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Year-End Roundup: Significant State and Federal Developments

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It has been a big year for federal and state election law. In New York, due process rights, fraud, residency issues and enforcement of the law have been tackled by the courts. Nationally, the push-and-pull of voting rights continues to be fought in the statehouses and litigated in the courts. Here is a sample of the most salient issues

New York Developments

Complying with Disclosure Requirements. In a case that reflects a more pronounced view that candidates must strictly comply with the Election Law, the Chief Enforcement Counsel of the New York State Board of Elections and the New York State Attorney General just brought a criminal complaint against an unsuccessful 2014 Assembly candidate, Michele Adolphe, for

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failing to file routine disclosure reports detailing her contributions and expenditures.[1] Although this is a misdemeanor, and there are literally hundreds of instances where other elected officials and candidates have likewise failed to comply, it is rare indeed for such charges to be brought.[2] It remains to be seen how this case will turn out and whether further complaints will be lodged.

Candidate Fraud. Whether insurgents or incumbents, almost all candidates for public office must circulate petitions to get on the ballot—and a good number of these petitions are challenged if candidates or their supporters do not follow the rules. Enforcing the long-held statutory prescription that each signer of a candidate's designating petition must sign his or her name and those collecting signatures must actually witness each and every signature, the Appellate Division, Third Department, recently bounced a candidate from the ballot for violating this procedure. In and of itself, this was not news. But the candidate in *Mattice v. Hammond*,[3] Michael Hammond, running for Delegate to the Conservative Party Judicial Convention, was held to a zero-tolerance standard.

Needing eight good signatures, he turned in 38. His opponent challenged the petitions, alleging, inter alia, that some of the signatures Hammond supposedly witnessed were fraudulent. Called to the stand, Hammond admitted that three of the signatures were actually written by the putative signer's spouse, and therefore, his "Statement of Witness," which is equivalent to an affidavit, was false. Hammond credibly testified that he did not know a husband or wife could not sign for their spouse, and had no intent to deceive anyone.

The Supreme Court, sitting in Lawrence County (McGill, J.), excused the candidate's error. On appeal, the Third Department disagreed, holding that scienter is not necessary to find fraud, and that if the candidate is tied to fraudulent conduct, his designating petition will be invalidated irrespective of how many otherwise valid signatures he had.[4] Ignorance of the law did not save his candidacy.

Residency. In 2014, two cases, one involving a candidate for governor[5] and the other a candidate for state Assembly,[6] stretched the law pertaining to a candidate's residency when running for office. In both cases, a five-year continuous durational residency in the state was

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1 *People of the State of New York v. Michele Adolphe*, brought in Albany County, New York. See http://www.ag.ny.gov/press-release/ag-schneiderman-and-chief-enforcement-counsel-sugarman-announce-arrest-former-new-york.

2 http://www.capitalnewyork.com/article/albany/2015/11/8583442/state-contacts-hundreds-candidates-about-delinquent-finance-reports.

3 *Mattice v. Hammond*, 131 A.D.3d 790 (3d Dept. 2015).

4 Id. ("Fraud… does not require proof of a "nefarious motive" [citation omitted].").

5 *Weiss v. Teachout*, 120 A.D.3d 701 (2d Dept. 2014);

6 *Jones v. Blake*, 120 A.D.3d 415 (1st Dept. 2014). See Jerry H. Goldfeder and Myrna Pérez, "Year-End Round Up on Elections and Voting Rights," New York Law Journal, Jan. 5, 2015.

required. And in both cases, despite prior tax filings that appeared to disclaim New York residency, the candidates amended their returns during or immediately before trial to show their state bona fides.

The Appellate Division, Second Department, in the gubernatorial case held that there was sufficient "ambiguity" in the candidate's residency; and the Appellate Division, First Department, found that contradictory inferences could be drawn from the facts. In that each candidate retroactively altered residency indicia to satisfy the law, both courts ruled that the challengers had failed to meet their respective burdens.

This year, the Appellate Division, Fourth Department, went further in the liberalization of residency requirements for candidates. *Vescera v. Karp*,[7] involved Maria Pezzolanella McNiel, a candidate for the Utica Common Council. It was alleged that the address she provided on the petitions she circulated was false in that she did not actually live there.

