Court Rulings Impact Elections in 2014

Users of a different kind of gavel have been busy setting rules for voters and election administrators in 2014.

Courts, and not legislatures, have been the major force shaping state election laws this year, with some key rulings landing just days before voters headed to the polling places.

And it’s not just district circuit justices who have been asked to rule on litigation about photo ID requirements for voters, early voting and same-day voter registration.

Several notable rulings from the U.S. Supreme Court this year have addressed how elections are run.

And some of those decisions from the U.S. Supreme Court have hardly settled election matters. The brief court orders in a few October cases—often two sentences—have addressed simply the timing of changes to the elections process; these cases are still to be decided on their merits by the courts with jurisdiction.

A forecast for further election litigation is now part of the conventional wisdom as states and the federal government address changes brought about by laws passed along partisan lines and by the 2013 Supreme Court ruling that stripped major provisions of the Voting Rights Act.

“I think courts and judges would like nothing better than for election litigation to dissipate,” said Rebecca Green, co-director of the Election Law Program at William & Mary Law School. “But because our election system is decentralized and because election litigation tends to spike only when races are tight, it is very difficult to stem the flow of election litigation in our current climate.”

Below, we recap several notable court cases affecting elections policy, dividing them into two camps: voter ID lawsuits and everything else.

Voter ID Lawsuits

Voter ID got most of the attention this year, with key court rulings in Arkansas, Texas and Wisconsin being issued in the weeks or days leading up to the start of early voting in those states.

Some of those decisions gave election administrators on-again/off-again guidance on the requirements they were to implement and enforce. The dizzying turn of events in those states made it difficult for voters and elections administrators to keep straight what identification would be required at the polling places.

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Wisconsin's requirements for voter identification were set only after cases progressed in both state and federal courts and the U.S. Supreme Court on Oct. 9 ruled that a state law from 2011 would not be in use for the November 2014 election. That decision was not based on the pros and cons of voter ID. Instead, it addressed simply whether the law could be implemented for the first time so close to Election Day.

The U.S. Supreme Court took a similar approach to the voter ID requirements in Texas, where it again said "no" to changing the rules so close to the election. The difference was that, going into this election season, Wisconsin's 2011 voter ID law had never been implemented, whereas Texas' 2012 voter ID law was in place and had been used in previous elections. Therefore, the decision to "not change" meant that Wisconsin continues without a strict voter ID requirement and Texas will keep its strict voter ID requirement.

Timeline of Texas' Voter ID Law and Lawsuit

March 2012: U.S. Department of Justice declines to approve Texas' strict voter photo ID law.
June 2013: Veasey plaintiffs file suit challenging voter ID law.
November 2013: State-approved photo ID is required of voters for the first time.
March 2014: Photo ID requirements remain in use during primary election.
Oct. 18, 2014: U.S. Supreme Court issues emergency ruling allowing Texas to continue with strict voter photo ID requirements.

Richard Hasen, an elections law professor at the University of California at Irvine's Law School, said it is no surprise that courts have had to rule on such controversial election cases. Over the past several years, legislatures passed measures fueled by partisanship.

"In the past, what was more likely is (legislation) would be passed by consensus and they would be simply good government measures," he said. "Here it seems more likely that some of these bills are intended to give one party an advantage."

For additional information about voter ID laws, see NCSL's webpage on the History of Voter ID and another on Voter ID and the Courts.

Other Election Lawsuits

In September, the U.S. Supreme Court allowed Ohio to cut its early voting period from 35 days to 28 days, as required by the passage of this year's SB 238. The law included provisions that eliminated Sunday voting as well as “Golden Week,” the time when Ohio voters were able to register to vote and cast a ballot on the same day. The week was the unintended result of an overlap between Ohio's registration window and the start of early voting. Critics of the new law said it was passed to shorten the opportunities for some voters to participate in an election. The state had argued that changes to the early voting window still left enough time for voters to participate in an election.

North Carolina’s law that eliminated same-day registration and prohibited voters from casting a provisional ballot outside of their jurisdiction was given the go-ahead by a U.S. Supreme Court decision on Oct. 8.

The Tenth Circuit Court of Appeals this month ruled against Kansas and Arizona in the states’ case against the U.S. Election Assistance Commission (EAC) to force the agency to include in the federal voter registration form state provisions that require proof of citizenship. The case, which deals with the clash between state and federal authority over elections procedures, could be taken up by the U.S. Supreme Court.

