Ready *for the* storm?

What judges should know about election law

BY RICHARD HASEN & MATTHEW QUEEN

The 2024 election is fast approaching. Many Americans undoubtedly feel anxious, as polarization, misleading rhetoric, and election-related litigation have sown distrust in elections. Indeed, the vitriol following the 2020 election culminated in a violent attack at the United States Capitol, shaking core assumptions about peaceful transitions of power.

Even before the violence of Jan. 6, 2021, the judiciary faced widespread post-election litigation challenging the results of the election. This presented a test of resolve amid turmoil — one that the judiciary passed with flying colors.[1] In the process, it restored some measure of calm, order, and confidence in the rule of law. That is reason for hope for a future in which political trickery withers in American courtrooms. But these tests are, likely, far from over.

If recent trends continue, the 2024 election promises a similar flood of litigation in state and federal courts. How can judges prepare for the coming challenges of treating litigants fairly, maintaining public confidence in elections, and upholding the rule of law? In the following Q&A, Professor Richard Hasen offers his advice. He is an internationally recognized expert on election law, professor of law and political science, and director of the Safeguarding Democracy Project at the University of California Los Angeles School of Law.

What accounts for the increase in election litigation over the past three decades, and what potential dangers accompany this trend?

Election litigation has nearly tripled in the period since the disputed 2000 U.S. presidential election that culminated in the Supreme Court's *Bush v. Gore* decision.[2] One reason for this increase is a growing recognition by political operatives that in very close elections, the rules of the game matter, and those rules sometimes can be changed through litigation. Further, as states change rules through legislation, those changes can lead to more litigation.

Sometimes specific events or actions can also spark a temporary rise in election litigation. In 2020, for example, COVID-19 spurred some states to change election rules to make it easier for people to vote safely as the disease spread. States that made such changes faced litigation, and those states that did not make such changes also faced litigation.

Finally, changes in federal campaign finance rules have made it easier for political parties to raise funds that can be used *only* for litigation. With that greater supply of money, additional lawsuits are filed — some of which appear to be more about gaining publicity than winning. And as the country has gotten more polarized, parties have more reason to fight over election outcomes.

What big-picture considerations should judges think about when election-related litigation arises in their courts?

The two major considerations are the political sensitivities of such lawsuits and timing. First on the politics of it all: In these high-profile cases, the public and press will look at the political background of the judges and make assumptions, often without any basis, about whether judges will rule in a way that benefits the political party with which they were affiliated before joining the bench. When judges side with co-partisans, they are likely to be attacked as making a politically motivated decision — even when the decision is defensible on the merits.

The worst situation is when a judge is called upon to make outcome-determinative rulings — where the judge's decision in essence dictates the winner of the election. In such cases, the best a judge can do is to decide legal issues consistently based upon the rule of law. They should clearly explain the basis of their rulings so that the public can examine the soundness of judicial reasoning.

Ideally, however, judges should look for ways to avoid being put in the position of deciding outcome-determinative issues. The key here is timing. Although judges may be inclined early on to put off deciding ▸

difficult issues (such as by jettisoning them based on ripeness or other prudential grounds), it is far better, when possible, to rule on the substantive legal issues before it is clear who would politically benefit from such a ruling — and definitely before a ruling is outcome-determinative.

A corollary to the timing point is that courts should not be afraid after an election to use the doctrine of laches — which allows a judge to deny relief based on unreasonable delay — when a party had a reasonable opportunity to litigate pre-election but failed to do so. Allowing the party to wait until the post-election period essentially gives a candidate an "option" to sue only if they end up losing the election.

To take an example from 2020: In Wisconsin, state election administrators greatly expanded the use of drop boxes and other out-of-polling-place voting opportunities in light of the COVID-19 pandemic. The Trump campaign did not sue over these voting changes before the election, but did so only after Trump had lost. The proposed judicial remedy — throwing out the ballots cast in drop boxes on the grounds that the use of such boxes was illegal — would have disenfranchised thousands of voters and potentially changed the election outcome in the state. The Wisconsin Supreme Court ruled that the post-election lawsuit was barred by laches.[3] A few years later, in another lawsuit brought well before the election date, the same court ruled that certain out-of-polling place voting did indeed violate state law as to future elections.[4] These rulings together should encourage candidates to sue early over problems, before they risk disenfranchising voters.

