

## MEMORANDUM

To: State Supreme Court Chief Justices

From: Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Law School (email: rick.hasen@lls.edu)

Date: July 20, 2006

Re: Best Practices for Handling Election Law Disputes

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As many of you know, the National Center for State Courts, with representatives from the Conference of Chief Justices and Conference of State Court Administrators, and the William and Mary Law School have launched an Election Law Program aimed at enhancing the adjudication of election law disputes by assisting state court judges in their resolution of these types of cases. The Program's primary goal is the creation of a manual for state court judges that identifies a broad array of potential election-related issues and provides analysis of those issues with appropriate citation to relevant statutory and case materials.

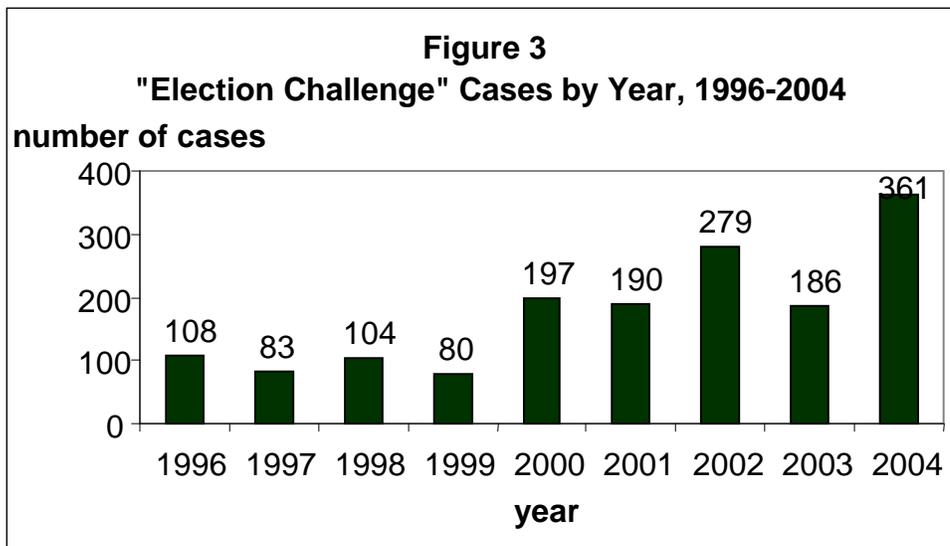
At the suggestion of Professor Davison M. Douglas, the Director of the Election Law Program, and as a first step in providing you with helpful, substantive material, I have prepared this brief memorandum addressing best practices for handling election law disputes likely to arise in state courts.<sup>1</sup> As this memorandum demonstrates, the amount of election law-related litigation is rising, particularly in state courts, raising challenges for courts to maintain the legitimacy of both the electoral and judicial processes. These cases are often high-profile and high-stakes, and their prompt and fair resolution is essential. In this memorandum, I make three suggestions for state court election law adjudication: (1) courts should encourage the presentation of pre-election challenges and discourage post-election challenges, at least for those issues that reasonably could have been foreseen and raised before the election; (2) courts should issue full opinions explaining their rulings in election law cases, even when the issues have become moot; and (3) state supreme court chief justices should appoint court personnel to monitor election law cases in the state's lower courts, and take other steps to insure that trial courts, the courts of appeal, and state Supreme Court will be ready to move expeditiously and fairly to resolve any election law disputes.

### **I. The Nature of the Burden on State Courts and Concerns Over Public Confidence**

Since the disputed 2000 presidential election in Florida, culminating in the United States Supreme Court's opinion in *Bush v. Gore*, 531 U.S. 98 (2000), the number of election law cases has risen dramatically. The average number of "election challenge" cases in the 1996-99 period was 96 per year, compared to an average of 254 cases per year from 2001-2004.

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<sup>1</sup> I have explored some of the issues in this memorandum in greater detail in Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937 (2005). I sent this article to each of the Chief Justices earlier in 2006, and a pdf copy of the article may be downloaded from: <<http://electionlawblog.org/archives/margin-final.pdf>>.



Source: Hasen, *Beyond the Margin of Litigation*

These figures include cases brought in both state and federal courts. Disaggregating the data, it turns out that *the lion's share of post-2000 cases have been brought in state, rather than federal, court:*

Average number of cases per year

	state	federal
pre-2000	54	40
post-2000	<b>198</b>	55

Source: author's compilation of data

These cases can place great strains on state courts. Often the cases are brought on a highly expedited schedule, either before an election (when the election calendar and the printing of ballots and related materials demand a quick decision) or after an election (when there is a dispute over the winner of an election or the legality of a ballot measure). When the dispute occurs after the election, the court's resolution of a case will be viewed by some in terms of its partisan consequences, and it is quite common for journalists and others to focus on the party affiliation of the judges deciding the cases.