Some court rulings have settled issues as specific as which voting machine can be used during an election. A federal judge in Maryland ordered the state to provide an absentee voting tool that allows certain voters to receive via the Internet a ballot they can fill out on the computer, print out and return in the mail. The tool was sought by advocates for voters with disabilities but did not win approval from Maryland’s State Board of Elections after security experts warned the system could be hacked and voter privacy would be at risk.

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What’s To Come

A common theme among some of the U.S. Supreme Court decisions has been brevity, Hasen said. The rulings delivered in one or two sentences did not get to the heart of the arguments in each case and simply were issued to meet the pressing need for elections administrators and voters to understand the ground rules for voting requirements.

That unfinished legal business leads elections law experts to believe election litigation will likely return to the U.S. Supreme Court for full consideration.

Two strong prospects for such a review are Texas’s voter ID lawsuit and the challenge from Kansas and Arizona for including on federal voter registration forms state provisions requiring proof of citizenship. And courts will likely keep dealing with redistricting and campaign finance.

“In the ideal situation, the (Supreme) Court would like to see a couple of other courts resolve these cases differently, to see a sort of split between circuit courts,” said Lisa Soronen, executive director of the State and Local Legal Center. “I would give this issue a couple of years. I don’t think (the Supreme Court) is chomping at the bit to take such a case but I don’t think it’s too long before one of these cases ends up before the court.”

The arguments in those cases will lean heavily on data to show what impact changes to state law could have or have had on voter participation, Soronen said.

“That will be an interesting time because it will be all about data,” Soronen said. “The math geeks will rule the day.”

What Legislators Can Do

Green said it would be wise for lawmakers to review their state’s elections code for gaps to head off legal challenges.

“It does damage to the democratic process to litigate these gaps as opposed to having established rules before elections take place,” she said. “It is a pretty fragile system. I don’t think state legislatures are spending enough time examining their codes and finding out where those gaps are.”

As for proposed laws, Green said legislators could avoid a legal tangle by studying the likely impact of their measure. Though each state has its own elections eco-system, much can be learned from watching how a new law fared elsewhere.

“One way to start is by looking to organizations like NCSL and to election scholars and experts who can tell you what the experiences have been in other states and what works and what doesn’t,” she said. “We can learn from the laboratories of the states to make better, more litigation-proof law in this area.”

Still, election laws passed in recent years without much consensus will likely prompt a new wave of elections litigation. And so the trend of lawsuits over state requirements that began with the 2000 presidential contest and ramped up two years ago appears to have gained permanence.

“What used to be an off-season/on-season is now an on-season and kind of a madness around elections,” Hasen said.

— Michael D. Hernandez

An Elections Question for NCSL

How many states still offer straight-ticket voting?

Twelve states—Alabama, Indiana, Iowa, Kentucky, Michigan, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah and West Virginia—all straight-ticket, also called straight-party, voting. In these states, voters can mark their ballots a single time to select all candidates from their preferred political party.

Supporters of straight-ticket voting say it provides a convenient way for voters who identify with a political party to make their selections. Opponents of straight-ticket voting say it diminishes consideration for each race.

There has been a trend in the past two decades to eliminate straight-ticket voting. Since 1994, straight-ticket voting has been abolished in seven states—Georgia, Illinois, Missouri, New Hampshire, North Carolina, South Dakota and Wisconsin.
Vote Centers: The Big-Box Option

Replacing traditional precinct-based polling places with “vote centers” is a decade-old idea that has quietly gained interest in recent years. Pioneered in Larimer County, Colo., in 2003, a vote center can be thought of as the big box store as opposed to the neighborhood “mom and pop” polling place. These larger polling places in high traffic locations accommodate voters from anywhere in a jurisdiction rather than restricting voters to their home precinct polling place. Counties that use vote centers have fewer, but larger, voting locations.

Voters in both urban and rural areas report positive voting experiences with vote centers. Urban voters appreciate being able to vote near their place of work rather than having to fight traffic to get to their neighborhood site before the polls close. Rural voters appreciate being able to go to a convenient location in the county where they may have other business. They may have to drive farther, but traveling to places such as shopping, doctors and schools is a fact of life for many rural residents.

