

Post-Voting Litigation, Part 4

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Other Kinds of Problems

- Severe chain-of-custody breaches.
- Severe breach of polling place protocol.
- Prohibited campaign practices.
- Special problems with absentee ballots.
- Uncounted provisional ballots.
- *Bush v. Gore* claims re local variations.

Severe Chain-of-Custody Breaches

- Broken seals; tampering: void election.
- *Foulkes v. Hays*, 82 Wash. 2d 629, 537 P.2d 777 (1975).
- *In re Vetch*, 71 N.W.2d 652 (Minn. 1955).
- Other similar cases.

Severe Polling Place Breaches

- Must undermine integrity of election.
- *George v. Municipal Election Comm.*, 515 S.E.2d 206 (S.C. 1999):
 - Denial of secret ballot in municipal election.
 - Entire election voided; new election required.
- *Barr v. Gainer*, 508 S.E.2d 96 (W.Va. 1989):
 - Candidate's sibling was poll worker.
 - All votes from precinct voided; new winner.

Prohibited Campaign Practices

- General rule: campaign violations do not void election.
 - Unlawful campaign spending or donations.
 - False campaign advertising.
 - Breach of no campaigning at polling places.
- Some states have statutory exceptions:
 - Minnesota.
 - Wyoming.
- Excessive challenges to voter eligibility?
- Other vote suppression/intimidation tactics?

Absentee Ballots: Special Issues

- Greater risk of fraud & ineligible ballots.
- Vote-buying & undue influence.
- Who can handle absentee ballots?
- Stricter procedural requirements.
- Absentee ballots lost in mail.

Miami's 1997 Mayoral Election

- Systematic absentee ballot fraud—hundreds of illegal ballots, including:
 - Fictitious addresses.
 - Stolen/intercepted ballots.
 - Falsely witnessed ballots.
 - Vote-buying, arm-twisting.
- Trial court ordered new election, but . . .
- Appeals court threw out all absentee ballots, giving victory to other candidate.
- Supreme Court denied review.

Undue Influence Voids Ballots

- *Qualkinbush v. Skubisz* (Illinois 2004):
 - Campaign worker helped 38 voters fill out absentee ballots; margin of victory 24 votes
 - Appeals court: other candidate now winner.
- *Pabey v. Pastrick* (Indiana 2004):
 - Campaign worker assisted absentee voters, sometimes offering payment.
 - Unclear whether more ballots affected than margin of victory; still, new election needed.

Who Can Handle Absentee Ballots?

- States differ in statutory rules.
- If statute bans third-party handling, non-compliance will void ballots.
- *In re Canvass of Absentee Ballots*, 577 Pa. 231 (2004):
 - Although local officials permitted practice,
 - Strict compliance needed; intended to deter fraud.
- *Miller v. Picacho School Dist.*, 877 P.2d 277 (Ariz. 1994): election void b/c officials hand-delivered absentee ballots; must be mailed.

Stricter Procedural Rules

- *Womack v. Foster*, 8 S.W.3d 854 (Ark. 2000): absentee ballots void if no stated reason for voting absentee; new winner.
- *Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251 (2004): absentee ballots void when sent to voters who did not request them; new winner.
- Other cases similar, but not all.

Absentee Ballots Lost in Mail

- Strict enforcement of statute requiring mailed ballots to arrive by certain date.
- *Ocean County*, 879 A.2d 1174 (NJ 2005).
- Akron city council race 2007:
 - 17-vote margin of victory.
 - 200 absentee ballots sitting at post office.
 - Court refused to count ballots.

Sharp Rise in Absentee Voting

- Move to “no excuse” absentee voting.
- Some states moving to only vote-by-mail.
- Absentee voting rates: 1/3 or more of all.
- With rise in absentee voting, more problems?

Uncounted Provisional Ballots

- Most states: voter must be registered for provisional ballot to count.
- But is voter “registered” if:
 - DMV failed to send form to election board?
 - Post office or third-party group lost form?
 - Form timely but missing some info?
- If voter casts provisional ballot b/c no ID, ballot counts if board can verify w/o ID?

Provisional Ballots: Wrong Precinct

- Some states say ballots must be cast in correct precinct in order to count.
- Several precincts often in same location.
- Voters in wrong line cast provisional ballot instead of moving to correct line.
- *Panio v. Sutherland*, 4 NY3d 123 (2005): must count “right church, wrong pew”.
- Mistake due to administrative error.

Who Voted Provisionally?

- Key question in election contests.
- HAVA suggests info is private, but ...
- Privacy of disenfranchisement at odds with integrity & transparency of election.
- Washington 2004: court orders release.
- Rhode Island 2006: courts order release.
- Ohio 2006: issue remains unresolved.

***Bush v. Gore* & Local Variations**

- *BvG* principle: no local variation due to excessively vague state rule.
- Florida counted some chads, not others, due to vague “intent of voter” standard.
- Same principle applies to provisional ballots, ID rules, other counting issues.
- Variation due to local official error?
- Contest based on inequality?

Deadline for Resolving Contests

- Presidential “safe harbor” date: 5 weeks after Election Day (set by Congress).
- *BvG*: stopped recount because of safe harbor.
- Many contests end after inauguration.
 - Washington 2004: ends June 2005.
 - Florida 2006: still pending.
- Courts must speed contests; states must speed canvassing & pre-contest recount.

NJ Case: Delay & Confusion

- *In re Contest*, S.Ct. (Nov. 8, 2007), **3-2**.
- Remand for trial 2 years after election.
- Petition dismissed: claim unspecific.
- 39-vote win; claim: 119 unlawful votes.
- S.Ct. majority: claim specific enough.
- S.Ct. dissent: insufficiently specific.
- No clear standard on what is enough.

Concluding Observations

- Courts Need Legislative Help:
 - More statutory clarity & specificity.
 - Periodic “election code audits” to plug gaps.
- States can learn from each other:
 - Role for NCSC; build on these videos.
 - Coordination w/ NCSL, NASS, others.
- ***<http://moritzlaw.osu.edu/electionlaw>***
- Highest value: public views courts as fair.