Unfortunately, in the post-Florida era, increasing numbers of Americans have expressed a lack of confidence in the fairness of the election process. Public opinion in this area is volatile, though it appears that voters whose candidates lose a court battle over election results have less confidence in the electoral process than those whose candidates prevailed in court.<sup>2</sup> It is therefore imperative that courts develop fair and effective procedures for handling these cases.

<sup>2</sup> Nationally, since the 2000 election controversy Democrats have had much less confidence in the election process than Republicans. In 2004, 21.5% of Democrats viewed the 2004 election as "somewhat" or "very" unfair, compared to only 2.9% of Republicans. However, in Washington state, where the razor-thin gubernatorial election ended up in court with a Democratic winner, 68% of Republicans thought the election process was unfair compared to 27% of Democrats.

## II. Best Practices

### A. Timing

The most important step courts can take to ensure continued public confidence in the electoral process and the judiciary is to carefully consider the *timing* of court challenges. *Courts should encourage the presentation of pre-election challenges and discourage post-election challenges, at least for those issues that reasonably could have been foreseen and raised before the election.* The argument for the timing change is two-fold, considering both the benefits of pre-election review and the costs of post-election review.

Turning first to the benefits, in some cases—particularly those involving presidential elections—*pre-election adjudication remains the only way to give an effective remedy to an aggrieved plaintiff.* Consider Palm Beach County’s 2000 “butterfly ballot.” There is strong evidence that its design cost Democratic candidate Al Gore the election in Florida. A group of plaintiffs brought suit challenging the butterfly ballot and asking for a re-vote in Palm Beach County to correct the error. Unsurprisingly, the trial judge denied the request for a re-vote,<sup>3</sup> ruling such a remedy unconstitutional.

Imagine if someone had gone to court before the election, making a claim that the design of the ballot would be confusing and could affect the outcome of the election. Had that kind of suit been heard on the merits, it is possible that the problem could have been avoided, and a redesign of the ballot would have greatly increased the chances for thousands more voters to cast votes matching their intent. Pre-election review thus presented the only possible opportunity to afford a remedy for potential disenfranchisement of Florida’s voters.

Consider also the costs associated with post-election challenges, when a court is asked to overturn the result of an election or take a step that can affect the outcome of an election. Such litigation puts courts in a difficult position. *A court asked to decide a question of statutory or constitutional law that affects the outcome of an already-held election is injected in the worst way into the political thicket.* Journalists immediately question the partisan background of the judges, and partisan motives are immediately questioned and dissected no matter what the judges do.

*Putting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts.* Moreover, when judges second-guess decisions made by legislators and votes cast by the people, the legitimacy of the election process itself can suffer. The nation does not want it to become the norm that no

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<sup>3</sup> Fladell v. County Canvassing Comm’n, CL 00-10965 AB; CL 00-10970 AB; CL 00-10988 AB; CL 00-10992 AB; CL 00-11000 AB at 5 (Fla. 15th Cir. Ct. Nov. 20, 2000), *available at* <http://election2000.stanford.edu/fladell1120.pdf>. On appeal, the Florida Supreme Court did not reach the remedial question, ruling that the butterfly ballot was in substantial compliance with Florida law. Fladell v. Palm Beach County Canvassing Bd, 772 So. 2d 1240, 1242 (Fla. 2000). Courts have ordered revotes in cases not involving a presidential election, and in extreme circumstances (such as a terrorist attack or a Category 5 hurricane) a revote even in a presidential election may be possible. See Steven J. Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election "Revotes,"* 10 GEO. MASON L. REV. 215 (2001).

close election results are considered final until the courts have had their say, but the nation is coming perilously close to that situation given the increased use of election law as political strategy.

Of course, there are situations where pre-election review is impossible because the election problem that materializes is not reasonably foreseen. Nor does it make sense to require campaigns to take extraordinary and costly steps to ferret out all potential election administration problems. But putting aside those cases that would require clairvoyance or an onerous undertaking, there are many reasons to favor pre-election review and disfavor post-election review.

