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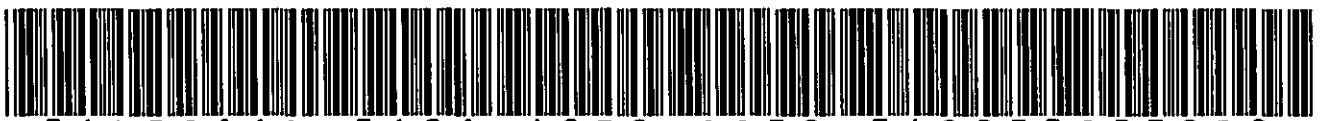

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Election Case Law 81

First, Second and
Third Quarters

INTRODUCTION BY THE NATIONAL CLEARINGHOUSE

ON ELECTION ADMINISTRATION

Election Case Law is a quarterly series designed to report and summarize all recent State and Federal litigation relating to election matters. The series is cumulative throughout the calendar year such that each quarterly edition contains the information of previous quarters culminating in the fourth quarter's Annual Cumulative Summary.

It is important to note that neither the listings nor the synopses are intended to be definitive. Legal conclusions should be drawn only by qualified professionals on the basis of the particulars of the original decision. Those concerned with the general direction of election case law will nevertheless benefit and will be assisted by the topic index in the back of the volume.

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ELECTION CASE LAW

AN ANALYSIS OF RECENT SUPREME COURT, FEDERAL COURT, AND STATE COURT DECISIONS

PREPARED FOR
FEDERAL ELECTION COMMISSION

BY

AMERICAN LAW DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

JANUARY THROUGH OCTOBER 1981

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FOREWORD

The Election Case Law is a project sponsored by the Federal Election Commission and produced by the American Law Division of the Congressional Research Service of the Library of Congress. The Election Case Law contains analyses of various Supreme Court, Federal and State Court Cases involving election matters. A quarterly cumulative publication will be issued in the months of April, July, October, and January. The January issue will be the final cumulative edition of the year.

The principal purpose of the Election Case Law is to furnish in the form of a brief analysis the important court decisions in the election law field. Should more information be desired by the reader, it might be necessary to contact the court involved to get a complete version of the decision regarding any of the analyses of the cases. In analyzing decisions in the publication, the objectives are to include as many decisions and provide as much detail about those decisions as time and space permit.

Each issue of the Election Case Law encompasses four sections, one relating to major Supreme Court decisions, another to major federal court decisions, another to major state court decisions, and the final section to major state attorney general opinions, all of which concern significant election matters. This report does not purport to cover all election decisions. The purpose of this report is to analyze the significant decisions in the election law field that may be of interest to large cross sections of readers rather than to certain readers in a certain locale or with certain interest groups.

Preparation of the Election Case Law is the responsibility of the American Law Division of the Congressional Research Service, Library of Congress under contract with the Federal Election Commission and under the Supervision of Gary L. Greenhalgh, Director of the Clearing House on Election Administration. Thomas M. Durbin, Jay R. Shampansky and Michael V. Seitzinger are the Editors. M. Ann Wolfe is the Managing Editor. La Vonne M. Grabiak is the Assistant Editor. Mary Schrock is the Editorial Assistant. Gilbert Gude, Director of the Congressional Research Service, Joseph E. Ross, Chief of the American Law Division, and Charles Doyle, Assistant Chief, serve as Supervising Editors.

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Apportionment and Redistricting - At-Large Elections

City of Mobile, Alabama, v. Bolden, 446 U.S. 55, Doc. No. 77-1844, decided 4/22/80

A divided Supreme Court reduced the power of federal courts to rewrite state and local election laws in voting rights cases by overturning a court order which restructured the city government of Mobile, Alabama from an at-large electoral system to single-member districts electoral systems due largely to the fact that no black had been elected to city office.

Mobile, Alabama is governed by a Commission consisting of three members elected by the voters of the city at-large. A suit was brought by black citizens of Mobile in the Federal District Court for the Southern District of Alabama; the complaint alleged that the practice of electing the commissioners at-large unfairly diluted the black voting strength in violation of (1) section 2 of the Voting Rights Act of 1965, (2) the fourteenth amendment, and (3) the fifteenth amendment. The district court found that the constitutional rights of the black citizens had been violated and ordered that the commission system be abandoned and replaced by a municipal government consisting of a mayor and a city council with members elected from single-member districts. 423 F. Supp. 384. The federal court of appeals affirmed noting that such at-large elections discriminated against blacks in violation of the fourteenth and fifteenth amendments and that the district court remedy was appropriate. Bolden v. City of Mobile, 571 F. 2d 238 (5th Cir. 1978).

In an opinion delivered by Justice Stewart and joined by Chief Justice Burger, and Justices Powell and Rehnquist, the Supreme Court reversed the lower courts and concluded that Mobile's system of electing commissioners at-large did not violate the voting rights of blacks in contravention of the fifteenth amendment. A violation of the fifteenth amendment requires racially discriminating motivation. The fifteenth amendment does not confer on black candidates the right to be elected but prohibits any purposely discriminating denial or abridgement of the right to vote on account of race, color, or previous condition of servitude. Since black citizens in Mobile register and vote without hindrance, the fifteenth amendment was not violated.

The at-large electoral system that was used by the city of Mobile was found not to be in violation of the equal protection clause of the fourteenth amendment since there was no purposeful discrimination. The equal protection clause does not require proportional representation as an imperative of political organization. The equal protection clause protects the right to vote in elections on an equal basis with other qualified voters but it does not protect any "political group" from electoral defeat. Also, there was no violation of the "one-person, one-vote" principle since the electoral system in Mobile is a unitary electoral district and since nobody's vote has been diluted. cf. Reynolds v. Sims, 377 U.S. 533 (1964).

Justice Blackmun and Stevens filed separate opinions concurring in the judgment. And Justice Brennan, White, and Marshall filed dissenting opinions.

Apportionment and Redistricting - County Plan

McDaniel v. Sanchez, 452 U.S. ____, 49 LW 4615, 68 L.Ed. 2d 724
Doc. No. 80-180, decided 6/1/81.

The Supreme Court affirmed the judgment of the court of appeals in holding that the preclearance requirement of sec. 5 of the Voting Rights Act of 1965 applies to a reapportionment plan submitted to a district court by the legislative body of a covered jurisdiction in response to a judicial determination that the existing apportionment of its electoral districts was unconstitutional.

The district court had ruled that the 1968 Kleberg County, Texas, apportionment plan violated the constitutional principle of one man, one vote and ordered that a reapportionment plan be submitted. When the new plan was submitted to the district court in December 1979, it was approved for use in the 1980 primary and general elections over the objections of four Mexican-American residents of the county whose objections were grounded, inter alia, in the Voting Rights Act requirement that the county obtain preclearance before the plan could become effective. The district court held that the adopted plan was not subject to the preclearance provisions of the Voting Rights Act because it was a court-ordered plan rather than a court-adopted plan.

The court of appeals vacated and remanded the judgment of the district court. Sanchez v. McDaniel, 615 F.2d 1023 (5th Cir. 1980). The court stated that "[a] proposed reapportionment plan submitted by a local legislative body does not lose its status as a legislative rather than court-ordered plan merely because it is the product of litigation conducted in a federal forum." The court of appeals relied on Wise v. Lipscomb, 437 U.S. 535 (1978), that "[a] new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court will not be considered 'effective as law,' ... until it has been submitted and has received clearance under §5 [of the Voting Rights Act of 1965]."

The Supreme Court held that the East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), discussion of sec. 5, in which the Court stated that preclearance was not necessary in court-ordered plans resulting from equitable jurisdiction over adversary proceedings, was dictum unnecessary to the decision in that case and therefore not controlling in this case, in which the impact of sec. 5 is directly placed in issue. The Court added that its subsequent decision in Wise indicates that, at least to the extent that East Carroll addressed the Voting Rights Act, it must be narrowly limited to its particular facts.

The Court stated that in Wise the revised reapportionment plan was deemed to be a valid legislative Act because the Dallas City Council had acted within its inherent legislative authority in devising and submitting a reapportionment plan to replace the plan invalidated by the district court. The Court stated that Wise distinguished East Carroll on the ground that the legislative bodies in East Carroll had

not purported to reapportion themselves and, indeed, had been without power to reapportion themselves under state law because the Louisiana enabling statute had been invalidated under the Voting Rights Act. The Court stated that neither East Carroll nor Wise decided the precise question that is presented here.

The Court turned to the legislative history of the Voting Rights Act for guidance in interpreting the meaning of the statutory language. The Court concluded that the view expressed in committee was consistent with the basic purposes of the statute and with the well-settled rule that sec. 5 of the Act is to be given a broad construction. See Dougherty County Board of Education v. White, 439 U.S. 32 (1978); United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978). The Court stated that the federal interest may be protected by the federal district court presiding over voting rights litigation, but sound reasons support the committee's view that the normal sec. 5 preclearance procedures should nevertheless be followed in cases such as this because a centralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way. The Court added that, if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, the statute might have the unintended effect of actually encouraging delay in making obviously needed changes in district boundaries.

Boards and Commissions - FCC Ruling - Right of Access

CBS, Inc. v. Federal Communications Commission, 453 U.S. ____ 49 LW 4891, Doc. Nos. 80-207, 80-213, sub nom. ABC, Inc. v. FCC, and 80-214 sub nom. NBC, Inc. v. FCC, decided 7/1/81.

In these consolidated appeals the three major networks, CBS, NBC, and ABC, petitioned the Court for a review of orders of the Federal Communications Commission (FCC). The FCC had ruled that the three networks had violated their obligation to provide "reasonable access" to the Carter-Mondale Presidential Committee (CMPC) in accordance with sec. 312(a)(7) of the Campaign Communications Reform Act. This section authorizes the FCC to revoke a broadcaster's license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy."

On October 11, 1979, the CMPC had asked the three major television networks to make available to it a half-hour of television time between 8:00 p.m. and 10:30 p.m. on either December 4, 5, 6, or 7. CMPC intended to present a documentary outlining President Carter's record and that of his administration. The program was to be presented just after the President's formal announcement of his candidacy, and it was designed to set the tone for the President's campaign. The networks declined to make the requested time available--saying in essence that it was too much time and too soon in the race. The court of appeals affirmed the FCC's orders, holding that the

statute created a new affirmative right of access to the broadcast media for individual candidates for federal elective office.

The Supreme Court affirmed the lower court decision. The Court stated that the conclusion was inescapable that sec. 312(a)(7) did more than simply codify the pre-existing public interest standard as appellant claimed. The Court said that sec. 312(a)(7) focused on the individual "legally qualified candidate" seeking air time to advocate "his candidacy," and guaranteed him "reasonable access" enforceable by specific governmental sanction. The Court noted the reliance petitioners had placed in a footnote in the decision CBS, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). The Court stated that the qualified observation in CBS, Inc. that the amendment "essentially codified" existing Commission practice was not a conclusion that the statute was in all respects coextensive with that practice and imposed no additional duties on broadcasters.

