

Election Day Litigation: Part 2

Edward B. Foley
Director, Election Law @ Moritz
Robert M. Duncan/JonesDay Designated Professor
Moritz College of Law, The Ohio State University
<http://moritzlaw.osu.edu/electionlaw>

Election Day Litigation, Part 2

- Types of litigation, continued
 - Challenges to Voter Eligibility.
 - Provisional Ballots.
 - Vote Suppression Tactics.
 - Breaches of Ballot Security Procedures.
 - Extending Polling Place Hours.
- Conclusion: Heat of the Moment

Challenges to Voter Eligibility

- **HAVA requires provisional ballots.**
 - Pre-HAVA: challenged voters could be disenfranchised.
 - Provisional ballot: eligibility is verified afterwards.
 - No voter should be turned away without casting any ballot.
- **Old cases no longer relevant.**
- **Need for enough provisional ballots.**

HAVA Rule for Provisional Ballots

- Voters may/should be redirected to correct precinct.
- Voters without required ID must be permitted to cast provisional ballot.

The Correct Precinct Issue

- Under HAVA, states may refuse to count provisional ballots not cast in correct precinct.
- Poll workers should inform voters of need to go to correct precinct.
- If voter insists on casting ballot in wrong precinct, voter receive a provisional ballot and be told that under state law it will not count.
- On Election Day, state judges may be asked to clarify these rules.

Voter ID at Polling Places

- Under HAVA, states may refuse to count provisional ballots if voter does not provide required ID.
- Most states permit voters to supply missing ID within certain period of time after casting provisional ballots (sometimes 24, 48 or 72 hours; sometimes 1-2 weeks).
- Poll workers may tell voters that, to cast a regular ballot, they will need return with their ID.
- But poll workers must not dissuade voters without ID from casting provisional ballot.
- Some states permit voters w/o ID to sign affidavit.

Potential Abuse of Challenges & Vote Suppression Tactics

- Challenges should not slow down voting
- Warning from Justice Stevens: *Spencer v. Pugh*, 543 U.S. 1301 (2004).
- Scare tactics over voter identification.
- Judges may be asked to remind poll workers that voters w/o ID may cast provisional ballots or, where applicable, sign affidavit.

Warning from Justice Stevens: *Spencer v. Pugh*, 543 U.S. 1301 (2004)

- In 2004 presidential election, Republicans in Ohio threatened to challenge tens of thousands of newly registered voters at the polls (after being enjoined from engaging in pre-election challenges).
- Appellate court overturned new injunctions against polling place challenges.

Warning from Justice Stevens: *Spencer v. Pugh*, 543 U.S. 1301 (2004)

- Early am on Election Day, Justice Stevens refused to intervene, but said that courts would stand ready in case challenges obstructed voting process.
- “I have faith that the elected officials and numerous election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots.”

Voter Intimidation & Deception by Third Parties

- Dirty tricks on the rise.
- Most abuses violate state & federal laws.
- Often difficult to identify perpetrators.
- Where perpetrators are identifiable, injunctions may be appropriate.
- Injunctions must not be overbroad; otherwise risk of Free Speech violation.

Breaches of Ballot Security

- Importance of chain-of-custody rules & transparency.
- Identity of individuals permitted to handle ballots & voting equipment.
- Sometimes alleged breaches go to court.
- Where feasible to enforce, orders to comply are appropriate.

Extending Polling Place Hours

- Problems often prompt suits to extend hours.
- Many states permit voters in line when polls close to cast ballots.
- Extra hours aid voters *not* in line when polls close.
- Courts often reversed for extending polling hours.
- Egregious circumstances can justify extension.
- All ballots cast due to extended hours must be provisional and separated from other ballots.

Courts Reversed for Extra Hours

- *State ex rel Bush-Cheney 2000 v. Baker*, 34 S.W.2d 410 (Mo. Ct. App., E.D. 2000).
 - Alleged long lines, machine failures, lack of supplies.
 - Appeals court voided trial court's extension: "simply permits voting by persons not entitled to vote due to their failure to come to the polls on time".
- *Republican Party of Arkansas v. Kilgore*, 350 Ark. 540, 98 S.W.3d 798 (2002): same.
- Many similar older cases.

Egregious Circumstances Can Justify Extended Hours

- Cleveland 1972 presidential primary: egregious (some precincts never open at all).
- Cleveland 2006 general election: not so bad (4 precincts late opening; long lines in 12 more).
- Are election officials responding properly?
- Relevance of early & absentee voting options.
- Will election remain valid w/o extended hours?

Heat of the Moment

- Sometimes tempting to intervene, but will it make matters worse?
 - Regular (non-provisional) ballots that should not have been cast, but now commingled with rest, cannot be extracted
 - Partial remedies may violate *Bush v. Gore*
- If provisional ballots exist, disputes can be resolved later; but post-voting suits have their own problems. . . .

Election Day Resource

Election Law @ Moritz

monitors Election Day litigation:

<http://moritzlaw.osu.edu/electionlaw/>