One other key point on timing is that the U.S. Supreme Court, under what I have termed "the *Purcell* principle," has greatly discouraged federal courts from issuing decisions that alter rules closely before an election, due to the risks of voter confusion and difficulties facing election administrators in incorporating last-minute changes.[5] The precise contours of this principle are still being worked out and debated among the Supreme Court justices, but this much is clear: Litigants have a greater incentive now to bring cases early to avoid this potential *Purcell* bar, and courts should be more open to hearing such cases early.

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What were the most common federal-law issues that arose in 2020 election litigation, and what related legal developments should judges be aware of?

Many of the issues concerned changes to election rules, especially those changes that had been made to mail-in ballot rules in light of the pandemic. Certain changes raised issues of equal protection or due process under the 14th Amendment, and about whether changes in election rules as applied to federal elections were consistent with the Constitution's provisions giving state legislatures some power to set election rules (the so-called independent state legislature theory). On this latter point, the Supreme Court's 2023 decision in *Moore v. Harper* provided some guidance on the scope of such arguments.[6] I expect these issues to continue to percolate in the 2024 election season.

After the 2020 elections, Donald Trump and his allies brought over 60 cases in federal and state court seeking to challenge the election results in battleground states such as Georgia and Pennsylvania in an effort to change the outcome. These cases commanded great public and media attention. Only one of these lawsuits turned out to be successful on a relatively minor point,[7] and the rest failed. None of the lawsuits led to the uncovering of any large-scale irregularities, illegal behavior, or fraud that justified overturning election results in any state.

The judiciary took these cases seriously and issued rulings, often unanimously, stressing the very high bar that comes when a candidate seeks to overturn election results. Most notable was the opinion of Judge Stephanos Bibas of the U.S. Court of Appeals for the Third Circuit. He wrote in one of the cases challenging the presidential results in Pennsylvania: "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require

specific allegations and then proof. We have neither here."[8]

What were the most common state-law claims in 2020 election challenges, and how did courts resolve them?

State law claims in 2020 also arose primarily out of the pandemic. For example, when state election administrators decided to expand the number of ballot drop boxes, courts sometimes were called upon to decide whether administrators had the power to set the number and location of those boxes.

Issues also arose in relation to campaigning and candidacies under pandemic conditions. For example, in states with an initiative process for putting up issues for a statewide vote, proponents must gather a certain number of signatures within a finite amount of time for the initiative to be placed on the ballot. Some initiative proponents argued for more time to collect signatures given the difficulty of encountering registered voters in public places during the pandemic. Courts had to consider whether such extensions were justified under state law.

*Given the bevy of challenges that arose **after** the 2020 election, what considerations are relevant as judges decide **pre**-election cases?*

As noted earlier, pre-election litigation should be favored — especially in federal court when the *Purcell* principle may make lawsuits filed too close to the election untenable. Post-election litigation needs to be handled fairly and expeditiously, with attention paid to the issue of laches.

Another key factor is the difficulties of election administration. When courts issue rules that govern how an election is going to be conducted, those will have an immediate impact on the detailed planning that election administrators must undertake. Courts may not be aware of how easy or difficult a ruling may be to administer on the ground.

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For this reason, when possible, it is always good practice for courts to hear from election administrators, preferably through in-court appearances, to understand the challenges inherent in the potential remedies under consideration. Often, small remedial adjustments that do not affect the substantive remedies may make a big difference to the administrability of the election. It is best to hear from those on the ground rather than guessing what the administrative repercussions of a judicially imposed remedy will be.

How can state supreme courts prepare themselves and the lower courts to decide high-stakes election cases expeditiously and effectively?

The most important thing that state supreme courts can do before an election is to determine how expedited procedures are going to work in the event of election-related litigation. Many states have rules that give election litigation calendar priority, but it is important to figure out where cases may be filed and the timeline for handling them.