The Court held that the legislative history of the statute also supports the plain meaning that individual candidates for federal elective office have a right of reasonable access to the use of stations for paid political broadcasts on behalf of their candidacies without reference to whether an opponent has secured time. The Court referred to a Senate report which acknowledged the "general" public interest requirement, but treated it separately from the specific obligation prescribed by the proposed legislation.

The Court reiterated its holding in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress refused to alter the administrative construction. The Court also referred to United States v. Rutherford, 442 U.S. 544 (1979), where it was held that such deference 'is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives.'

The Court noted that, although Congress provided in sec. 312(a)(7) for greater use of broadcasting stations by federal candidates, it did not give guidance on how the Commission should implement the statute's access requirement. The Court said that, by confining the applicability of the statute to the period after a campaign commences, the Commission had limited its impact on broadcasters and had given substance to the command of reasonable access. The Court agreed with the Commission that sec. 312(a)(7) assures a right of reasonable access to individual candidates for federal elective office and agreed with the Commission that the requirement that candidates requests be considered on an individualized basis is consistent with that guarantee.

The Court stated that the Commission's standards have achieved greater clarity as a result of the orders in past cases. The Court said that these prior decisions and the Commission's 1978 Report and Order, which states the relevant criteria broadcasters must employ in evaluating

access requests under the statute, had given petitioners adequate notice that their conduct in responding to the Carter-Mondale Presidential Committee's request for access would contravene the statute.

Finally, the Court held that the statutory right of access as defined by the Commission properly balances the first amendment rights of federal candidates, the public and broadcasters. The Court stated that sec. 312(a)(7) makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.

Justice White, joined by Justice Rehnquist and Justice Stevens wrote a dissenting opinion which labeled as "untenable" the majority's conclusion that Congress had intended to create such a broad right of access. Justice White said that "the court has laid the foundation for the unilateral right of candidates to demand and receive any 'reasonable' amount of time a candidate determines to be necessary to execute a particular campaign strategy. . . . There is no basis in the statute for this very broad and unworkable scheme of access."

Justice Stevens wrote a short dissent which stated that the Court's ruling "creates an impermissible risk that the commission's evaluation of a given refusal by a licensee will be biased."

Campaign Financing - Political Action Committee

California Medical Association v. Federal Election Commission, 453 U.S. ___, 49 LW 4842, 69 L.Ed. 2d 567, Doc. No. 79-1952, Judgment aff'd., 6/26/81

The California Medical Association (CMA), an unincorporated association, and its political action committee, the California Medical Political Action Committee (CALPAC), challenged the constitutionality of contribution limits which are imposed by the FECA (§ 441a(a)(1)(C)). The CMA and CALPAC contend that the $5,000 per year restriction on support of a political action committee by an unincorporated association violates their first amendment rights to speech and association both on its face and as applied to them. Appellants also claim that sec. 441b(b)(2)(c) constitutes invidious discrimination in violation of the fifth amendment. This section allows labor unions and corporations, but not other organizations, to pay for the administration and solicitation costs of their PACs. The court of appeals affirmed the district court conclusion that these contribution limits are constitutional.

The Supreme Court affirmed the lower court decision. The Court stated that the "speech by proxy" that CMA seeks to achieve through its contributions to CALPAC was not the sort of political advocacy that this Court in Buckley v. Valeo, 424 U.S. 1(1976), found was entitled to full first amendment protection. The Court stated that CALPAC is not merely the mouthpiece of CMA as appellants' claim but instead is a separate legal entity that receives

funds from multiple sources and which engages in independent political advocacy. The Court stated that the contribution restriction provided for in sec. 441a(a)(1)(C) was enacted in part to prevent circumvention of the limitations on contributions that the Court upheld in Buckley, i.e. that individuals and unincorporated associations such as CMA may not contribute more than $1,000 to any single candidate in any calendar year and that individuals may not make more than $25,000 in aggregate annual political contributions. The Court stated that these limitations could easily be evaded if the argument is accepted that Congress cannot prohibit individuals and unincorporated associations from making unlimited contributions to multicandidate political committees. An individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee. Similarly, individuals could evade the $25,000 limit on aggregate annual contributions to candidates if they were allowed to give unlimited sums to multicandidate political committees, since such committees are not limited in the aggregate amount they may contribute in any year.

The Court also concluded that the $5,000 limitation on the amount that persons may contribute to multicandidate political candidates does not violate the fifth amendment's equal protection component. The Court stated that appellants' claim of unfair treatment ignores the plain fact that the statute as a whole imposes far fewer restrictions on individuals and unincorporated associations than it does on corporations and unions. The Court noted that the differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.

The Supreme Court also considered the complex judicial review provisions of the FECA which are outlined in secs. 437g and 437h. Section 437h, the alternative method provided by Congress for obtaining expedited review of constitutional challenges to the Act, requires a district court to immediately certify all questions of the constitutionality of the Act to the court of appeals. The court of appeals decisions may be reviewed in the Supreme Court on direct appeal. The Act directs the courts of appeals and the Supreme Court to expedite the disposition of such cases. The Court declined to construe the sec. 437h judicial review provisions narrowly. The Court stated that there was no suggestion in the language or legislative history of sec. 437h which would indicate that Congress intended to limit the use of this provision to situations in which no sec. 437g enforcement proceedings are contemplated or underway. The Court stated that if Congress had intended to remove a whole category of constitutional challenges from the purview of sec. 437h, thereby significantly limiting the usefulness of that provision, it surely would have made such a limitation explicit.

Justice Blackmun in a concurrent opinion stated that "contributions to political committees can be limited only if those contributions implicate

the governmental interest in preventing actual or potential corruption, and if the limitation is no broader than necessary to achieve that interest."

Justice Stewart, the Chief Justice, Justice Powell and Justice Rehnquist joined in a dissent concerning the judicial review sections of the Act, i.e. secs. 437g and 437h. The Justices believed that where a party has been formally notified of a sec. 437g enforcement proceeding, it may not use the issues raised in that enforcement proceeding as a basis for an action under 437h.

Political Parties - National Rules v. State Laws

Democratic Party of United States v. La Follettee, 450 U.S. ____, 49 LW 4178, 67 L.Ed.2d 82, Doc. No. 79-1631, decided 2/25/81

The National Democratic Party Rules provide that only those who are willing to affiliate publicly with the Democratic Party may participate in the process of selecting delegates to the Party's National Convention. Wisconsin election laws permit voters to participate in the Democratic presidential candidate preference primary without regard to party affiliation and without requiring a public declaration of party preference. The voters in Wisconsin's open primary express their choice among presidential candidates for the Democratic Party's nomination, and they do not vote for delegates to the National Convention. Delegates to the National Convention are chosen separately after the primary at caucuses of persons who have stated their affiliation with the Party. However, these delegates are bound under Wisconsin's law to vote at the National Convention according to the results of the open primary election. Thus, although Wisconsin's open presidential primary does not itself violate National Party rules, the state's requirement that the results of the primary determine the allocation of votes cast by the state's delegates at the National Convention does violate National Party rules.

In May 1979 the State Party submitted to the Compliance Review Commission of the National Party its plan for selecting delegates to the 1980 National Convention. The plan incorporated the provisions of the state's open primary laws, and the Commission disapproved it as violating its public affiliation rule. The National Party indicated that Wisconsin delegates who were bound to vote according to the results of the open primary would not be seated. The State Attorney General brought suit, seeking a declaration that the Wisconsin delegate selection system was constitutional and that the National Party could not lawfully refuse to seat the Wisconsin delegation at the Convention.

The Supreme Court held that Wisconsin cannot constitutionally compel the National Party to seat a delegation chosen in a way that violates the Party's rules. The Court relied upon its decision in Cousins v. Wigoda, 419 U.S. 477 (1975), which stands for the proposition that the National Democratic Party and its adherents enjoy a constitutionally protected right of political association. This first amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the fourteenth amendment from infringement by any state. The freedom to associate for the common advancement

of political beliefs presupposes the freedom to identify the people who comprise the association and to limit the association only to those people.

The state defends its actions as a compelling interest in preserving the over all integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. However, all of these interests go to the conduct of the presidential preference primary and not to the imposing of voting requirements upon those who are eventually selected as delegates. Therefore, the State's interests do not justify its substantial intrusion into the associational freedom of members of the National Party.

Political Parties - Patronage Positions

Branti v. Finkel, 445 U.S. 507, Doc. No. 78-1654, decided 3/31/80.

Two assistant public defenders were about to be discharged because of Republican Party membership. They contended that the dismissal would violate their first and fourteenth amendment freedom of speech and association rights. The district court permanently enjoined the petitioner public defender (a member of the Democratic Party) from terminating respondents' employment on those grounds. 457 F. Supp. 1284 (SDNY 1978). The lower court, guided by Elrod v. Burns, 427 U.S. 347 (1976), held that this type of dismissal would be permitted only if assistant public defenders could be defined as policymaking, confidential employees. The district court decided that, although respondents had broad responsibility for particular cases that were assigned to them, they had 'very limited, if any, responsibility' for the overall operation of the public defender's office. The court of appeals affirmed in an unpublished memorandum opinion. 598 F.2d 609 (2d Cir. 1979) (table).

The Court affirmed the court of appeals. The Court disagreed with petitioner's contention that there was a requirement under Elrod which prohibited only those dismissals which resulted from an employee's failure to capitulate to political coercion. Petitioner argued that, so long as an employee is not asked to change his political affiliation or to contribute to or work for the party's candidates, he may be dismissed with impunity, even though he would not have been dismissed if he had had the proper political sponsorship. The Court held that for respondents to prevail in this action it was sufficient that they prove that they were discharged solely for the reason that they were not affiliated with or sponsored by the Democratic Party.

The Court stated that the "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." The Court agreed with the lower courts that the continued employment of an assistant public defender cannot properly be conditioned upon his or her allegiance to the political party in control of the county government because

the primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the state; whatever policy-making occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests.

Dissenting opinions were filed by Justices Stewart, Powell and Rehnquist. Justice Stewart believed that Elrod does not control the present case because the relationship between the public defender and his assistants is of a confidential nature necessitating mutual confidence and trust.

Justices Powell and Rehnquist joined in a dissent which rejected both Branti and Elrod. They stated that the Court's conclusion "largely ignores the substantial government interests served by patronage." They said that the "standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position."

Qualifications to Vote - Special Districts, Freeholder

Ball v. James, 451 U.S. ____, 49 LW 4459, 68 L.Ed. 2d 150, Doc. No. 79-1740, decided 4/29/81

In this case the plaintiffs challenged the constitutionality of Arizona statutes that limit voting in elections for directors of the Salt River Project Agricultural and Improvement Power District to landowners in proportion to the amount of land they own. The district, a governmental entity, stores and delivers untreated water to the owners of 236,000 acres of land in central Arizona, and, to subsidize its water operations, sells electricity to hundreds of thousands of people in an area including a large part of metropolitan Phoenix. Each plaintiff either rents land or owns less than one acre of land within the district and thus is denied the right to vote in district elections.

