What part does county-level variation play in election-day disputes? County-level officials make decisions about election mechanisms and machines. Most states do not have uniform standards. This is also true of the number of voting

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1. [553 U.S. 181](#).

machines per location. Systemic problems with voting technology and availability should be addressed by the courts.

### *Part III: Post-Election Day*

After the election, the stakes of litigation are much higher. The most difficult issue for courts to address is the balance of how closely to read the statutes versus what happened at the polls on election day. Is strict compliance with the law the most important thing, or is it voter access? Judges may need to be tougher on parties about the factual record and what actually occurred on election day. Judges must balance partisan candidates with a fair process. It is important that the judges be clear in their application of the rules, how they arrive at their decisions, and that they be consistent in their decision-making.

Judges rarely deal with election issues, but the attorneys are experts. As much as they can, it is important for judges to be steeped in election law before they face the cases before them. There have been many changes to the voting process—legal, mechanical, and technical—since the last case was decided in most states. What is on the books may no longer be good law.

How do judges deal with election variation by precinct? State laws vary widely. The court may need to take into account what happened on election day in each precinct in question. Judges cannot create a pattern after the fact or write the rules for elections after they have taken place. An example is when absentee ballots are not signed, though this is required by law, but they were accepted by an election official. How do you reconcile the problem with the fact that voters were not notified of the error in time to correct it? Judges cannot remedy poorly written legislation either.

Using an intent-of-the-voter standard when reviewing the process for counting ballots can be challenging. There is high variation in these standards. Courts do not have good law on what to do with equal protection challenges when there are different applications of the law. Generally, courts rule that review of ballots must be the same for all votes. There cannot be variation in review depending on where one lives. The case law, however, can be unclear on what rises to the level of an equal protection claim. Unequal access to voting services is generally best addressed before election day. Unequal application of the rules is both an election-day issue and a post-election issue. Although the best remedy may be state-wide standards, that may be a legislative remedy, not a judicial one.

What remedies are available to deal with election-day problems? Judges cannot go back and undo actions, but the remedies available vary with state law. New elections can be called, but this is typically a last resort. Parties will always argue the vote was extremely close and the number of questionable votes is larger than the margin of victory. The court needs to provide for a uniform set of eyes on the universe of ballots for review. If this is not possible, other measures, such as re-voting, proportional reductions in votes, blind polls, and coin flips, have been used to resolve these disputes. These are extraordinary remedies. Fraud would have to be pervasive to prompt a revote. Fortunately, the procedures for a revote are not that different from run-off elections, which are far more common, so there is some guidance on how to conduct a revote.

There is little that the judiciary can do about the increase in filings related to elections. A legislative remedy would be necessary to reduce many of the problems with elections. The federal judiciary is the only non-partisan broker in the dispute, and it needs to remain so. Election law doctrine is unsettled, so disputes are likely to rise, especially as the partisan divide in the country continues to increase.

## **Video Series 2: The Election Law Issues Program**

This program is made up of three series of lectures. Professor Richard Hasen provides an overview of the unique nature of election litigation, and covers pre-election issues. Professor Edward Foley discusses election-day and post-election litigation. Professor Aviel Rubin discusses the technical issues of electronic voting machines, including the essential features and concerns. All of the videos also contain PowerPoint presentations, which are available online.

### *Part I: Professor Richard Hasen*

Why are election cases different?

- Judges typically try to avoid getting involved in the political thicket, with the exception of redistricting cases in the 1960s.
- There is a substantial increase in this litigation, especially since the 2000 election. Most, though not all, of this litigation occurs in state courts.

Why has this type of litigation increased?

- Election litigation is used as a political strategy to win elections. Parties are less reluctant to bring suit.
- There have been substantial changes in voting laws (such as HAVA), voting technology, and voter-eligibility requirements.

What is the effect of the increase in litigation?

- Public confidence in elections has decreased substantially.
- The decrease in confidence shows strong partisan and race divisions.

What are the benefits of engaging in pre-election litigation?

- Deciding disputes before election day may minimize the court's involvement in political situations.
- Pre-election remedies may be the only ones available.
- Resolving disputes early prevents plaintiffs from having litigation as an option after the fact.

What are the costs of pre-election litigation?

- It can create confusion as the election draws near.
- There may be ripeness issues.

What are the procedural concerns inherent in pre-election litigation?

- It can put a strain on judicial resources, especially when the rules for expediting cases are not clear. Courts may want to have these procedures ready in advance of election day.
- There may not be an adequate evidentiary record. Courts may want to allow parties to submit the available evidence for review.

In 2006, the Supreme Court said in *Purcell v. Gonzales*<sup>2</sup> that it is important for courts to take evidence and provide reasons for their decisions. This will help both with public confidence in the decision and with the appeals process. It is possible for the court to issue a decision on the outcome and follow up with a more detailed opinion at a later date. The 2002 New Jersey election for U.S. Senate is an example in which the court did this.