The appeals court, affirming Oneida Supreme Court (MacRae, J.), held that the candidate intended to reside in the subject apartment, but was unable to move in yet "for reason beyond her control"—the building was being refurbished and no Certificate of Occupancy could be issued until all the apartments were completed. Her move-in date had come and gone, and McNiel was still unable to occupy the premises. With that as a backdrop, the court found that the candidate nevertheless was intending to make the apartment her residency. As such, her residency was at least constructively established, and the challenge to her candidacy was rejected.

Due Process? In *Boniello v. Niagara County Board of Elections*,[8] a candidate asserted that he was denied his due process rights by the Board of Elections, which had invalidated his designating petitions. The Appellate Division, Fourth Department, affirmed the Niagara Supreme Court's (Montour, J.) rejection of the candidate's attempt to have the court overturn the Board of Elections' decision. The proceeding was brought by a candidate for the office of Niagara Falls City Court Judge, David G. Boniello, who alleged that the board had made an erroneous ruling relating to several signatures obtained by a notary. Boniello asserted that he was denied his due process rights by the Board of Elections in that there was no open hearing at which he could present his case; he also alleged that this closed-door process violated the Open Meetings Law.

The court rejected his contentions, ruling that it was not improper for the board to have a closed meeting, and the candidate's due process rights were protected by being able to commence a proceeding in Supreme Court. In fact, there are many boards around the state

7 131 A.D.3d 1338 (4th Dept. 2015).

8 131 A.D.3d 806 (4th Dept. 2015).

that do not have any open hearings—decisions are made by the election commissioners behind closed doors. The Boniello case sustains this practice.

National Developments

Automatic Registration of Voters. Automatic registration, a new pro-voter reform to modernize voter registration, is gaining national momentum.[9] This reform accomplishes two very modest, but impactful results. First, it registers eligible citizens when they interact with government agencies, unless they decide they do not want to be signed up. In other words, the new procedure changes the currently prevalent "opt-in" system to one that automatically registers voters but allows them to "opt-out." This will increase voter rolls significantly.

The second result is that government agencies will be able to electronically transfer voter registration information instantaneously, rather than forcing election officials to hand-enter data from paper forms. This speeds up the process, and dramatically reduces erroneous entries that often disenfranchise otherwise eligible voters. Automatic registration is an exciting reform because if done right, it could lead to higher registration rates and more accurate voter registration records.

In March 2015, Oregon passed the first law to automatically register eligible citizens who have driver licenses (who do not opt out).[10] California also passed an automatic registration bill in October.[11] Although New Jersey's Legislature passed automatic registration legislation, Gov. Chris Christie vetoed it.[12] In fact, legislators in 18 states plus the District of Columbia introduced some version of automatic registration.

This momentum has carried into the 2016 presidential race. In a campaign speech in June, Hillary Clinton embraced automatic, universal voter registration for eligible citizens once they turn 18,[13] and more recently Sen. Bernie Sanders introduced an automatic registration bill in Congress.[14] Sanders' bill was the second automatic registration bill introduced in Congress this year; in June, Rep. David Cicilline and

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9 TOMAS LOPEZ, BRENNAN CTR. FOR JUSTICE, THE CASE FOR AUTOMATIC, PERMANENT VOTER REGISTRATION (2015), available at https://www.brennancenter.org/publication/case-automatic-permanent-voter-registration.

10 Press Release, Or. Governor, Governor Brown Signs New Motor Voter Bill Into Law (March 16, 2015) available at http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=628.

11 Press Release, Ca. Sec'y of State, California New Motor Voter Act Passed by Legislature (Sept. 11, 2015), available at http://admin.cdn.sos.ca.gov/press-releases/2015/pdf/ap15-061.pdf.

12 Samantha Marcus, "Christie Vetoes Bill Overhauling N.J. Voting System," THE STAR-LEDGER (Nov. 9, 2015), available at http://www.nj.com/politics/index.ssf/2015/11/christie_vetoes_bill_overhauling_nj_voting_system.html.

13 Ryan J. Reilly, Hillary Clinton Calls for Automatic, Universal Voter Registration, THE HUFFINGTON POST (June 4, 2015), available at http://www.huffingtonpost.com/2015/06/04/hillary-clinton-voting-rights_n_7513858.html.

14 Raising Enrollment with a Government Initiated System for Timely Electoral Registration Act of 2015, S. 1970, 114th Cong. (2015).