The district court upheld the constitutionality of the voting scheme, but the court of appeals reversed. The court of appeals, guided by two cases, Reynolds v. Sims, 377 U.S. 533 (1964), and Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973), based its argument on the one-person, one-vote principle that the Supreme Court has applied repeatedly since the Reynolds case. The court of appeals pointed out that in the Salyer case the Supreme Court held that that district's purpose was especially limited and that its activities disproportionately affected the district's landowners, thus justifying the voting restriction.

The Supreme Court reversed and remanded. The Court held that the district's purpose was sufficiently specialized and narrow and its activities bear on landowners so disproportionately as to release it from the strict demands of the Reynolds principle. The Court emphasized that the district does

not exercise broad governmental powers because it cannot impose ad valorem property taxes or sales taxes, cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services. The Court stated that even the district's water functions which comprise the primary and originating purpose of the district, are relatively narrow; the district and association do not own, sell, or buy water, nor do they control the use of any water they have delivered. The Court held that as in Salyer, the nominal public character of the district cannot transform it into the type of governmental body for which the fourteenth amendment demands a one-person-one-vote system of election. The Court stated that as in Salyer, the voting scheme for the district is constitutional because it bears a reasonable relationship to its statutory objectives.

A dissenting opinion was written by Justice White and joined by Justices Brennan, Marshall, and Blackmun. Justice White argued that the Court misapplied the limited exception recognized in Salyer on the strained logic that the provision of water and electricity to several hundred thousand citizens is a "peculiarly narrow function." Justice White stated that the district involved here clearly exercises substantial governmental powers, that the district is a municipal corporation organized under the laws of Arizona and is not, in any sense of the word, a private corporation. Justice White stated that the tax exempt status of the district's bonds and the fact that its property is not subject to state or local property taxation clearly indicates the governmental nature of the district's function.

Voting Rights Act- Section 5

City of Rome v. United States, 446 U.S. 156, Doc. No. 78-1840, decided 4/22/80.

After the coverage date of the Voting Rights Act of 1965, the Georgia General Assembly made several changes in Rome's election procedures. It enacted a majority vote requirement for City Commission and Board of Education general and primary elections and provided for the conduct and timing of runoff elections; reduced the number of wards from nine to three; provided that the Commission was to consist of one commissioner from one of three numbered posts in each of three wards; increased the size of the Board of Education from five to six; provided that the Board of Education was to consist of one member from one of two numbered posts in each of three wards and that each candidate had to be resident of the ward in which he ran; instituted staggered terms in the Commission and Board of Education; eased restrictions on voter qualifications; and transferred voter registration responsibility to the county. Further, sixty annexations were effected by either state law or by local ordinance.

Litigation ensued as a result of Rome's submitting an annexation to the Attorney General for approval pursuant to section 5 of the Voting Rights Act, 42 U.S.C. 1973c. This section provides essentially that, whenever a covered state or political subdivision covered by the Act seeks to make a change in its

voting laws, it must submit these proposed changes for approval to the U.S. Attorney General or to the United States District Court for the District of Columbia.

As a result of the investigation of this submitted annexation, the Attorney General discovered that the other annexations and voting changes had not been submitted for preclearance either to him or to the United States District Court for the District of Columbia. Rome then submitted all but one of these changes to the Attorney General for preclearance. During the administrative hearings, the Attorney General precleared the following: 47 of the 60 annexations; the reduction in wards from nine to three; the increase in size of the Board of Education from five to six; and the easing of restrictions on voter qualifications. The Attorney General did, however, object to several other changes, and plaintiffs filed suit. Plaintiffs contended that 1) Rome is entitled to "bailout" from coverage pursuant to section 4 of the Act, 2) that some or all of the objected-to changes have already been administratively precleared, 3) that section 5 is unconstitutional, and 4) that the disputed changes have neither the purpose nor the effect of denying or abridging the right to vote on the basis of race or color.

The Court ruled in favor of the United States. The Court held that Rome could not use section 4's bail-out procedure. Application of this section depends on whether the city is either a "State with respect to which the determinations have been made" under section 4(b) or "a political subdivision with respect to which such determinations have been made as a separate unit." Because section 4(b)'s coverage formula has never been applied to the city, the city does not fall within the definition of either term. Thus, a bail-out action to exempt the city must be filed by the state. In response to the city's argument that its electoral changes were precleared because of the Attorney General's tardy action, the Court stated that the sixty-day period within which the Attorney General must object to the proposed changes begins again when the submitting jurisdiction supplements its initial submission. Thus, the Attorney General's response in this situation was timely, and the changes were not precleared because of his allegedly tardy action.

City of Rome raised five issues of law to support its contention that the Voting Rights Act may not be applied to the electoral changes and annexations disapproved by the Attorney General. First, Rome argued that the changes should have been precleared because they had only a discriminatory effect and not a discriminatory purpose. Section 5 of the Act states that the Attorney General may clear a practice only if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (emphasis added). According to the Court, Rome's electoral changes could not be precleared because Congress plainly intended that a voting practice not be precleared unless both discriminating purpose and effect are absent.

The second issue of law raised by Rome was that the Voting Rights Act exceeds Congress's power to enforce the fifteenth amendment. To this argument the Court responded that under section 2 of the Amendment Congress may prohibit practices that do not violate section 1 of the Amendment so long as the prohibitions attacking racial discrimination in voting are appropriate. The Court

found that in this situation the Voting Rights Act's ban on discriminatory electoral changes is an appropriate method of promoting the fifteenth amendment's purposes. It was rational to conclude that it was proper to prohibit changes that have a discriminatory impact in jurisdictions with a history of intentional racial discrimination.

Advertising and Solicitation - Corporate Employees

International Association of Machinists and Aerospace Workers v. Federal Election Commission, No. 80-0354 (D.D.C. December 16, 1980)

In this case, cross-motions for summary judgment were filed under the Federal Election Campaign Act of 1971 (2 U.S.C. sec. 431 et seq.) (FECA) concerning solicitation of corporate employees by political action committees (PACS). Plaintiffs claimed that the Federal Election Commission (FEC) acted contrary to law in dismissing without investigation the administrative complaint that eleven corporations were violating 2 U.S.C. sec. 441b(b)(3) by soliciting political contributions under coercive conditions. Plaintiffs argued that the statutory interpretation adopted by the FEC raised three other issues which might be constitutionally defective by violating: (1) the first amendment rights of corporate employees by sanctioning "coercive" solicitations; (2) the fifth amendment rights of labor unions since unions "have no comparable economic power over thousands of career employees ..."; and (3) the first amendment rights of shareholders by compelling shareholders to finance coercive political solicitations. The plaintiffs requested a reversal of the FEC's dismissal of the administrative complaint, or, alternatively, they urged that the three constitutional questions be certified to the en banc court of appeals pursuant to 2 U.S.C. sec 437h.

Defendants moved to have the three constitutonal issues dismissed on the grounds that (1) they failed to state a claim upon which relief could be granted and (2) plaintiffs did not have standing to raise such issues.

After reviewing the FEC's decision, the court held that the Commission applied the proper legal standard in determining what constituted prohibited solicitation practices under the FECA and did not act contrary to law or abuse its discretion in dismissing the administrative complaint. Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972). The court stated that the FEC's dismissal of the complaint could be reversed only if "the agency acted in a manner which was arbitrary or capricious, was an abuse of discretion, or was otherwise contrary to law...." Hampton v. Federal Election Commission, Fed. Elec. Camp. Fin. Guide (CCH) para. 9036 at 50, 439 (D.D.C. 1977), aff'd, No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion).

The court ruled that (1) plaintiffs' claims on the constitutional issues were neither frivolous nor insubstantial as to warrant dismissal for failure to state a claim; and (2) plaintiffs have shown that there was a "distinct and palpable injury." Warth v. Selden, 422 U.S. 490, 501 (1975). However, the court believed that it should not rule on the issues and certified them to the appellate court. Buckley v. Valeo, 519 F. 2d 821, 835 (D.C. Cir. (1975), aff'd in part rev'd in part, 424 U.S. 1 (1976).

Advertising and Solicitation - Use of Broadcast Facilities

Belluso v. Turner Communications Corporations, 633 F.2d 393 (5th Cir. 1980)

Gubernatorial candidate who was denied use of broadcast facilities filed action for damages against a television station, alleging that a violation of equal opportunity, 47 U.S.C. sec. 315(a), and the first amendment had been committed.

Candidate contacted the television station to seek commercial broadcast time for political advertising. After informing the station that he planned to use hypnotic techniques in his advertisement, the station refused to air the proposed commercial. Candidate then filed action against the licensee of the station, alleging injury to his candidacy and reputation. The district court dismissed the suit and held that no private cause of action for damages was created under 47 U.S.C. sec. 315(a) and that no governmental action was involved which would give rise to a first amendment violation.

In affirming the lower court's decision, the court of appeals relied heavily on Cort v. Ash, 422 U.S. 66 (1975), to determine whether plaintiff had an implied cause of action. The court concluded from the four considerations outlined by the supreme court in the same case ((1) whether the statute creates a federal right in favor of the plaintiff; (2) whether there is any indication of legislative intent, explicit or implicit, either to create or deny such a remedy; (3) whether it would be consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law) that Congress did not intend 47 U.S.C. sec. 315(a) to be enforced through a private action for damages and that implication of such a remedy would be inconsistent with the purpose of the Act, which "was to protect the public interest in communications." Scripps-Howard Radio, Inc. v. FCC, 316 U.S. at 14.

Upon reviewing Kuzco v. Western Connecticut Broadcasting Co., 566 F.2d 384 (2d Cir. 1977), the court held that the conduct of the television station in refusing to air candidate's advertisement was private and not governmental action open to challenge under the first amendment. Additionally, the court held that the candidate did not show a constitutional right of access to the broadcast facilities that would constitute actionable violation of his first amendment rights. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

Apportionment and Redistricting - At-large Elections

Cross v. Baxter, 639 F.2d 1383 (5th Cir. 1981)

Plaintiff-appellant brought this action to have the at-large electoral system for selecting city councilmen in Moultrie, Georgia, declared illegal, as violative of the first, thirteenth, fourteenth, and fifteenth amendments as well as the Voting Rights Act (42 U.S.C. §§1971 and 1973). The district court, holding for the defendants, dismissed the complaint.

The court of appeals affirmed the district court's decision. The court referred to the opinion it had given on the same day, Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981). The court incorporated by reference the legal principles established in that case (see a digest of Buxton in this issue).

