

Post-Voting Litigation, Part 3

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Election Contests: Types of Cases

- Extra Votes that Should Be Out.
- *Missing Votes that Should Be In.*
- Other Kinds of Result-Clouding Problems.

Possible Causes of Missing Votes

- Organized effort to steal election.
- Canvassing error.
- Machine vote-tabulating error.
- Human-machine interface problem.
- Candidate omitted from ballot in error.
- Ballot design problem.
- Voters denied provisional ballots.
- Polling place shuts down or never opens.

Remedies for Missing Votes

- **Award election to runner-up:**
 - When missing votes caused by fraud; *or*
 - When missing votes can be recovered and adding them changes the result.
- **Order new election:**
 - When missing votes caused by official mistake; *and*
 - Large enough to affect result but cannot be recovered.

Machine Vote-Tabulating Error

- *Bauer v. Souto*, 277 Conn. 829 (2006)
- City race: 1 machine failed in 1 precinct.
 - One candidate received virtually no votes on one machine, compared to consistently high numbers on all other machines.
 - Other evidence, including court-supervised testing, showed machine to be defective.
- Had machine worked, likely that affected candidate would have won.
- S.Ct. ordered new election citywide.

Human-machine Interface Errors

- *Bush v. Gore*: need for clear rules.
- Optical-scan machines: still an issue.
- Are the statutory rules really clear? Can they be?
- Are courts faithful to *Bush v. Gore*?

Shambach v. Bickhart

- 575 Pa. 384, 845 A.2d 793 (2004): **4-3.**
- 10 write-in votes for candidate on ballot.
- Statute: only write-in when not on ballot.
- Old precedent: count them anyway.
- New admin reg: don't count them.
- Election certified w/o counting them.
- Majority: go w/ precedent; new election winner.
- Dissent: go w/ statute & reg.
- Consistent with *Bush v. Gore*?

Big Spring v. Jore

- 326 Mont. 256, 109 P.3d 210 (2005): **6-1.**
- Candidates: Jore & Cross.
- 5 ballots: ovals filled for both, X in oval for Cross.
- Officials counted ballots for Jore.
- Court ruled: ballots spoiled; do not count.
- Statute & regs: count only when clear.
- Dissent: defer to local officials.
- Ruling caused change in control of legislature.

Candidate Omitted From Ballot

- Not a “ballot access” case.
- No dispute: name should’ve been on.
- Administrative error left name off.
- Courts will order void election, if enough precincts cloud result.
- See, e.g., *Whitley v. Cranford*, 119 S.W.3d 28 (Ark. 2003).

Ballot Design Problems

- Famous “butterfly ballot”.
- FL-13 congressional district: this race. was inconspicuous above governor’s.
- Courts reluctant to intervene here.
- Voters did cast votes; whose error?
- Candidates can see design pre-election.

Voters Denied Provisional Ballots

- Never should happen.
- New mandatory requirement of HAVA.
- Reason to void election, unless clear that error too small to affect outcome.
- *Landwersiek v. Dunivan*, 147 S.W.3d 141 (Mo.App. S.D. 2004).
- Old cases concerning challenged voters denied ballots are inapplicable.

Polling Places Inoperable

- Voters can't vote because polls inoperable.
- Types of inoperability:
 - Polls don't open on time (or ever).
 - Polls shut down because of machine failure.
 - No emergency ballots available.
 - Polls run out of ballots.
 - Long lines: "constructive" shut-down?
 - Power outage, natural disaster, terrorism.

Remedy If No Ballots to Count?

- Election void when substantial number of voters are disenfranchised by error.
- Election valid when error hurts few.
- Long lines different from no voting at all.
- No remedy if no error: natural disasters.

Representative Cases

- *McNally v. Tollander* (Wisc. 1981): void when no ballots for 40% of voters.
- *In re 1984 General Election*, 497 A.2d 577 (N.J. Super. 1985): new election in precinct where 3.5 hours w/o voting; 14-vote margin of victory.
- *In re Election of Council of Oak Harbor*, 118 N.E.2d 692 (Ohio 1953): void where ballot shortage disenfranchised more voters than margin of victory.

Long Lines Not Enough to Void

- *Contest*, 628 N.W.2d 336 (S.D. 2001): “Mere inconvenience or delay in voting is not enough to overturn an election”.
- *D’Amico v. Mullen*, 116 R.I. 14, 351 A.2d 101 (1976): “discouraged by long lines,” but not “actually denied right to vote”.
- Other cases same; no case contrary.