45 co-sponsors introduced legislation requiring automatic registration for federal elections at all DMVs.[15]

Easing Voting Restrictions for People with Criminal Convictions. Approximately 4.4 million people in the United States who are currently living and working in their communities cannot vote because of a criminal conviction in their past—and some remain disenfranchised long after leaving prison.[16] State policies vary. On one end of the spectrum are Maine and Vermont, where citizens never lose the right to vote because of a criminal conviction and can vote even from prison. On the opposite end, Iowa and Florida, permanently disenfranchise people for any felony convictions unless the government decides to issue an individual pardon.

Two states, Virginia and Kentucky, were once permanent disenfranchisement states, but are no longer—in 2015, their governors exercised their constitutionally authorized clemency powers to expand ballot access to certain persons who had lost their voting rights because of criminal convictions. In 2014, Gov. Terry McAuliffe of Virginia used his executive authority to shorten the period that people with certain past criminal convictions must wait before becoming eligible to apply for rights restoration; he also changed the classification of some crimes so that more people could access a streamlined restoration process.[17] In June 2015, McAuliffe instituted additional reforms to the rights restoration process. Since taking office, McAuliffe has restored voting rights to more people than any previous Virginia governor.[18]

A few days before Thanksgiving, Gov. Steve Beshear of Kentucky issued an executive order making rights restoration automatic for citizens who fully complete sentences for non-violent felony convictions.[19] Previously, citizens with felony convictions could never vote again unless they could personally persuade the governor to restore their individual voting rights. Gov. Beshear's new policy, while a relatively modest adjustment (it is still more restrictive than the state of Texas' rights restoration policy, for example) means Kentucky is no longer one of the outlier permanent disenfranchisement states.

Redistricting and Photo ID. There are several potentially important election cases winding their way through the courts. On Dec. 8, 2015, the U.S. Supreme Court heard a redistricting case that could bring about a huge shift in how state legislative boundary lines are drawn in this country. Practically everywhere in the country, state legislative districts are drawn based on the number

15 Automatic Voter Registration Act, H.R. 2694, 114th Cong. (2015).
16 CHRISTOPHER UGGEN ET AL., STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 16 (THE SENTENCING PROJECT (2012)), available at http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.
17 Press Release, Office of the Governor of Va., Governor McAuliffe Announces Changes to Virginia's Restoration of Rights Policy (April 18, 2014), available at https://governor.virginia.gov/newsroom/newsarticle?articleId=3880.
18 Press Release, Office of the Governor of Va., Governor McAuliffe Announces New Reforms to Restoration of Rights Process (June 23, 2015), available at https://governor.virginia.gov/newsroom/newsarticle?articleId=11651.
19 Exec. Order No. 2015-871 (Ky. Nov. 24, 2015), available at http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2015-MISC-2015-0871-242277.pdf ("Relating to the Restoration of Civil Rights for Convicted Felons").

of people who live there. But, in *Evenwel v. Abbott*, the Supreme Court was asked to require state-level redistricting to be based upon an equal number of citizens of voting age in a district instead of the total number of residents.[20] A change like this would effectively wipe children and other people ineligible to vote off the map and would have an impact on state legislative districts across the country. This would hurt the representation of our fastest-growing communities, particularly Latino communities.

A case challenging the strict photo ID law in Texas is currently being considered by the U.S. Court of Appeals for the Fifth Circuit for en banc review, and will likely make its way to the Supreme Court.[21] The Texas law was first challenged, and blocked, pursuant to the Voting Rights Act Section 5's preclearance provision. Shortly after the Supreme Court rendered Section 5 inoperative, Texas implemented the ID law, which was then challenged pursuant to Section 2 of the Voting Rights Act—the provision that bars election practices that interfere with the ability of racial and language communities to elect their candidates of choice. There is no doubt that the outcome of this case could profoundly affect the scope of federal protections available to combat racial discrimination in voting practices.

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20 *Evenwel v. Abbott*, 192 L.Ed.2d 143 (W.D. Tex. 2014), appeal docketed, No. 14-940 (U.S. May 26, 2015).

21 *Veasey v. Perry*, 29 F.Supp.3d 896 (S.D. Tex. 2014), petition for reh'g en banc filed, No. 14-40003 (5th Cir. Aug. 28, 2015).