The court held that, in order to maintain a voting dilution action, a plaintiff must establish that the governmental body in question is unresponsive to its legitimate needs. The lower court concluded that plaintiffs had failed to establish that the Moultrie City Council was unresponsive to the particularized needs of the black residents of that city. The court based that finding, which the court of appeals agreed was amply supported and not clearly erroneous, on the following evidence: 1) black areas of the community have recreational programs and facilities equal to those in the predominately white areas; 2) public housing is substantially integrated; 3) the City Council has made "affirmative efforts" to increase voter registration and has long since desisted from its earlier practice of maintaining segregated voting lists; 4) the jail facilities are not operated on a segregated basis, and law enforcement is administered without regard to race, creed, or color; 5) under the current plan the black neighborhoods will have more paved streets than the white neighborhoods; and 6) the city has made an "active effort" to remedy any past disparity in the racial composition of its labor force.

Apportionment and Redistricting - At-large Elections

Jenkins v. Pensacola, 638 F.2d 1249 (5th Cir. 1981). Petitioned for certiorari 5/20/81, Doc. No. 80-1962.

The reapportionment plan for future city council elections in Pensacola, Florida, which had been approved by the district court, was appealed. This appeal presents the very narrow question of whether the district court properly approved a 7-3 plan for future City Council elections in Pensacola, Florida (a 7-3 plan is one with seven single-member districts and three at-large districts. The single-member district council members would be required to reside within the district and would be elected by the voters of the district. There would be no residency requirement for the at-large seats.).

The court of appeals affirmed the lower court decision. The court determined that the decision of whether to affirm or reverse was governed by whether the plan was properly characterized as a "legislative" or "court-ordered" plan. The court stated that, if the plan were classified as "legislative," then the district court properly deferred to the City Council and the plan is acceptable under Wise v. Lipscomb, 437 U.S. 535 (1978). The court stated that, if the plan is "court-ordered," then the presence of the three at-large seats makes the plan unacceptable under East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). The court stated that this plan appears to be legislative for the following reasons: 1) as in Wise, the district court reviewed the plan as a legislative plan; 2) federal law did not prevent the City Council

from redistricting itself; 3) the court told the City Council to reapportion itself; and 4) Pensacola, like Dallas, Texas, in Wise, is not covered under sec. 5 of the Voting Rights Act.

The court stated that, although it may be argued that the City Council delegated its authority to the district court when it passed an ordinance that the district court should determine if and when the plan would become effective, the district court did not accept the responsibility and simply approved the plan but did not order it into effect.

The court held that Wise did not make it essential that Pensacola go through the referendum process as is required under its Home Rule Charter. The court stated that Justice White's opinion in Wise indicates that once the at-large provision in the City Charter was declared unconstitutional, the city was free to exercise apparently inherent legislative powers to enact a new system without the necessity of following the set procedure which requires a referendum.

The court was also persuaded that Pensacola's actions were not so unresponsive to the need for reapportionment that the federal court should have enacted a court-ordered plan.

The court noted that the fourteen percent deviation from the one person-one vote ideal was acceptable because to reduce it in the context of a 7-3 plan would require undue distortion of precinct lines and contiguity. The court concluded that, because this is a legislative plan and because the council will have to be reapportioned after the 1980 decennial census, the fourteen percent deviation does not render the plan unconstitutional.

Apportionment and Redistricting - At-Large Elections

Leadership Roundtable v. City of Little Rock, 499 F. Supp. 579 (E. D. Ark. 1980)

Plaintiffs, black registered voters of Little Rock and Leadership Roundtable, an organization established to secure the rights of black citizens of Pulaski County, Arkansas, and to further the political, social, and civic interests of blacks, challenged the constitutionality of the at-large method of electing city directors in Little Rock. Plaintiffs alleged that the at-large election of city directors effectively diluted the voting power of blacks in violation of the first, thirteenth, fourteenth and fifteenth amendments. Plaintiffs asked the court to enjoin the defendants from conducting any further at-large elections and to require the establishment of single-member districts from which city directors will be elected.

The election scheme for Board of Directors has no residency requirements by wards but does have permanently designated positions numbered 1-7. Each candidate must specify the position for which he or she is running. Each Director is elected by the electors of the City at large. Elections for Board membership are non-partisan and they are determined on a plurality basis. Directors receive no compensation for their services. The Mayor and Assistant Mayor are elected by the Board from among its members.

The district court dismissed the complaint and denied the relief requested. The court held that under the general standard of Whitcomb v. Chavis, 403 U.S. 124 (1971), which was rearticulated in White v. Regester, 412 U.S. 755 (1973), the plaintiffs are not entitled to relief, since they have not demonstrated that they have less opportunity than other citizens or groups of citizens to participate in the political processes of Little Rock and to elect city directors of their choice. The court based this decision on certain findings of fact, some of which follow.

The court stated that the 1956 adoption of the city manager form of government was the result of a pervasive disenchantment with the mayor/alderman form of government which had been involved in widespread allegations of scandal and corruption in 1954-55. The court stated that there was no competent evidence to support the view that past or present city directors were controlled or manipulated by an unofficial "shadow government" composed of the members of a private organization known as "Fifty for the Future." The court also rejected the suggestion that the Board was somehow responsible for certain alleged post-1957 manifestations of discrimination in areas such as public and private schools, housing, and employment as well as population movements and state and federal highway and expressway decisions.

The court noted that approximately 90 percent of the black population of Little Rock lives in an identifiable geographic area referred to by the parties to this litigation as the "Black Voting Area" (BVA). The court noted that BVA residents generally though not always "bloc" vote for the black candidate for city director in races involving one black candidate and one or more white candidates. The court also noted that the evidence suggests strongly that race has not been a controlling factor in city director elections in the "white" voting areas since 1968. The court stated that the result of the bloc voting phenomenon in the BVA and the lack of bloc voting in the non-BVA is that the BVA has the potential for exerting more influence under the plurality at-large method of electing city directors than it would under a single-member-district system. The court also stated that racial campaign tactics have not been used in campaigns for positions on the Board. Another factor that the court considered was that successful white candidates for city director have generally considered support of the black community important and have actively campaigned to gain that support through personal appearances, signs, media or other means.

The court noted that since 1969 blacks have served 19.3 percent of the eighty-four position-years on the Board which is roughly proportionate to their estimated presence in the voting age population (20%). The court stated that of the 219,329 votes cast between 1972 and 1980 in elections involving black candidates 11.2 percent were cast by residents of the BVA; during the same period, blacks served for 12.25 of 56 position-years, or 21.9 percent of the representation on the Board.

The court also discovered that in 1974 the Board formally adopted Equal Employment Personnel Policies for the city. In 1977, the Board adopted

an affirmative action plan regarding employment by the city. In 1977, the Board also adopted the goal that 50 percent of its appointments to city boards and commissions would be other than white males. Little Rock took affirmative steps to apply for participation in the Model Cities Program and also received federal Community Development Block Grant funds. These funds, approximately $30 million, have been spent in predominately black areas or in areas having significant black populations. The court noted that overall the predominately black areas of Little Rock have received far more than their proportionate share of funds and services controlled by the decisions of the city's Board of Directors.

Apportionment and Redistricting - At-large Elections

Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981). Appealed U.S. Sup. Ct. 6/12/81 sub nom. Rogers v. Lodge, Doc. No. 80-2100

Plaintiffs-appellees, all black residents of Burke County, Georgia, brought this action to have that county's system of at-large elections declared invalid as violative of the first, fourteenth and fifteenth amendments and the Voting Rights Act (title 42 U.S.C. §§1971 and 1973). The district court held for the plaintiffs on the grounds that the at-large election process was maintained for the purpose of limiting black access to the political system. The district court also held that, although the state policy behind the at-large election system was neutral in origin, this policy had been subverted to invidious purposes. The district court ordered that the existing system of at-large elections be abandoned and that the county be divided into five districts with each district electing one county commissioner.

The court of appeals affirmed the judgment of the lower court. The court stated that the Supreme Court's decision in Mobile v. Bolden, 446 U.S. 55 (1980), contained certain ambiguities which requires that an attempt be made to construe it in a manner consistent with other precedents of the Supreme Court. The court reviewed Supreme Court decisions and decisions of this court prior to Bolden. The court also set out in detail the positions taken by the Justices in their various opinions in Bolden. The court attempted to reconcile Bolden with prior decisions and attempted to establish a workable rule to follow.

The court stated that after Bolden five Supreme Court Justices believe that the fifteenth amendment creates a right of action in voting dilution cases. The court stated that after Bolden the use of the Zimmer criteria is sound to the extent that the inquiry focuses on the primary question of discriminatory purpose. The court stated that the Supreme Court's decision in Bolden was simply that the evidence adduced was insufficient to allow an inference of discriminatory purpose.

The court found that the lower court had correctly included a reliance not only on the criteria presented in Zimmer v. McKeithen, 485 F.2d 1297

(5th Cir. 1973) (en banc), aff'd. on other grounds, sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), but also evaluated the case in light of "similar factors" set out by this court in Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.), cert. denied, 434 U.S. 968 (1977).

The court held that the district court's finding of the county commissioners' unresponsiveness to the particularized needs of the black community was correct. This unresponsiveness was demonstrated by: 1) allowing some blacks to continue to be educated in largely segregated and clearly inferior schools; 2) failing to hire more than a token number of blacks for county jobs, and paying those blacks hired lower salaries than their white counterparts; 3) appointing extremely few blacks to the numerous boards and committees that oversee the execution of the county government, particularly those groups whose function is to monitor agencies of the county government that work primarily with blacks; 4) failing to appoint any blacks to the judge selection committee, with respect to the appointment of a Judge for the Burke County Small Claims Court, despite the fact that most of the defendants in that court are black; 5) making road paving decisions in a manner so as to ignore the legitimate interests of the county's black residents; 6) forcing black residents to take legal action to protect their rights to integrated schools and grand juries and to register and vote without interference; and 7) participating in the formation of and contributing operating funds for a private school established to circumvent the requirements of integration. The court stated that the county commissioners, acting in their official capacity, have demonstrated such insensitivity to the legitimate rights of the county's black residents that it can only be explained as a conscious and willful effort on their part to maintain the invidious vestiges of discrimination.

The court believed that the district court finding, that previous acts of official discrimination had a significant negative impact on the opportunity of blacks in Burke County to exercise their right for effective participation in the electoral process, was not clearly erroneous. The court noted this negative impact in the following areas: 1) black voter registration; 2) past and present bloc voting; 3) inadequate and unequal educational opportunities, both in the past and the present; and 4) the past and present operation of the county's Democratic primary system and in the Georgia law making it more difficult for blacks to serve as chief registrar in a county.

The court found that the district court finding, that the depressed socio-economic conditions of the black citizens was caused at least in part by past discrimination and that such depression had a direct negative impact on the opportunity for blacks to participate effectively in the electoral process, was not clearly erroneous.

The court stated that the lower court finding of a lack of access to the political process was not clearly erroneous. The district court based its conclusions of lack of access on the following criterion:

1) the inability of blacks to participate in the operation of the local Democratic party, 2) the County Commissioners' failure to appoint blacks to local governmental committees in meaningful numbers, and 3) the social reality that person-to-person relations, necessary to effective campaigning in a rural county, was virtually impossible on an interracial basis because of the deep-rooted discrimination by whites against blacks.