What are the substantive concerns about pre-election litigation?

- Is the standard of review strict scrutiny—because this is a fundamental right—or the sliding scale—because the challenge is to a garden variety election issue, such as the required number of signatures to appear on the ballot?
- Should judges use a literal reading of the statute or follow the intent of the voters?

How can difficulties be minimized?

- More precise legislation would reduce uncertainty.
- Clearer signals about the standards that apply would minimize difficulties.

#### *Part II: Professor Edward Foley*

What are the considerations for election-day litigation?

- Are parties using litigation as a way to win the election?
- Is the judiciary maintaining the appearance of impartiality?
- Can state officials handle this matter?
- Will intervening in the dispute impair the validity or integrity of the election?
- Should this issue have been raised before election day?
- Can this issue be better addressed after the election?

What challenges can be brought regarding access to polling locations?

- Election observers, including the media, may want access to polling locations. There is typically a media exception to the Supreme Court's 1992 decision in *Burson v. Freeman*<sup>3</sup> regarding approaching voters within 100 feet of a polling location.
- What or who qualify as the media now?
- What about non-media nonpartisan organizations, such as the League of Women Voters?

What challenges can be brought regarding voter eligibility?

- Provisional ballots are required by HAVA—no voter can be turned away without voting—but precincts need enough ballots for everyone who shows up.
- Some states have requirements that provisional ballots be cast in the proper precinct or not counted at all. Poll workers may have an obligation to tell the voter the proper precinct and that the vote will not count if a provisional ballot is cast in the wrong precinct.

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2. 549 U.S. 1.

3. 504 U.S. 191.

- Different types of identification may be required to cast a provisional ballot. Most states allow voters to bring proper identification back within a specific period of time to allow the vote to count.
- In *Spencer v. Pugh*,<sup>4</sup> the Supreme Court noted that voting challenges are allowable, but the court has to be ready to respond if these challenges are the result of misinformation or create substantial delays at polling locations.
- Voter intimidation can be a problem, but the remedy may also be problematic. Even if it is clear that someone wants to engage in an illegal action, prosecution may be barred by the prior restraint doctrine. It may be best for the behavior to occur so that appropriate action can be made to respond to a clearly observed behavior.

What are the challenges that judges face regarding ballot security?

- Rules about the chain of custody for ballots need to be clear and transparent.
- If there is a breakdown in the chain, prompt response may be necessary to prevent nullification of the election.

What are the likely challenges regarding extending polling hours?

- Judges may want to exercise caution when entering this area. Often the delay in voting is treated as reversible error. The exception would be systematic or widespread failure of voting machines.
- Most states have laws allowing those in line at closing to vote. If these laws do not exist or are not being enforced, judicial intervention may be necessary.

What should judges consider before getting involved in a dispute?

- Would intervention make matters worse?
- Can the issue be handled with provisional ballots or post-election litigation?
- Will a partial remedy violate the Equal Protection Clause?
- Judges cannot undo errors cast on regular ballots; provisional ballots can always be verified and counted after election day is over.

*Post-Election Litigation.* There are several problems that make post-election litigation even more challenging than election-day litigation:

- Candidates know how many votes they need to win.
- No one is ignorant about who benefits from the law.
- There is a need for quick action to certify elections.
- It is difficult but necessary for courts to appear neutral.

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4. [543 U.S. 1301](#) (2004) (memorandum).

In *Spencer*, it was alleged that the Republican Party planned to send hundreds of people to predominantly African-American districts to challenge voters on election day. While the Supreme Court did not review the case, in part because of the last-minute nature of the litigation, Justice Stevens issued a memorandum putting the parties on notice that the Court would be closely watching what happened on election day 2004 in Ohio, and it would respond to allegations of fraud, if necessary.

- The law itself is not clear on this issue.
- The facts of cases matter more than the doctrine.

When reviewing cases, judges may want to start with the statutes, but they need to be prepared for gaps and ambiguity in the law. Judges should keep in mind that vague constitutional provisions can trump statutes. The doctrine is not specific enough to dictate the outcome. Courts have wide latitude to do justice. The intervention required depends on the nature of the election and the problem at issue. In looking at the dispute, judges should consider the following factors:

- What is the importance of the race? Is this a statewide office or a local office?
- What is the margin of victory?
- Were the problems in the election technical?
- Were the problems widespread?

Newspaper accounts of what is going on in the dispute may be helpful so that judges have a better sense of what went on in a specific precinct.

*Procedural or Threshold Issues.* Some threshold matters are common in the political thicket of post-election litigation.

- “Election contests” are the vehicle under statutory law in which these issues are decided.
- One party will be seeking to overturn the results.
- There are different rules for state and federal races, as well as for primaries and general elections.
- The doctrines of estoppel and laches are typically important.
- Judges may want to consider if challenges to voter eligibility can be brought better before the election.

