



WILL “ARMIES OF LAWYERS” IN SERVICE TO POLITICAL PARTIES DETERMINE ELECTION 2008?

By Richard L. Hasen
William H. Hannon Distinguished Professor of Law

If November 2008 is anything like November 2004, “armies of lawyers” are going to provide an important, though controversial, kind of service for their favorite political parties: they will be monitoring election administration in key battleground states and standing ready for (or already engaged in) litigation over the means for casting and counting of votes, especially for president of the United States.

Ordinarily, we might think of such pro bono service by lawyers as an unmitigated good; after all, busy and talented lawyers are offering their considerable intellectual firepower and practical legal experience in support of the democratic process. But sometimes there is too much of a good thing, and armies of lawyers deployed to watch our elections may actually undermine voter confidence in the fairness of the election process and make it more likely that a close election will be decided by the courts, rather than the people.

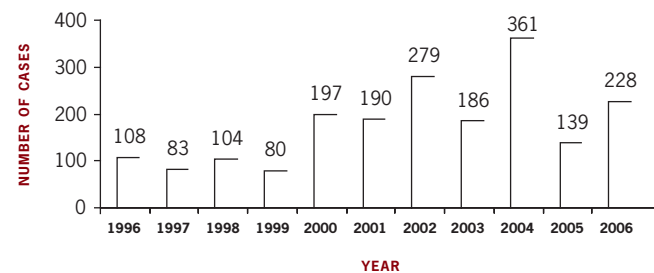
How did we get to such a state of affairs, that we expect presidential candidates to “lawyer up” in advance of Election Day? The prob-

lem traces back to 2000, and is perhaps the result of the extraordinary Florida dispute that culminated in the United States Supreme Court’s opinion in *Bush v. Gore*, 531 US 98 (2000).

With the help of some very able Loyola Law School research assistants, I have been keeping track of the amount of election law litigation. The figures are quite stark: before 2000, the courts decided an average of about 96 election challenge cases per year. Since 2000, that number has jumped to an average of 230 cases per year—with the largest single year total being the last presidential election year of 2004.

It is unclear precisely why election litigation took off in 2000. The increase began even before the Florida debacle, but has clearly accelerated since then. One theory is that the litigation is simply the product of increased polarization in the electorate. Democrats and Republicans have grown increasingly apart in their views and

“Election Challenge” Cases by Year, 1996-2006



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actions, in Congress and in the public’s views of the incumbent president. Such increased conflict may be spilling over into courts. Many lawyers are strong partisans, and they are eager to lend their talents in pursuit of their cause.

A second, and perhaps related, theory for the rise in litigation is that candidates and parties have become less willing to accept the

results of a close election at face value, especially since—as we know from Florida—the administration of elections is far from perfect. As candidates pursue election law as part of their political strategy to get elected or stay in office, they can focus in a close election on any number of problems that might provide the basis for a challenge. There may be problems with ballot design, lack of clarity in the applicable election rules, problems with voting technology or other issues that all may present the opportunity for litigation.

Indeed, the *response* to Florida has itself opened up the opportunity for new litigation, as states have rolled out (and sometimes re-rolled out) new technology (and accompanying new laws and administrative rules) for the casting and counting of ballots. Many of these technologies have been deployed for the first time in a presidential election year, much like a producer’s decision to bring a play straight to Broadway without an opportunity to work out the kinks in less important venues.

Whatever the cause of the increase, it could be contributing to an increase in public perceptions that the election process itself is unfair. Since 2000, we’ve seen a partisan gap in this regard, too. Democrats and African-Americans have shown the most skepticism about the fairness of the electoral process in polls since 2000, but part of that might be that these groups had been on the losing end of some close election results. In Washington State, which saw a razor-thin gubernatorial election resolved by the courts in 2005 in

favor of the Democratic candidate, Republican voters were much more likely to express skepticism about the fairness of the electoral process than were Democrats.

It is not clear that courts can do much to stop the tide of litigation. One possibility is for courts to work on structuring the *timing* of election law litigation. The electoral process and the judicial system are under the most strain when courts must decide the outcome of very close elections. I suggest that, when possible, courts should try to resolve election disputes *before* the election. Thus, if there is a potential problem with a ballot design or voting technology, complaining litigants should bring suit as soon as they could reasonably be expected to see the problem—and if they wait too long, courts should bar their claim under the doctrine of laches for unreasonable delay. In other words, sue early or don’t sue at all.

Structuring the timing of election litigation is only a partial solution. Legislatures should also take steps to clarify election laws (so there is less to litigate) and to make sure that professional, nonpartisan administrators run elections. Unfortunately, since 2000, legislatures have not done their share to improve the election system much. Indeed, many election reforms such as new voter identification laws have passed on party line votes.

In the end, what likely will save this country from another *Bush v. Gore* in November is not the lawyers, courts or legislatures. It is the simple

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fact that litigating over election results only makes sense when the results are extremely close in terms of actual numbers of votes. Most elections are simply beyond the “margin of litigation.” As we enter this election season, I cannot help but utter the Election Administrator’s prayer: “Lord, let this election not be close.”

“As a presidential battleground state, Nevada will undoubtedly play a key role in the upcoming election. In 2004, Nevada witnessed an unprecedented number of poll watchers who were brought into Nevada by the presidential campaigns to monitor the administration of our election. To prepare for an even greater level of scrutiny, we are undertaking significant changes in anticipation of legal challenges to our administration of the election. Whether these measures will prove sufficient to withstand the scrutiny of a closely monitored election remains uncertain.

What is certain is that while sitting in Professor Hasen’s Election Law classes, I never imagined, even in my occasional lucid moments, that I would actually be so intimately involved in such a scenario.”

Ross Miller '02, Secretary of State, Nevada