According to a U.S. Election Assistance Commission report, vote centers mean fewer overall polling sites for officials to identify, manage, and ensure are in compliance with the Americans with Disabilities Act (ADA). The larger sites used for vote centers typically have more parking available, and fewer sites makes deployment of resources more efficient. Fewer sites also mean that fewer poll workers are needed. A 2009 report from Indiana notes that personnel is the most expensive component of either a precinct-based or a vote center model.

Permitting voters to cast a ballot anywhere in the county has the added benefit of reducing provisional ballots. Provisional ballots are often cast as a result of voters showing up at the wrong precinct. With vote centers, there is no need to process provisional ballots after the election because there is no “wrong precinct.”

Though turnout is determined by a variety of factors, a report by Robert Stein and Greg Vonnahme finds that vote centers increase turnout, particularly among infrequent voters. Analyses from Indiana and Texas, however, find only a minimal impact on turnout.

Eleven states have implemented vote centers since 2003: Arizona, Arkansas, Colorado, Indiana, Iowa, New Mexico, North Dakota, South Dakota, Tennessee, Texas and Utah. An additional six states have considered but failed to pass legislation (Kentucky, Michigan, Virginia, Wyoming, Missouri and Ohio).

Nevada and California saw vote center legislation pass both houses only to be vetoed by the governor.

In states that already have other convenience voting options such as vote-by-mail and early voting, vote centers are arguably unnecessary and may provide additional expenses and complications for election officials.

Technology is one expense. To have a site that accommodates any voter in the county and also prevents double voting, vote centers usually have electronic poll books and require a reliable Internet connection—something that is unavailable in some areas.

A vote center also has to be able to produce a variety of ballot styles to suit every voter in the county. The options are using electronic voting equipment that can be programmed with all the potential ballot styles, producing ballots on demand by using a specially designed printer, or having a sufficient (and therefore expensive) supply of ballots on hand. Additional technology can also lead to additional points of failure, as Yuma County, Ariz., experienced in 2012, and election officials may be nervous with putting more of their eggs in fewer baskets.

Making the initial transition to vote centers comes with additional costs and considerations. Educating voters about the change to larger polling centers requires money. Finding the most convenient sites for vote centers and stocking them with enough voting machines supplies and poll workers can also be tricky at first. The required number of vote centers and guidelines for their location within the county are dictated by statute in Colorado, Indiana, Tennessee and Texas.

Finally, vote centers alter a time-honored tradition of voting with neighbors and friends at a neighborhood polling place. Many voters value the civic and social experience of voting at their home precinct on Election Day.

– Katy Owens Hubler

One big number

5. It might not seem like a gargantuan figure but this month’s election included ballot measures related to elections policy for a quintet of states. In Oregon, voters rejected a measure that would have changed the state’s traditional primary elections system to a top-two primary system, in which candidates from all parties compete on the same primary election ballot for each race and the top two finishers face off in the general election. California and Washington use a top-two primary elections system and Louisiana runs a similar system. Voters in Connecticut and Missouri rejected constitutional amendments that would have allowed pre-Election Day voting. Currently, 36 states allow voting to begin before the official Election Day date. Montanans rejected a measure that would have eliminated same-day voter registration. The only measure that passed came from Illinois, where a voter anti-discrimination constitutional amendment was supported.
From the Chair

California Senator Alex Padilla (D) served as chair of the Elections and Constitutional Amendments Committee and is California's newly elected secretary of state. He represents a portion of the San Fernando Valley, a vast community in Southern California that includes urban precincts as well as rural townships. Padilla will serve in the Senate through November. NCSL interviewed Padilla on Oct. 27.

Excerpts:

- “My philosophy begins with trying to get more people to participate in the electoral process and includes everything from getting more eligible Californians to register to vote as well as getting registered voters to vote in every election.”

- “Our elections system and equipment is beyond its life expectancy. Many local jurisdictions took (the Federal Help America Vote Act) money and ran with it for systems that were decertified (by the secretary of state) after a cycle or two or equipment that has run its course. There is a desire to think about what is next for voting systems and consider how we are going to pay for it.”

- “I think there’s an increasing appetite for vote centers. It’s still a new concept for California but one of the bills signed by Governor Brown allows San Diego County in certain elections to pilot that model. We will use data from those results to guide our future policy.”

- “You have to visit with county clerks and registrars of voters to have a local and specific conversation about what is working and what is not working with elections.”

Read the full interview with Padilla.

