Post-Voting Litigation: Part 2

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Election Contests:
Types of Cases

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

Possible Causes of Extra Votes

- Tampering with vote counts (fraud).
- Modern-day "ballot box stuffing" (fraud).
- Ballots cast by ineligible voters (mistake).
- Procedural errors cloud eligibility of ballots (mistake).

Election-Stealing Efforts: Remedies (Huefner, 44 Harv. J. Leg. at 307)

- Award election to runner-up when # of illegal votes:
  - Exceeds margin of victory; or
  - Is unknown & winning candidate participated in the fraud.
- Hold new election when number of illegal votes:
  - Is unknown & winning candidate didn't participate;
  - Is less than margin of victory, but winning candidate participated in the fraud.
- Uphold election, when # of illegal votes is less than margin of victory & winning candidate didn't participate.

Ballots Cast By Ineligible Voters

- Non-citizens, non-residents, felons.

- Double or multiple voting.

- Unregistered voters (questionable registration status is different).

- Does the number of ineligible ballots exceed margin of victory?

- Is it possible to identify for whom ineligible ballots were cast?

More Ineligible Ballots Than Margin of Victory, But Impossible to Identify for Whom They were Cast

Three Options:

- Uphold Election Result.
- Order New Election [or Void & Remand].
- Use "Proportional Deduction".
  - To Award Victory to Other Candidate, or
  - To Confirm Result; Otherwise Void Election.

2004 Washington Governor's Race

- Margin of victory: 129 votes.
- Number of ineligible ballots: 1678 (mostly felons, some unregistered, a few other).
- Ineligible ballots tended to come from winner's precincts.
- Losing candidate wanted "proportional deduction" or new election.
- Judge upheld election, rejecting losing candidate's arguments; no appeal.

Hypo of "Proportional Deduction"

- Margin of victory of 100.

- 1000 ineligible ballots in precincts that voted for victor in 60-40 ratio.

- Deduct victor's total by 600, loser's by 400; net deduction: 200 votes from victor.

- Deduction reverses outcome in favor of losing candidate; new winner declared.

Debate re Proportional Deduction

- Ineligible votes may not track precinct overall.
- Modern statistics may offer better estimate of ineligible ballots' effect on outcome of election.
- Requiring losing candidate to prove for whom ineligible ballots were cast is unfair.
- Sanctity of secret ballot: no compulsory testimony from voters.
- Legislative silence; judicial discretion.

More Policy Thoughts on Problem

- New election appropriate when # of ineligible ballots dwarf margin of victory
    - Indicates large-scale failures in election administration
    - Greater threat to legitimacy of victory
    - If "proportionate deduction" unacceptable, void result

2. Less appropriate when # of ineligible ballots very small (and/or slightly larger than margin of victory)
    - Unlikely that ineligible ballots affected outcome
    - No election is perfect; new election susceptible to error

3. Fix now or in next election cycle?

Gecy v. Bagwell

- 372 S.C. 237, 642 So.2d 569 (2007).
- City council race: 1-vote victory margin.
- 2 ineligible ballots: voters non-resident.
- Unknown for whom ballots were cast.
- State supreme court orders new election.
- Other similar cases: e.g., *McCavitt v. Registrar of Voters of Brockton*, 385 Mass. 833, 434 N.E.2d 620 (1982).

Procedural Flaws Cloud Ballots

- Most procedural errors don't void ballots.
- Biggest concern: more ballots cast than verified voters.
- Statutory rule: random withdrawal.
- Some courts will order compliance with statutory rule; others won't.
- Some courts will void precinct where procedural errors are extreme.
- Or new election in egregious cases.

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