This is especially important for litigation over presidential elections. A finite number of weeks separate the time when voters cast their ballots and the time when electors must meet in state capitols to vote for president and vice president. States that fail to meet the "safe harbor" deadline set by state law run a greater risk of Congress not accepting the state's electoral college votes. State supreme courts should consider timelines that give enough time for trial courts to gather evidence and rule, state appellate courts to review trial court rulings, and, if necessary, for the U.S. Supreme Court to review state supreme court rulings.

Given this time frame, in states with intermediate appellate courts, it is far better for presidential election-related cases to have a path to go directly to the state supreme court rather than lose precious time at an intermediate appellate court.

How should judges balance the obligation to explain election decisions against the litigation's accelerated timeline and resource-intensiveness?

On the one hand, courts need to give reasons for their decisions, not only because the public needs and deserves to know the legal basis, but also so that appellate courts can properly review ▸

the factual findings and legal conclusions of the lower court. On the other hand, especially in the context of presidential elections, the time pressures are enormous. Courts might consider, when allowed by the applicable rules of court and when there are not expected to be further levels of review (such as a state supreme court ruling affecting state elections), giving shorter opinions accompanying judgments in cases followed by fuller discussions of the legal issues in later-issued opinions. Rushed decision-making is not ideal, and rushed opinion writing does not allow the judiciary to do its best work. So if there is a way to provide enough material for review and explanation early, followed by more detailed analysis later, this may be the best way to achieve balance.

What types of election procedures are most often challenged, and what raises the likelihood of a procedure being litigated?

The United States has an exceptionally complex election system. Some federal rules pertain to all elections, such as under the Constitution and the Voting Rights Act, while state and local rules also apply. We conduct our elections primarily on the county level and, depending upon state law, voting systems and rules may differ from county to county. Within each state and locality, the power to run elections may be shared among different administrative bodies, elected authorities, boards, and appointed administrators.

Given this great diversity and decentralization, no particular election procedures or rules are generally challenged more than others. Sometimes issues relate to ballot access for candidates; at other times they may center on whether a ballot measure is qualified to appear on the ballot and whether its title and summary are accurate. Someone might challenge voter registration database management as too lax, and others as too strict. Some disputes relate to who has authority to issue certain rules and the standard of review that applies to administrative decisions.

The likelihood of a procedure being challenged depends in part upon the closeness of the election and the stakes. It seems that the higher the stakes, the more likely someone will litigate over election rules — even if the chances of success in court are low.

What other issues do you anticipate arising in the upcoming election cycle's litigation?

It is impossible to predict with any confidence the specific issues that will arise in particular elections. The courts have developed certain general principles to deal with election litigation, and many of these rules will soon be restated by the American Law Institute (ALI) in its new project on election litigation.[9] An earlier ALI project also dealt with some discrete issues related to nonprecinct voting and ballot-counting disputes.[10]

As the academy and judiciary continue to work together, developing clear rules in advance of the election and preserving the rule of law by consistent application of these rules are paramount for both the integrity of the election system and the judiciary.

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1 *See generally* David F. Levi, Amelia Ashton Thorn & John Macy, *2020 Election Litigation: The Courts Held*, 105 Judicature 1 (2021).

2 Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 Election L.J. 150, 151 (2022), available at https://www.liebertpub.com/doi/epdf/10.1089/elj.2021.0050.

3 Trump v. Biden, 951 N.W.2d 568, 577 (2020).

4 Teigen v. Wis. Elections Comm'n, 976 N.W.2d 519, 547 (2022).

5 *See generally* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 Fla. St. U. L. Rev. 427 (2017).

6 Moore v. Harper, 600 U.S. 1 (2023).

7 *See* Donald J. Trump for President, Inc. v. Kathy Boockvar, et al., No. 602 M.D. 2020 (Pa. Commw. Ct.); Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, But Not A Wipe-Out*, Brookings (Nov. 30, 2020), https://www.brookings.edu/articles/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/.

8 Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 Fed. App'x 377, 381 (2020).

9 *Restatement of the Law, Election Litigation*, Am. L. Inst. (last visited Apr. 17, 2024), https://ali.org/projects/show/election-litigation/.

10 *See generally* Principles of the Law: Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes (Am. L. Inst. 2019).