Originally published in

New York Law Journal

Election and Political Law

June 23, 2023

Mid-Year Round-Up: There Is A Lot Going On

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By Jerry H. Goldfeder

Jerry H. Goldfeder *is director of Fordham Law School's Voting Rights and Democracy Project and practices election law at Stroock. He is the author of Goldfeder's Modern Election Law (6th Edition, NY Legal Publishing Corp. 2022).*

There is a lot going on. The U.S. Supreme Court in Allen v. Milligan has just affirmed an Alabama district court's ruling that the state's congressional lines were an impermissible racial gerrymander, thereby preserving, at least for now, what remains of the historic Voting Rights Act's protections. Much has been written about the civil rights community's surprise and relief that the court did not continue to eviscerate the law that was hollowed out 10 years ago by its decision in Shelby County v. Holder. Yet, insofar as the majority in Allen included Chief Justice John Roberts and Justice Brett Kavanaugh, wariness of future decisions is warranted. Prof. Justin Levitt, a leading voting rights scholar, puts it this way: I remain "in the fetal position," still quite worried about evolving jurisprudence.

The court is also about to issue its decision on whether a legislature can act unilaterally on election procedures without regard to the state's constitution or its courts—the so-called Independent State Legislature Theory. This potentially far-reaching ruling (unless the court decides to punt) can have an deep impact on 2024. So, any day now, keep an eye out for Moore v. Harper.

Of course most of the ink these days is on United States of America v. Donald J. Trump. On the heels of the Manhattan district attorney's indictment, the conviction of the Trump organization, and the E. Jean Carroll verdict, the twice-impeached former president appears to be basking in his legal troubles as a narrative for his current campaign for the White House. Reams can be—and will be—written about the legal issues involved—examples include whether the reason for his conduct matters; what classified documents may be used at trial; if the hearsay rule or attorney-client privilege will bar his former lawyer's notes to be admitted; and whether the assigned federal judge should recuse. Those thinking ahead are wondering whether an indicted or convicted person can run for or serve as president of the United States—the answers are yes and yes.

And Here in New York

Here in New York, the legislature has enacted several election-related laws and the courts have issued a few important decisions.

Legislation

No-Excuse Mail-in Ballots. Following the lead of 35 states and Washington, D.C., and replicating New York's pandemic-era rules, Albany enacted no-excuse mail-in voting during the early voting period. Instead of having to provide an anticipated rationale ("I think I will be ill on Election Day"), voters will have the option of sitting at their kitchen table and deciding for whom to vote. A more expanded version was defeated at the polls two years ago when a state constitutional amendment was proposed, but this reform is thought to pass muster as a legislative act. It takes effect next year.

Voters opting to vote by mail need to be aware that a related law was enacted previously that provides that a voter who applies for such a ballot (an "absentee ballot" in New York parlance) cannot then decide to cast a ballot on the voting machine instead. They would have to vote by affidavit ballot (referred to as a provisional ballot in most parts of the country), not on the machines. And these need to be filled out carefully to be counted. Fortunately, the legislature liberalized the process somewhat, allowing some mistakes to be cured.

New York State Public Matching Funds. Several years ago the legislature enacted a public campaign finance program similar to New York City's. The new program, now in effect, dramatically reduced overall contribution limits, and candidates running for state-wide office and the state legislature can have certain contributions matched by taxpayer dollars. It is hoped that, following the New York City experience, the program will make it easier for those not connected to wealthy donors to run a viable campaign.

This session the legislature modified the law to allow more rigorous eligibility requirements for matching funds, and permit supporters to have their initial dollars matched even when contributing up to the limit.

More specific information about the program is available on the Public Campaign Finance Board website, https://pcfb.ny.gov/.

Venue For Constitutional Challenges. Undoubtedly with the Steuben County redistricting case fresh in their mind, Democratic legislators introduced a bill requiring that a constitutional challenge to a state law may only be brought in New York, Westchester, Albany or Erie counties, depending upon the residence of a plaintiff. The rationale was to prevent the kind of forum shopping that allowed a Republican challenge to the legislature's redistricting plan to be commenced in a small county whose judge was thought to be ideologically inclined to overturn the plan. Republicans opposed the law, arguing that the four enumerated counties are Democratic strong-holds, which in effect, was itself forum shopping. On the other hand, these counties are among the most populous in the state, as opposed to Steuben, for example, which has a relatively small population. The law takes effect immediately. It would be surprising if this law is not challenged.

Court Decisions

Stein v. Eisner, 187 N.Y.S.3d 47 (1st Dep't. 2023), affirmed a Supreme Court decision to invalidate a candidate's designating petition for the political party position of district leader on the ground that the candidate failed to identify his gender. Relying on a Court of Appeals case, Justice Lucy Billings, sitting in New York County, cited to provisions in the election law that required a male and female district leader, and thus held that the name of the party position on the petition was deficient.

In an era when gender identity is in flux, it is perplexing that the election law—or at least the courts interpreting the law—remains wedded to old norms.

King v. Ugell, 2023 WL 3363254 (2d Dep't.), reversed a Rockland County Supreme Court decision that invalidated the candidacy of a town justice running for town supervisor on the ground, inter alia, that he violated the Rules Governing Judicial Conduct by not resigning his judicial position before seeking another office. The Appellate Division held that such conduct may have violated ethics rules but did not run afoul of the election law. The candidate's defense, rejected by Justice Paul Marx as untruthful, was that he was the victim of a candidate who wished to replace him and knew nothing of the petitioning effort. Indeed, the candidate in fact declined the town supervisor nomination.

The Commission on Judicial Conduct opened an investigation of the town justice for not resigning his judicial post before seeking another public office and for his allegedly false statements in court. At that point, he resigned from his judicial post.

The Appellate Division interpreted the election law correctly, but practitioners are urged to read Marx's decision—his election-related decisions are always quite thoughtful and unconstrained by narrow or time-honored views.

Kowal v. Mohr, 2023 WL 3315666 (4th Dep't.), held that, consistent with the constitutional rights of political parties, write-in votes will only be counted when the name written in is an enrolled member of the political party whose nomination is being sought voteswhether in a primary election or in an opportunity to ballot (a write-in process to obtain a party nomination).

These 2021 provisions were in response to a trend in which members of one party were attempting to snatch the nomination of a competing party, a practice known as "party-raiding," which is consistently frowned upon by the courts.

Hoehmann v. Town of Clarkstown, 2023 WL 3451198 (2d Dep't.), reversed a Supreme Court decision and invalidated a term limits law nine years after it was enacted on the ground that the town failed to hold a referendum on the law when it was first proposed. The court rejected the defense that the action was time-barred because the law presented a "continuing harm" to the candidate and voters who challenged the law.

This decision is significant for several reasons—the court held that term limits required a voter referendum; voters could challenge a law years after it was improperly enacted; and it was not deemed too close to the impending election to be considered.