The last primary factor considered by the lower court was the state policy behind the at-large election system. The court stated that the finding that the policy, though neutral in origin, had been subverted to invidious purposes was not clearly erroneous. The lower court had noted that Burke County's representatives in the state legislature had always been white, and that the county has retained a system which has minimized the ability of Burke County blacks to participate in the political system.

The lower court also considered several factors which enhance the opportunity to use an electoral system for invidious purpose. The court agreed with the lower court's conclusion of law that the very large size of Burke County tended to impair the access of blacks to the political process. The court also agreed with the lower court that the majority vote requirement enhanced the likelihood that the electoral system could be used for discriminatory purposes. Finally, the court agreed with the lower court's decision that the fact that Burke County has no residency requirement despite the fact that candidates must run for numbered posts enhances the denial of access to the electoral system to blacks.

Apportionment and Redistricting - At-large Elections

Thomasville Branch of the NAACP v. Thomas County, Georgia, 639 F.2d 1384 (5th Cir. 1981)

Plaintiff-appellants brought this action to have the at-large electoral system in Thomas County, Georgia, declared invalid on the grounds that it diluted the vote of black citizens in violation of the first, fourteenth and fifteenth amendments as well as the Voting Rights Act (42 U.S.C. §§1971 and 1973). The district court, apparently considering plaintiffs contentions only as to the fourteenth and fifteenth amendments, held for the defendant.

The court of appeals reversed and remanded the decision of the district court. The court stated that its decision was based on the proper interpretation that this court gave in Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), to the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55 (1980) (See digest in this issue). The court stated that the lower court decision was reversed because Bolden had been erroneously interpreted to mean that proof of the criteria formulated in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), e.g. where a minority can demonstrate a lack of access to the process of slating candidates, unresponsiveness of legislators to their particular interests, tenuous state policy underlying the preference for multi-member or at-large districting, etc., is not adequate to allow an inference to be drawn that the electoral system was being maintained for discriminatory purposes.

The court stated that the final resolution of this case depended entirely on a conclusion of law regarding the following lower court findings: 1) blacks were not denied access to the political process, in terms of voter registration; 2) the county commission is unresponsive to the needs of blacks in Thomas County; 3) the state policy for allowing at-large elections is not discriminatory; and 4) past discrimination does adversely affect the opportunity of blacks to effectively participate. The court was satisfied that an examination of the record revealed that none of these findings was clearly erroneous.

The court also encouraged the district court to consider factors other than those set out in Zimmer, such as depressed socio-economic conditions and such "enhancing factors" as the size of the county, a history of bloc voting, anti-single shot provisions, requirements that candidates run from numbered posts, and majority vote requirements in primary elections. See Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977).

Apportionment and Redistricting - County Plan

Wyche v. Madison Parish Police Jury, 635 F.2d 1151 (5th Cir. 1981)

Madison Parish, Louisiana, was reapportioned under a court order in 1971. After a court drew its plan and the 1971 elections were held, two low income housing projects were built outside the town limits of Tallulah. More than 700 persons, about five percent of the total parish population, lived in these projects. Although the parish is essentially rural, sixty-six percent of the total population lives in the town of Tallulah. This town area is populated predominately by black citizens, while the more sparsely populated rural area is preponderantly white. In July, 1972, the town of Tallulah annexed the area in which the projects were located. Although the two low income projects were physically located in what had been a predominantly rural ward, the residents of those projects were registered to vote in the town ward. This de facto change of district lines was made without either court approval or submission to the United States Department of Justice as required by sec. 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c). The result was to increase the population of the town ward in relation to the other districts, thus creating underrepresentation for the residents of that ward on the Police Jury (the local governing body) and the School Board. The plaintiffs petitioned the federal court for a new redistricting.

The district court appointed a qualified demographer to make a parish census and to draft a plan of reapportionment composed of single-member districts. The demographer prepared three plans. The district court selected plan 3 which proposed eight districts, five of which had a black majority population. The deviation from median population in this plan was 4.11 percent. Plan 3 represented a conscious effort by the demographer to devise a plan containing three rural districts.

The plaintiffs contend that, while plan 3 proposes five districts with a majority black population, black candidates could be elected from only three

of those districts because the black population figures in districts 1 (53%) and 3 (62%) do not reflect voting strength. The plaintiffs sought to introduce evidence to the district court to prove that this plan would result in the election of only three black persons, but the court ruled the evidence inadmissible. Plaintiffs appealed, urging the court of appeals to adopt a rule that to remedy demonstrated discrimination against black voters a court must adopt the plan most likely to result in proportionate election of black representatives.

The court of appeals affirmed the lower court's decision. This affirmation seemed to reflect the fact that elections had been held, no new elections were scheduled in the immediate future, and, more importantly, an official census has been taken and its results would shortly be released. The court stated that, if, within six months from the date the 1980 census data for Madison Parish is officially published, the Police Jury and School Board have not reapportioned themselves, the plaintiffs may apply for further relief. The court noted that any such reapportionment would be subject to the requirements of sec. 5 of the Voting Rights Act.

The court cited Reynolds v. Sims, 377 U.S. 533 (1964), in which the one person, one vote principle commands that consituencies include approximately equal numbers of voters so that the weight of individual votes in larger districts will not be substantially diluted. The court noted that in devising a reapportionment plan a court is held to equitable standards of voting equality more stringent than those governing a legislature. Connor v. Finch, 431 U.S. 407 (1979). The court stated that Chapman v. Meier, 420 U.S. 1 (1979), requires that a judicially-mandated reapportionment plan must ordinarily achieve the goal of population equality "with little more than de minimis variation." The court stated that the total deviation factor in the court adopted plan 3 (4.11%) was sufficiently de minimis to satisfy the one person, one vote precepts as applied to court-ordered plans.

The court stated that neither the fifteenth nor the fourteenth amendment commands proportional racial or ethnic representation. In the absence of an invidious purpose, a state is constitutionally free to draw political boundaries in any manner it chooses. City of Mobile v. Bolden, 446 U.S. 55 (1980). The court cited Marshall v. Edwards, 582 F.2d 927 (1978), in which it was stated that, even as remedial measures, court plans should not aim at proportional representation except for some impelling reason such as where the correction of historic racial discrimination is involved. In this case historic racial discrimination was alleviated by a prior court order.

The court stated that the district court should have accepted the proffer of evidence to show both voter registration and voting age population. The Supreme Court has recognized in Gaffney v. Cummings, 412 U.S. 735 (1973), that total population may not actually reflect that body of voters whose votes must be counted and weighed for purposes of reapportionment.

Apportionment and Redistricting - Manipulation of District Lines

Zimmer v. Edwards, 629 F.2d 425(5th Cir. 1980), Certiorari denied 6/15/81 sub nom. East Carroll Parish Police Jury v. Marshall

This case is on remand following reversal of a decision of the district judge ordering a reapportionment plan for a Louisiana parish that reached an improper goal of racial proportionality brought about by manipulation of district lines. See Marshall v. Edwards, 582 F.2d 927(5th Cir. 1978). The court stated that, if the plan passes the dilution test (which determines if probable results of the plan are such that minority strength is not diluted, Zimmer v. McKeithen, 485 F.2d 1297(5th Cir. 1973)), race is no longer an important factor. The court explained that the district boundaries should be drawn with compactness, contiguousness and the preservation of natural, political and traditional boundaries in mind, not racially balanced representation.

The court held that on remand the trial judge should evaluate any plans submitted in light of the 1980 federal census results, devise its own plan, or order new plans to be developed and adopt or approve a plan following the instructions set out in Marshall. The court stated that the trial judge should avoid approving a plan that has odd-shaped districts explainable only in terms of racial proportionality.

Boards and Commissions - FCC Ruling - Equal Opportunity

Kennedy for President Committee v. Federal Communications Commission, 636 F.2d 417 (D.C. 1980)

In this case, petitioner challenged a Federal Communication Commission (FCC) decision which denied a request for an "equal opportunity" to respond to statements made at a press conference by President Carter and which had been carried live in prime time by the four major American television networks on February 13, the eve of the 1980 presidential primary in New Hampshire. Petitioner claimed that the Commission gave up a duty to apply the equal-opportunity mandate of sec. 315(a) of the Communications Act of 1934. Petitioner also claimed that its first amendment rights of free speech were violated.

The court affirmed the Commission decision. The court agreed with the Commission that the presidential press conference fell within exemption four of sec. 315(a). Exemption four immunizes the "appearance by a legally qualified candidate on any ... on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)." The court noted that for more than two decades after the enactment of the exemptions the Commission read them as applicable only when the candidate's appearance was not the central focus of the broadcast but was merely incidental to an independently newsworthy event. The court noted that this interpretation was reversed in 1975 when the Commission held that candidates' press conferences were encompassed by exemption four. Aspen Inst. Program on Communications &

Soc'y, 55 F.C.C.2d 697 (1975), aff'd sub nom. Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976), cert. denied, 429 U.S. 890 (1976).

The court was satisfied that the Commission had examined the February 13 press conference, using the same criteria as was employed in Chisholm, before determining that it was exempt from the equal opportunity section. These criteria are: 1) whether the conference is broadcast live, 2) whether it was based upon the good faith determination of the broadcaster that it is a bona fide news event, and 3) whether there is evidence of broadcaster favoritism.

The court disagreed with petitioner's argument that the actual content of a candidate's press conference should determine whether the equal opportunity obligation is activated. The court stated that one of the main purposes of sec. 315(a) would be frustrated by requiring the Commission to make subjective judgments on the political content of a broadcast program. The court also stated that it found eminently reasonable, the Commission reading of the section to require broadcasters to appraise newsworthiness prior to broadcast of the event. Were the Commission to hinge operation of the equal opportunity provision on after-the-fact re-examination of the event, the purposes of the section would be nullified. Broadcasters could never be sure that coverage of any given event would not later result in equal-opportunity obligations to all other candidates; as a result, broadcaster discretion to carry or not to carry an event would be seriously, if not fatally, crippled.

The court found no merit in petitioner's first amendment contention. The court held that in the area of broadcasting the interest of the public is the chief concern. The court stated that Congress specifically exempted coverage of a number of political news events in the belief that an overly-broad statutory right of access would diminish, rather than augment, the flow of information to the American public.