The Election Administrator’s Perspective

Clifford Rodgers is the elections administrator for Knox County, Tenn. Since 2011, he has served the county, which includes Knoxville and has about 275,000 voters. NCSL interviewed Rodgers on Oct. 22.

Excerpts:

- “I keep reading that people are cutting back on early voting sites and early voting hours. Not here in Knox County. We have 10 early voting sites and we are extending the hours the last three days of voting. My goal is to see everybody voting early because all of the drama is on Election Day.”

- “Our biggest challenge is that we don’t have a nice public facility for all of our early voting locations. We sometimes have to rely on private property owners for our early voting sites and so I’m like a beggar out there trying to get a piece of real estate for voting.”

- “We need to shut schools down when we are voting out there. I saw the (Presidential Commission on Election Administration’s) report in January and its recommendation for closing schools on Election Day made sense to me. Anybody with a lick of common sense would agree that we don’t need strangers going into schools to vote while children are there.”

- “I spend a lot of my time trying to educate candidates and trying to educate the public about our elections laws.”

Read the full interview with Rodgers.
Worth Noting

- Stanford University and Dartmouth College are being investigated for a possible violation of Montana’s election laws after voters received a mailer from political science researchers that included the Montana state seal without permission. The mailer rated nonpartisan Supreme Court candidates on a partisan scale, comparing them to President Barack Obama and 2012 Republican presidential nominee Mitt Romney. Voters received a second mailing from the universities, this time a letter from the presidents of both institutions apologizing for the first mailing. The institutions are looking into whether research rules were violated.

- Voters this November were able to use Get to the Polls, a new tool that showed users where their polling place was located, its hours of operation and summarized their ballot. The voter information tool, which uses a person’s address, received about 8 million page views. It was launched by The Pew Charitable Trusts Voting Information Project and The Internet Association and used an application developed by Google. The tool can be embedded onto websites to help provide voter information.

- African Americans and Hispanics have lower rates of having the required voter identification than white Americans, a new report by the Government Accountability Office showed. The report examined state data that showed identification rates and considered the effect of voter ID laws on turnout. It compared voting results in Kansas and Tennessee, which have strict requirements for identification, against voting in similar states that have less strict requirements.

- Internet voting as a secure and accessible elections system received failing assessments, according to a report prepared for the City of Toronto. The Canadian city commissioned the reports to consider Internet voting for its September elections.

- NCSL has loads of analysis about this year’s election on its blog, including a look at state legislative races, another on the outcomes of this year’s 147 ballot measures, an item about the GOP’s gubernatorial gains and an article that shows about 1,750 women will serve as state legislators in 2015, which is slightly less than the number of female lawmakers in 2014. Also keep an eye out for additional analysis due out in the December edition of NCSL’s State Legislatures magazine.

- Fleeting messages, even false political statements, sent out on Twitter are not subject to Ohio’s false claims statute, a federal judge ruled in October. The ruling addressed Tweets by an anti-tax group. It is the second such ruling in Ohio in as many months. In September, a federal judge, in a case addressing messages on billboards, struck down the state law banning false political statements.

- The voting system Los Angeles County is developing will have a touchscreen interface that could display foreign languages and larger fonts, would have the ability to process voice commands and could read and upload a sample ballot stored on a person’s smartphone. Field-testing for the system could begin as early as 2017, Los Angeles County Supervisor Zev Yaroslavsky wrote in his blog.

- Colorado’s elections data is now gathered in one searchable place thanks to the Accountability in Colorado Elections portal, a project from the secretary of state. The site has data on vote methods and ballot statistics, legal requirements, election costs and voter registration tallies.

- You can test your knowledge of elections thanks to a pair of recent quizzes. An 11-question quiz from The Pew Charitable Trusts focuses on the U.S. election system. For an international view of elections, try a 10-question quiz from The Carter Center.

From NCSL’s Elections Team

NCSL’s Fall Forum, Dec. 9-12 in Washington, D.C., will feature seven panel sessions for the Redistricting and Elections Standing Committee. The sessions will focus on elections policy in the courts, a look at the “Motor Voter” law, how state agencies partner for efficient elections, primary elections systems, a look at Census Bureau reporting, redistricting and the future of the U.S. Senate.

Registration is available online. For more information, call 303-364-7700.

As always, thanks for reading.

Wendy Underhill, Michael D. Hernandez and Katy Owens Hubler

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