The statute in question may be mandatory or directory in nature. If it is mandatory, a remedy is required. The election would be put in doubt if the statute were not followed. If the statute is directory, a remedy is not required. The problem with statutes is that they allow for administrative laxity on the part of state officials, especially when they are not mandatory.

When considering a remedy, the judge may first need to determine if the election will stand. If not, the following remedies are available:

- Subtracting the unlawful votes, adding the lawful votes, and declaring a new winner.
- Voiding the election and ordering a new one.
- Voiding the election, creating a vacancy, and using the statutory rules for filling a vacancy.
- Voiding unlawful ballots, ordering a count of the lawful ballots, and remanding the case.

If there is a new election, the judge may need to consider the following:

- Will the election be whole or partial? (This may depend on the costs of conducting a new election.)
- If there are at-large offices, a whole new race will be necessary.
- Should a single precinct be voided? If so, will it change the outcome?



*Types of Cases.* Post-election cases typically come in three types.

- Extra votes were cast (more votes than signatures on the poll records).
- Missing votes (fewer votes than signatures on the poll records).
- Other outcomes clouding the result for the election.

Extra votes can be the result of fraud or a mistake. Fraud includes tampering with the count or stuffing the ballot box. Mistakes include ballots cast by ineligible voters and procedural errors. Ineligible voters include noncitizens, nonresidents, and felons. Judges may want to consider whether the number of extra votes is larger than the margin of victory and which party benefited from the extra votes. The nightmare scenario is when the number of votes in question exceeds the margin of victory and there is no way to determine who benefits from the votes. In this situation, there are three options:

- Uphold the outcome.
- Call a new election.
- Use proportional deductions:
  1. Identify the precinct and the percentage of the vote for each candidate in that precinct.
  2. Apply that proportion to the number of questionable ballots and reduce the vote total accordingly.

There is a debate on the use of proportional deduction. Older cases tend to use this method. The statutes are generally silent about its use. Given how old the practice is, modern methods may be a more appropriate as remedies. Proportional deductions are problematic when ineligible votes cannot be matched to a specific precinct, if the losing candidate cannot prove who benefited from the ineligible votes, and if finding out what happened in the election—specifically who each voter intended to choose—violates the sanctity of the secret ballot.

*Other Procedural Problems.* When there are more ballots cast than verified voters, judges could randomly withdraw ballots—this may be allowed by statutory law—or the precinct with the problem could be voided. A new election is also an option.

If there are votes that should be included, it may be important to determine why this happened. The first question to answer is whether the missing votes can be tracked down, and then the focus can move to determining the reason.

- Was this an organized effort to throw the election?
- Was this a canvassing error?
- Was this a machine error?
- Was this human error?
- Was a candidate mistakenly omitted from the list?
- Was this a ballot design error?
- Was the voter denied a provisional ballot?
- Did a polling place shut down?

The law is mixed on issues of human error. *Bush v. Gore*<sup>5</sup> showed that there is a need for clear rules when determining the voter's intent. If a candidate is omitted, the law is clear: the election should be voided. If there is a ballot design issue, courts are often reluctant to enter at the election or post-election stage. Most of the litigation about ballot design can be handled in the pre-election phase. If a voter is denied a provisional ballot, a remedy is required. If the polling place shuts down, a judge may need to consider whether the problem rises to the level of invalidation. If there is known fraud by one candidate, the other candidate wins by default.

Was there a severe chain-of-custody breach? Were seals broken or tampered with? These undermine the integrity of the election; a revote may be necessary. If there is a prohibited campaign practice, such as campaign finance violation, generally the results of the election will stand even with these problems.

Absentee ballots present a unique problem. There are special rules for who can handle these ballots, and courts may need to make sure that there were no efforts to buy or influence the votes. Noncompliance can result in voiding the ballots or the election result. With the rise in the use of absentee ballots, this is more likely to become an issue.

If there are uncounted provisional ballots, courts must determine whether the voters are eligible. Did a voter submit a registration application, but the DMV failed to send it on? Did the post office or a third-party registration group, such as an interest group, fail to deliver the registration? Did a voter bring back identification in a sufficient amount of time? What types of identification are acceptable?

*The Need for Speed.* There are timing issues for the elections. Some states have safe harbor provisions, such as in presidential elections, in which elections must be certified within a specific time frame so that the winner can assume office. Not all states have these provisions.

### *Part III: Professor Aviel Rubin*

There are really two issues that arise for electronic voting:

- Are the systems counting the votes correctly?
- How much control should manufacturers have over the outcome of elections?

While throwing elections may not be a likely outcome, it is important to keep in mind that rigging an election is easier to accomplish in electronic voting systems than it is to detect in such systems. Electronic systems make it more difficult for elections to be observable, harder to audit, and harder to recover from failures. The more complex the voting system, the easier it is to disrupt it.

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5. [531 U.S. 98](#) (2000).