Boards and Commissions - FCC Ruling - Right of Access

Kennedy for President Committee v. Federal Communications Commission, 636 F.2d 432 (D.C. 1980)

The Kennedy for President Committee petitioned the court to review the Federal Communications Commission decision concerning Senator Kennedy's request for network time to respond to the following broadcasts: 1) a half-hour, 4:00 to 4:30 p.m., speech by President Carter; and 2) a 9:00 to 9:30 p.m. presidential press conference. Both of these media events took place on March 14, 1980, only four days before the 1980 Illinois presidential primary. Petitioner charges that these programs saturated the American public with the President's views on the economy. Petitioner claims that sec. 312(a)(7) of the Communications Act of 1934 and the well-known fairness doctrine separately entitle the Senator to free time for telecasts of his own ideas and proposals on economic conditions. The three major commercial television networks construed petitioner's request as an invocation of the equal-opportunity command of sec. 315(a) and said that the telecasts were exempt from that requirement because they were on-the-spot coverage of bona fide news events.

The court affirmed the decision of the Commission. The court held that the Communications Act envisions integration of secs. 312(a)(7) and 315(a) in an uncomplicated scheme of access to broadcast facilities by candidates for public office.

The court stated that sec. 312(a)(7) of the Communications Act provides that broadcasters may fulfill their obligation of "reasonable access" either by allotting free time to a qualified candidate for federal office or by selling the candidate time at prescribed rates. The court noted that the petitioner has never claimed that he was denied an opportunity to buy time. The court stated that sec. 312(a)(7) entitles a candidate to free time only if and when a broadcaster refuses to sell the candidate a reasonable quantity of time; free time is not required either from reading statutory language or from the legislative history.

The court stated that a candidate cannot secure broadcast time, free or otherwise, by reading sec. 312(a)(7) as just another equal-opportunity provision. Nothing in the history of the section's evolution or its administrative interpretation serves to validate that interpretation. The court noted that, if sec. 312(a)(7) were construed as automatically entitling a candidate to responsive broadcast access whenever his opponent has appeared on the air, sec. 315(a)'s exemptions (the four types of bona fide news events) would soon become meaningless. The court added that statutes are to be interpreted, if possible, to give operation to all of their parts and to maintain them in harmonious working relationship.

The court agreed with the Commission in finding that the fairness doctrine had not been violated. This doctrine is violated only on a showing that the broadcaster's decision was unreasonable or in bad faith. Compliance with the fairness doctrine is to be determined on the basis of the broadcaster's programming in its entirety. The court held that a prima facie case under the fairness doctrine must offer much more complete evidence than was offered that the networks have not balanced their coverage of controversial issues. Finally, the court agreed with the Commission that under the fairness doctrine, no specific individual or group is entitled to present the contrasting viewpoints.

Boards and Commissions - FEC Disclosure of Investigation Information

Federal Election Commission v. Illinois Medical Political Action Committee, 503 F. Supp. 45 (N.D. Ill. 1980).

In this case the Federal Election Commission (FEC) requested that the court dissolve a protective order imposed on the FEC which prohibited the FEC from disclosing documents submitted to it by the Illinois Medical Political Action Committee (IMPAC) during the course of an investigation. The FEC and IMPAC entered into a conciliation agreement which terminated the investigation. The FEC argues that entry of this agreement requires dissolution of the protective order.

The court granted the FEC motion. The court noted that the legislative history of the confidentiality provision of the Federal Elections Campaign Act (2 U.S.C. § 437g(a)(12)(A) was not meant to conceal the results or the contents of an investigation, but rather that it was meant to avoid adverse speculative publicity during the pendency of an investigation. The court also stated that the statutory provision (2 U.S.C. § 437g(a)(4)(B)(i)), which states that no information derived in connection with a conciliation attempt by the FEC can be made public, did not apply to material supplied to the FEC before the conciliation began. The court stated that the conciliation process referred to in this provision is a phase of the FEC proceedings which is normally entirely distinct from the investigative-discovery phase and that sec. 437g(a)(4)(B)(i) cannot plausibly be construed as protecting the documents currently covered by this court's order.

Boards and Commissions - Usurpation of Executive Power

Parcell v. Governmental Ethics Commission, 626 F.2d 160 (10th Cir. 1980)

This case, certified by the district court to the U.S. court of appeals, involves determination of whether the Government Ethics Commission constitutes a usurpation of executive power by the legislative branch of the government and thereby violates the doctrine of separation of powers as recognized as part of the Kansas State Constitution. Plaintiff, accused of violating the Campaign Finance Act (K.S.A. 1979 Supp. 26-4101 et seq.) by failing to prepare and file reports relative to expenditures in a county election, brought action challenging the constitutionality of various provisions of the Campaign Finance Act, including the composition of the Governmental Ethics Commission.

The court agreed with the trial judge in concluding that the statute does not violate the principle of separation of powers. The Commission has the power to adopt rules and regulations for the administration of the Campaign Finance Act (K.S.A. 1979 Supp. 25-4119a) but cannot enforce compliance or penalize violators. The Commission only investigates and reports to those who have the authority to penalize and enforce. This blending of powers does not constitute a violation of separation of powers.

The court referred to State v. Bennett, 547 P.2d 786 (1976), and Parcell v. Kansas, 486 F. Supp. 2174 (D. Kan. 1979), in concluding that the Governmental Ethics Commission, the majority of which is appointed by legislators (five appointed by the governor, two by the president of the Senate, two by the speaker of the House of Representatives, one by the minority leader of the Senate, K.S.A. 1979 Supp. 25-4119a), does not constitute a usurpation of executive power by the legislative branch of the government. It was found that these appointments indicated the intent by the legislature to establish a balanced commission (At least five but no more than seven of the members would be of the same political party as the executive.) and a cooperative venture rather than the usurpation of power by the legislative branch of the government and does not violate the doctrine of separation of powers as is recognized by the Kansas Constitution.

Campaign Financing - Contribution - Draft Candidate Groups

FEC v. Machinists Non-Partisan Political League, No. 80-1136, 49 LW 2751 (D.C. Cir. May 19, 1981). Petitioned for certiorari 8/14/81, Doc. No. 80-299.

The Machinists Non-Partisan Political League (MNPL), a political arm of the International Association of Machinists and a registered multi-candidate political committee with the Federal Election Commission (FEC), appealed a district court order which enforced a subpoena issued to them by the FEC. The subpoena was part of an FEC investigation into the activities of nine so-called "draft-Kennedy" organizations which operated during the first ten months of 1979. The subpoena ordered production of all documents and materials relating to communications between MNPL and other "draft Kennedy" groups as well as all documents and materials relating to meetings, discussions, correspondence, or other internal communications whereby MNPL determined to support or oppose any individual in any way for nomination or election to the office of President in 1980. MNPL was also ordered to provide a list of every official, employee, staff member, and volunteer of the organization, along with their respective telephone numbers.

The court of appeals held that the FEC's subpoena exceeded the Commission's subject matter jurisdiction. The court vacated the enforcement order of the district court. The court held that the highly deferential attitude which courts usually apply to business related subpoena enforcement requests from agencies whose subject matter jurisdiction is unquestioned, has no place where political activity and association never before subject to bureaucratic scrutiny form the subject matter being investigated. The court stated that this investigation into "draft-candidate" groups represents an unprecedented assertion of subject matter jurisdiction for the FEC. The court was concerned that the delicate nature of the materials demanded in the subpoena represented the very heart of activity protected by the first amendment, i.e. political expression and association concerning federal elections and office holding. The court said that release of such information to the government carried with it a real potential for chilling the free exercise of political speech and association.

The court cited Buckley v. Valeo, 424 U.S. 1 (1976), in which the Supreme Court explicitly recognized the potentially vague and overbroad character of the "political committee" definition in the context of the Federal Election Campaign Act's (FECA) disclosure requirements and limited it appropriately. The Court found that FECA's limitation on contributions to candidates and their political committees was "focus[ed] precisely" on the "narrow aspect of political association where the actuality and potential for corruption have been identified. . . ." The court stated that where a group's activities are not related in any way to a person who has decided to become a candidate, the "actuality and potential for corruption" are far from having been "identified." The court stated that although draft groups vary widely in character they do have in common the aim to produce some day a candidate acceptable to them, but they have not yet succeeded and that therefore they are not promoting a "candidate" for office, as Congress uses that term. The Supreme Court

in Buckley has found that unless a group is "under the control of a candidate or [its] major purpose . . . is the nomination or election of a candidate, it cannot constitute a "political committee" under the Act. The court concluded that, since the FEC lacks jurisdiction to control draft group contributions, the district court should not have enforced the subpoena.

The court recommended that in those cases where the FEC asserts a need for additional factual information before a decision on the jurisdictional question can reasonably be made the district court might consider the adoption of a two-step procedure similar to the one used in Reader's Digest Ass'n v. FEC, 509 F. Supp. 1210 (1981). This procedure was designed to strike an appropriate balance between the need for effective investigations and the preservation of first amendment liberties. Initially, the court may enforce a subpoena limited to that information which would allow the FEC to ascertain whether it does or does not have jurisdiction. If jurisdiction for a full investigation appears to exist, a broader subpoena seeking evidence of a violation may then be enforceable.

Campaign Financing - Contribution - Limitation

Bread Political Action Committee v. Federal Election Commission, 635 F.2d 621 (7th Cir. 1980). Cert. granted 7/2/81, Doc. No. 80-1481

Plaintiff trade associations brought this suit under sec. 437h of the Federal Election Campaign Act (FECA). See Bread Political Action Committee v. FEC, 591 F.2d 29 (7th Cir. 1979). Plaintiffs were seeking a declaration that sec. 441(b)(4)(D) of the FECA is unconstitutional for infringing their right of association guaranteed by the first amendment and for depriving them of due process of law in violation of the fifth amendment of the Constitution.

Section 441b(b)(4)(D) is one of the 1976 permissive exceptions to sec. 441b(a) of the Act, which prohibits contributions or expenditures by "any corporation whatever" or "any labor organization" in connection with a federal election. Section 441b(b)(4)(D) permits a trade association or its segregated political fund to solicit contributions from the stockholders and executive and administrative personnel of its member corporations and their families, provided that such solicitation has been approved by the member corporation and provided that the member corporation has not approved a solicitation from any other trade association for the same calendar year.

The court of appeals held that sec. 441b(b)(4)(D) does not violate the first or fifth amendment of the Constitution and remanded the case to the district court for further proceedings consistent with this finding.

The court stated that association and solicitation are not protected absolutely under the first amendment but may be subject to governmental regulation where there is an overriding state interest in such regulation. Buckley v. Valeo, 424 U.S. 1 (1976). The court stated that the legislative objective served by

the FECA is the elimination of and the appearance of corruption in the federal election process. The court held that sec. 441b(b)(4)(D) serves that function as well as protecting individuals from economic coercion. The court explained that, because there is no limit on the number of trade associations to which a corporation may belong, the restrictions serve to prevent a proliferation of trade associations and solicitations which would in turn undermine the purpose of the Act's restrictions on the use of corporate treasuries in federal elections.