Allowing post-election review when pre-election review would have been relatively easy to request essentially gives a campaign the “option” whether to sue: The campaign identifying a potential election problem can sit on its hands until it sees the election results, and if it does not like the election results it can use the problem as an excuse to get a more favorable outcome. *It is far better to have a legal system that discourages such speculation and encourages preventing harm in elections that would prove difficult to undo after the fact.*

This analysis suggests that courts take the following three steps in relation to timing (if they are not already taking them):

1. Courts should address the merits of preelection challenges, rather than dismiss such suits on procedural grounds such as standing or ripeness.
2. Courts should clearly signal an aggressive use of *laches* in election law disputes: litigants should understand that they cannot raise issues after the election that should have been raised before the election.
3. State Supreme Courts *should reexamine their procedural rules for expediting election law cases to ensure that the cases can be finally resolved by the state-imposed deadlines.* In appropriate cases, state Supreme Courts should suggest that the legislature change election-related deadlines to insure fair and timely review of election law disputes. In this regard, courts might work formally or informally with the state legislature or an advisory committee toward a review of election laws focused on doing what can be done to rationalize possible litigation.

## **B. Issuance of Full Opinions, Even After Dispute Ends**

Sometimes, because of the tight time frame in election law cases, a court cannot issue a full decision on the merits at the time it must issue its ruling. *In such circumstances, the court should issue a full opinion in a reasonable time after it rules, even if the issue it was ruling upon has become moot.*

The New Jersey Supreme Court followed this path in a dispute over the replacement of U.S. Senate Democratic candidate Robert Torricelli on the New Jersey election ballot in 2002. It issued a very brief opinion, *New Jersey Democratic Party v. Samson*, 814 A.2d 1025 (N.J. 2002) allowing Democrats to name a replacement for Torricelli, followed by a more comprehensive

decision 6 days later, 814 A.2d 1028 (N.J. 2002). In California, the California Supreme Court in a brief order told state officials to place a ballot measure back on the ballot after an intermediate appellate court ordered it removed. *Costa v. Superior Court*, 128 P.3d 149 (Cal. 2005). Even after the measure went down to defeat, the California Supreme Court ordered briefing and oral argument on the questions presented in the petition for review, eventually issuing an opinion in the case. *Costa v. Superior Court*, 128 P.3d 675 (Cal. 2006).

Courts should be encouraged to issue their opinions in election law cases, even at a later date when the issue might have become moot (assuming state constitutional law gives the court the power to do so). Issuing opinions in such circumstances serves two purposes. *First, the opinions provide much-needed guidance for lower courts to resolve similar issues in the future.* The *Costa* opinion, for example, clarified important questions under California law about pre-election review of ballot measures and the doctrine of “substantial compliance.” *Second, the issuance of opinions serves to blunt irresponsible claims that judges are deciding election law cases on political grounds.* Opinions explain the reasoning of the court, and can serve to educate the public about the rule of law. The opinions also provide information for state legislatures on the meaning of certain election law provisions. Legislators may then wish to use the information to make changes in state election laws to avoid problems in the future.

### **C. Appointment of an Election Law Case Coordinator**

State supreme court chief justices should appoint court personnel to monitor election law cases in the state’s lower courts, to insure that the courts of appeal and state Supreme Court will be ready to move expeditiously to fairly resolve any election law disputes. In appropriate cases, law clerks or research attorneys should begin reading the briefs filed in the lower courts and working on the legal issues so that there is not an unnecessary delay between the time that an appeal is filed and the time that an appellate court can issue its opinion. In appropriate cases (as allowed by state law), a state Supreme Court may wish to take over the appeal of certain high profile election law cases from intermediate appellate courts so as to streamline the process for review.

Courts should also consider having a judge (or, if appropriate, judges) ready on election day ready to handle urgent matters. Recusal issues should be resolved in advance if possible.

### **III. Conclusion**

The chief factor that drives election law litigation—the closeness of an election—is out of the hands of courts to control. Moreover, there is little that courts can do to prevent candidates and their lawyers from using election law as a “political strategy” to get elected when things do not go well at the ballot box. And courts cannot redraft poorly-written election law statutes. With increased public scrutiny over both the mechanics of conducting elections and state election laws, election law cases will likely continue to be filed in increasing numbers in state courts. However, by following the suggested best practices outlined above, courts can do much to ensure that election law litigation is conducted in a way that offers fair and prompt resolution of disputes, bolstering public confidence in the judiciary and the electoral process.