The court disagreed with plaintiff that the amount of solicitation allowed to trade associations is too limited to withstand constitutional scrutiny. The court noted that trade associations or their political action committees were free to express or disseminate political ideas and information in the following ways: 1) trade associations are free to solicit any individual to join their trade association; once an individual joins (including shareholders and executive or administrative employees or its member corporations), he or she may be solicited for contributions without limitation; 2) political committees are free to accept contributions made to them by shareholders and employees of member corporations without solicitation on the trade associations' or their political committees' part; 3) trade associations and their political committees are free to urge any individual to support or oppose a particular candidate and to contribute directly to a candidate's campaign fund.

The court held that the equal protection guarantee subsumed in the fifth amendment has not been violated because, to the extent that trade associations are treated differently from other corporations and other membership organizations, the difference lies in the fact that trade associations are not limited as are the others to soliciting their own shareholders, employees or members. The court also stated that the somewhat dissimilar treatment of corporations, labor organizations, membership organizations and trade associations under sec. 441b(b)(4) follows from the fact that each of the different groups has a different structure and a different kind of constituency and that each requires somewhat different regulation to curb abuses that the Act was intended to halt.

Finally, the court held that the terms "solicitation" and "trade association" are frequently used and well understood terms and it is unnecessary that sec. 441b(b)(4)(D) define them.

Campaign Financing - Contribution - Limitations

Federal Election Commission v. California Medical Association, 502 F. Supp. 196 (N.D. Cal. 1980)

Suit was brought by the Federal Election Commission (FEC) for alleged violations of the Federal Election Campaign Act (2 U.S.C. sec 431 et seq.). The FEC claimed that during the years 1976, 1977, and 1978 the California Medical Association (CMA) made contributions to the California Medical Political Action Committee (CALPAC) in excess of the $5,000 limit (as stated in 2 U.S.C. sec. 441a(1)(C)) and that the Committee knowingly accepted such contributions in violation of 2 U.S.C. sec. 441a(f).

Defendants sought a declaration that the $5,000 limit on contributions did not apply to in-kind contributions by unincorporated associations and, if it did, that the statute was unconstitutional because it deprived them of their first amendment right to free speech and their fifth amendment right to equal protection of the law. (CALPAC is a nonpartisan political committee formed by the CMA and has reported its affiliation in compliance with 2 U.S.C. secs. 433, 431(4) and 431(7).)

The district court certified the constitutional questions to the appellate court. The appellate court rejected CMA's and CALPAC's arguments and held that the $5,000 limitation did not infringe on their constitutional rights.

The issue then left before the district court was the determination of the allocation of contributions to CALPAC that were used for influencing federal elections as well as other purposes. CMA did not specify the use to which CALPAC should put the donations and CALPAC in turn had no guidelines for the distribution of its funds. The court had to determine whether the contributions did indeed exceed the Act's $5,000 limitation. Three alternative methods were therefor before the court: (1) presume that all contributions to a political action committee are made for the purpose of influencing federal elections; (2) require the FEC to prove that each contribution was made for the specific purpose of influencing federal elections; and (3) allocate the dollar value of CMA's contributions according to the relative proportions of CALPAC's federal and nonfederal activities.

The court found that even under the method most favorable to the defendants (CMA's contribution allocated according to state and federal contributions) the contribution limitation was exceeded. The court, therefor, held that CMA violated 2 U.S.C. sec. 44la(a)(1)(C) and that CALPAC violated 2 U.S.C. sec. 44la(f) by knowingly accepting such excessive contributions.

Campaign Financing - Contribution - Limitations

Federal Election Commission v. Florida for Kennedy Committee, 492 F. Supp. 587 (S.D. Fla. 1980)

Summary proceeding was brought by the Federal Election Commission (FEC) to enforce its subpoena for Florida for Kennedy Committee (FFKC) documents. (The FFKC was formed to persuade Senator Edward Kennedy to seek the Democratic nomination for Presidency of the United States. The FFKC registered with the FEC, filed contribution and expenditure reports, and ceased operations once Senator Kennedy announced his candidacy.) The subpoena was brought after the Carter-Mondale Presidential Committee, Inc., filed a complaint with the FEC alleging that the FFKC, along with other "draft Kennedy" committees, violated the Federal Election Campaign Act (the Act), 2 U.S.C. sec. 44la(a)(1)(C) (no individual or committee may contribute in excess of $5,000 to any group of affiliated committees supporting a single candidate). The FEC, upon concluding that the Act had been violated, was required to investigate and issued a subpoena. The FFKC refused to comply with the FEC's subpoena, alleging that (1) the subpoena was unconstitutional and (2) the constitutional considerations

require the FEC to meet a heavy burden before enforcement. Both of these objections rest on the first amendment and its guarantees of free speech and association. The FEC petitioned the court for an order to show cause why the subpoena should not be enforced.

The subpoena was not aimed at directly regulating political speech but at investigating the activities and affiliation of the FFKC. In determining whether a first amendment objection may be made to the enforcement of this subpoena, the court had to address two questions: (1) whether the activities of a political organization are protected and (2) whether those activities may be investigated. Using both Buckley v. Valeo, 424 U.S. 1 (1976), and NAACP v. Alabama, 357 U.S. 449 (1958), the court concluded that the subpoena could not be enforced, quoting that "abridgment of [first amendment] rights, even though unintended, may inevitably follow from varied forms of governmental action." Id. at 461. The court held that in following detailed procedures in enforcing the subpoena it was necessary to strike a balance between the FEC's need for speedy investigation and the FFKC's first amendment rights.

Campaign Financing - Contributions - Limitations

Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980). Petitioned for certiorari 12/8/80 sub nom. Firestone v. Dade Voters For a Free Choice, Doc. No. 80-969 and sub nom. Firestone v. Let's Help Florida, Doc. No. 80-970.

Complaint was filed to challenge the constitutionality of the Florida statutes that restrict the size of contributions that an individual could contribute to any single political committee in a referendum election. The district court declared the statutes unconstitutional and the plaintiffs appealed. The appeal was taken and consolidated with another appeal of a judgment which held unconstitutional the limitation on contributions to the committees organized in connection with countywide elections.

Plaintiffs alleged that sec. 106.08(1)(e) and 106.08(1)(d) of the Florida Statutes Annotated violated the first amendment right of persons by restricting the size of contributions to a single political committee in a referendum election. In Buckley v. Valeo, 424 U.S. 1, 26 (1976), the Supreme Court recognized as a justification for restricting contributions the prevention of quid pro quo corruption between a contributor and a candidate.

The court of appeals held that the actual or apparent corruption of candidates, which the Supreme Court found so compelling in Buckley, does not justify restrictions upon political contributions in referendum elections. People decide the pertinent political issue for themselves when voting on a referendum proposal. The court held that the district court properly enjoined enforcement of the statutes.

Campaign Financing - Contributions - National Bank

Federal Election Commission v. Lance, 635 F.2d 1132 (5th Cir. 1981). Certiorari denied 7/2/81, sub nom. Lance v. Federal Election Commission, Doc. No. 80-1740

Appellant, a candidate for the Governor of Georgia in 1974, appealed a district court enforcement order of a Federal Election Commission (FEC) subpoena which required the defendant to produce certain documents pertaining to possibly illegal political campaign bank loans, some in the form of overdrafts, which the FEC had "reason to believe" violated the Federal Election Campaign Act (FECA) (2 U.S.C. § 441b). The Enforcement and Compliance Section of the Comptroller of the Currency of the United States began an investigation nine months after the appellant lost the primary election. The investigation focused on the financial dealings between the appellant's campaign committee and the two banks where the appellant had a checking account. The Comptroller determined that the banks had repeatedly permitted the campaign committee to overdraw its accounts to pay campaign expenses. The overdrafts were still being repaid as late as a year and a half after the campaign, and the banks were paid no interest for the use of their money.

Appellant argued that sec. 441b violated first amendment free speech rights in prohibiting banks from making loans or permitting overdrafts in connection with an election and out of the ordinary course of business. Appellant also argued that the equal protection component of the fifth amendment is violated by sec. 441b in that greater restrictions are imposed on national banks than on certain other entities.

The court of appeals sitting en banc affirmed the district court's order enforcing the subpoena. The court stated that the Supreme Court's opinion in Buckley v. Valeo, 424 U.S. 1 (1976), indicates that there exist important differences, for purposes of first amendment analysis of statutes regulating campaign speech, between "contributions" and "expenditures." An expenditure, according to the Buckley approach, is a payment to a third party for the purpose of influencing the outcome of an election, e.g. distributing handbills, the financing of speeches, and the financing of television or radio publicity. A contribution is a direct payment to a candidate or campaign committee. The court of appeals stated that, unlike the contributions that the Court considered in Buckley, the overdrafts made to the appellant's campaign committee out of the ordinary course of business had no speech elements at all. Because they were made out of the ordinary course of business, they were inherently private or secret and were therefore not the sort of public expression of support for the appellant and his views that would make them even "symbolic speech." Since the court could find no significant speech elements in the transactions, it held that the FECA's prohibition of such unsound banking practices in connection with elections does not violate the first amendment.

In addressing the appellant's fifth amendment claims, the court held that, because it had already concluded that the banks' contributions contained no cognizable elements of speech, the statute must be upheld if it has a rational relationship to its purpose. The court stated that since it had no difficulty

in concluding that a prohibition against banks engaging in unsound banking practices is rational, defendant's equal protection claim is rejected.

The court, following the example set by California Medical Association v. Federal Election Commission, No. 79-4426 (9th Cir. May 23, 1980) (en banc), heard the case under Fed. R. App. P. 35. Although the Federal Election Campaign Act provides that "all questions of constitutionality of this act" be heard by a court of appeals sitting en banc, the court stated that because various difficult questions can be raised about the meaning and constitutionality of the section's en bank requirement, it would be best to hear the case under the Federal Rules.

Campaign Financing - Expenditures

Reader's Digest Association, Inc. v. Federal Election Commission, 509 F. Supp. 1210 (S.D. N.Y. 1981)

The Reader's Digest Association (RDA) sued to enjoin the Federal Election Commission (FEC) from proceeding with an investigation into whether RDA had violated the Federal Election Campaign Act (FECA), sec. 441b(b)(2). This section makes it illegal for a corporation to make a contribution or expenditure in connection with any federal election or primary. The FEC had received a complaint involving materials connected with a February issue article of Reader's Digest concerning Senator Kennedy's accident at Chappaquiddick. The complaint alleged that the RDA had violated the Act by making "an illegal corporate expenditure to negatively influence" the 1980 presidential election, based on RDA's purchase, in connection with the article, of (1) a computer study of the speed at which Senator Kennedy's car was traveling when it crashed into the water, and (2) a study of the tides and currents in the area of Chappaquiddick Island, and (3) the production and distribution of video tapes of the computer reenactment to major media outlets.

Subsequently, the FEC found "reason to believe" that RDA violated the statute with regard to an expenditure to disseminate to other media the computer reenactment video tapes. The FEC sent a letter to RDA requesting answers to fifteen questions and production of a copy of the video tape; the letter did not order that any reply be made, nor was any subpoena issued. The questions concerned the content of the video tape, how it was obtained, and what use RDA made of it. RDA refused to answer these questions claiming that the investigation had a severe effect on its right to speak freely and comment on newsworthy events.

The district court denied RDA's motion to enjoin the FEC investigation. The court, referring to the news story exemption section of the FECA (2 U.S.C. § 431(9)(B)(i)), stated that the press exemption has certain limitations -- the statute would seem to exempt only those kinds of distribution that fall broadly within the press entity's legitimate press function. The court stated that it would not seem to exempt any dissemination or distribution using the press entity's personnel or equipment,

no matter how unrelated to its press function. The court held that the second limitation on the press exemption is that press "facilities owned or controlled by any political party, political committee or candidate" are outside the exemption.

The court suggested that a two step process is called for by the statute. In the first stage, until the press exemption is found inapplicable, the FEC is barred from investigating the substance of the complaint. No inquiry may be addressed to sources of information, research, motivation, connection with the campaign, etc. The court stated that the only investigation permitted in the first stage is into the two questions on which the exemption turns -- whether the press entity is owned by the political party or candidate and whether the press entity was acting as a press entity in making the distribution complained of.

The court stated that the fact that the FEC had only included the dissemination of the video tapes to other media as within the FEC's reason to believe finding suggested a recognition by the FEC that the research and the publication of the article were on their face exempt functions.

The court concluded that it was appropriate within the framework of the statutory exemption for the FEC to continue its investigation of the limited question whether, in disseminating the tape, RDA was acting in the context of the distribution of a news story through its facilities or whether it was acting in a manner unrelated to its publishing function.

Campaign Financing - Political Committees - Independent Expenditures

Common Cause v. Schmitt, No. CA 80-1609 (D.D.C. Sept. 30, 1980). Prob. jur. noted 2/23/81, U.S. Sup. Ct., Doc. No. 80-847 and 80-1067 sub nom. FEC v. Americans for Change.

This suit was consolidated with the suit entitled Federal Election Commission v. Americans for Change, No. CA 80-1754 and heard before a three judge court pursuant to 26 U.S.C. sec. 9011(b). Both plaintiffs allege that sec. 9012(f) of the Presidential Election Campaign Fund Act (26 U.S.C. sec. 9001 et seq. (1976)) prohibits the defendants' proposed "independent expenditures" to further the election of Ronald Reagan for President. Mr. Reagan was entitled under the Fund Act to receive almost $30 million in public campaign funding. Section 9012(f)(1) very plainly prohibits all expenditures over $1,000 by political committees which further a presidential candidate's election including "independent expenditures." Defendants in both actions are various organizations who are broadly soliciting contributions from individuals who favor Ronald Reagan for President. These organizations planned to use the money they collected (They hoped to raise and spend millions of dollars.) to hire professional media and political consultants and purchase advertising. The defendant organizations have registered with the Federal Election Commission (FEC) as "political committees."

The court held that sec. 9012(f) was unconstitutional. The court relied on Buckley v. Valeo, 424 U.S. 1 (1976), which ruled that limitations on independent expenditures (those made without any consultation or cooperation with

candidates or their campaigns) to $1,000 were unconstitutional. The court rejected defendant's argument that the provision be interpreted as prohibiting only coordinated expenditures which have been authorized or requested by a publicly funded presidential candidate. The court stated that, if a limiting construction were correct, the section's proviso that only such expenditures are prohibited as "would constitute qualified campaign expenses if incurred by an authorized committee of [the] candidate" would be superfluous.

The court relied on Buckley and Republican National Committee v. Federal Election Commission, 487 F. Supp. 280 (S.D.N.Y.)(three judge court), aff'd summarily, 100 S. Ct. 1639 (1980), that a candidate's decision to forego his or her own right to private contributions and unlimited expenditures in exchange for (exclusive) public financing cannot bind his or her supporters outside the official campaign. In fact, Republican National Committee would appear to mean that the restrictions associated with public funding (e.g., no private contributions, expenditure ceilings, etc.) are permissible only because the rights of supporters are left untouched.

On the constitutional issue, the court's analysis turned on two fundamental questions: (1) does the proposed spending by the defendant political committees constitute an "expenditure" question under Buckley? (2) are political committees, under Buckley, entitled to the same first amendment rights to make independent expenditures as individuals and "informal groups?" The court said yes to both questions.

The Supreme Court in Buckley rejected the contention that expenditures in a campaign entailed "conduct" and not "speech." The court stated that election laws regulating political expression require a demonstration of "compelling governmental interest" to withstand a constitutional challenge calling for "strict scrutiny" by the reviewing court. The Supreme Court did not accept that even the compelling anticorruption governmental interest supported a limitation on expenditures in a campaign. The Court stated that the expenditure provision did not appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions, for, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." The Court stated that "The rights of citizens and groups to make expenditures in a campaign poses ... only the most attenuated danger of a quid pro quo. Evidently, spending money can just not be equated with giving money as a source of possible corruption."

The district court ruled that this case was an "expenditure" case because it is precisely the speech of individual contributors which is hampered by the statutory restriction. The defendant political committees are simply 'polling agents' for many small voices.

The court pointed out how speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters. The court stated that a candidate strives to satisfy and mollify his or her supporters whenever possible. Candidates are loosely tethered, not bound, to the notions of political speech held

by their supporters. Political committees are bound to reify the political thoughts of their member-contributors. The organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors.

The district court stated that it is absolutely plain that free speech rights protected under Buckley extend beyond the individuals. The Supreme Court in Buckley also emphasized that free expression may not be limited on the basis of the "identity of its source, whether corporation, association, union or individual." The district court also stated that the phenomenon of the so-called political committees is the right of association to express political views together with others. The first amendment ensures both that persons may speak and that they may speak together.

The district court held that Common Cause's request for a determination that the independent committees are not independent of the Reagan campaign is "an impermissible attempt by ... a private plaintiff to enforce the Fund Act."

The court stated that the FEC is charged by statute with exclusive enforcement jurisdiction of the election laws. The court noted that the alleged illegal coordination would violate Fund Act provisions only with respect to candidates, not the defendant political committees.

The district court also stated that this suit raised complicated questions of fact and difficult questions of election law policy. This fact-finding is prerequisite to a determination of compliance with the election laws. The court held that a compliance issue in not one properly before a three-judge court charged with implementation and construction of a congressional act.

Campaign Financing - Public Financing

Gelman v. Federal Election Commission, 631 F.2d 939 (D.C. 1980). Certiorari denied 10/6/80, Doc. No. 80-209

Petitioners, supporters of Lyndon LaRouche, who was a candidate for the Democratic Party's nomination for President of the United States, contended that Mr. LaRouche satisfied the prerequisites of the Presidential Primary Matching Payment Account Act (26 U.S.C. secs. 9031-9042 (1972)) by receiving at least 20 percent of the vote on the Democratic side in the Michigan primary in May of 1980. Petitioners challenged the Federal Election Commission's (FEC) denial of their request to resume payment of matching funds.

Due to a conflict between Michigan state election laws, which required an "open" primary in which any registered voter could vote on either the Democratic or Republican side of the ballot, the Michigan Democratic Party did not participate in the Michigan primary election. At the state party's request, both President Carter and Senator Kennedy withdrew from the primary. These withdrawals resulted in two candidates being listed for the Democratic nomination: Governor Edmund G. Brown, Jr. and Lyndon LaRouche. Governor Brown ceased to be an active candidate before the primary was held. According to petitioners'

calculations, the number of votes which could be taken into account totaled 18,996, with 47.1 percent for LaRouche and 52.9 percent for various write-in candidates. (This result did not include 36,385 votes (46.4%) cast for "Uncommitted" or the 23,043 (29.4%) votes which were cast for Governor Brown.)

The court of appeals affirmed the FEC's determination that Mr. LaRouche had failed to reestablish his eligibility to receive federal matching funds. In this issue of first impression, the court held that the phrase "votes cast for candidates of the same party in a primary election" refers to votes cast for any and all voter preferences within a single party, including those cast for inactive candidates, for write-in, and for "Uncommitted." The court noted that the FEC has consistently computed the candidate's share of the total votes cast within a party designation and that the FEC's approach in evaluating Mr. LaRouche's request was consistent with this long-standing practice and as such was entitled to considerable deference by the court.

The court rejected petitioner's argument that the word "candidate" must take its meaning from the Act, which defines "candidate" as "an individual who seeks nomination for election to be President of the United States ... [and] who is ... actively conducting campaigns in more than one State." This interpretation would eliminate all votes cast for candidates who cease to campaign actively in more than one state and votes cast for "Uncommitted," because "Uncommitted" does not refer to any individual candidate. The court held that "[p]etitioners' sterile reading of the statute ignores Congress' practical purpose [that federal matching funds should go only to those candidates who have demonstrated at least minimal public support for their candidacies] and exalts literalness over common sense." The court added that "Mr. LaRouche would have us conclude that 88.6 percent nonsupport translates into 47.1 percent support. No amount of statutory construction can reach such an illogical conclusion."

Candidates - Ballot Access - Change of Party

Crussel v. Oklahoma State Election Board, 497 F. Supp. 646 (W.D. Okla. 1980)

In this case, a writ of mandamus was sought by plaintiff against the State Election Board to have her name reinstated on the ballot as a candidate for state senator of the newly-formed Libertarian Party. Plaintiff claimed that tit. 14, Oklahoma Statutes, secs. 80 and 108, as applied by the state election board, are unconstitutional in that they violate the first and fourteenth amendments of the U.S. Constitution and 42 U.S.C. sec. 1983.

Title 14, Oklahoma Statutes sec. 80 states that a candidate seeking nomination for the office of state senator must have been a registered member of the same party for six months immediately preceding the filing period. The same is required for the office of state representative under sec. 108 of tit. 14, Oklahoma Statutes. However, there is no six-month party registration requirement imposed upon candidates for state executive office. Title 26, Oklahoma Statutes, secs. 4-112 state that a party may be formed and recognized within the six-month period prior to an election. As a result, a person who registers

as a member of a newly-recognized party would be unable to meet the registration requirement to run as a candidate for state legislative and county office of that party. Such is the situation in the present case.

Following Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979), the court held that: (1) the Oklahoma Legislature did not imply an exception to the six-month affiliation requirement for members of newly-formed political parties; (2) the six-month party affiliation requirement was an unconstitutional burden on the right of political association, right to vote and right of reasonable access to the ballot; (3) the six-month party affiliation requirement for state legislature and county office but not for state executive office was unconstitutional on the basis of the Fourteenth Amendment (equal protection of laws); and (4) candidate was entitled to an injunction enjoining board members from removing her name from the ballot and from issuing the same ballot without including her name as candidate of the Libertarian Party.

Candidates - Ballot Position

Bloomenthal v. Lavelle, 614 F.2d 1139 (7th Cir. 1980)

Plaintiffs, candidates in the March 31, 1980, primary election, sought injunctive relief to require the defendants, the Chicago Board of Election Commissioners and its members, to list all the names of the candidates for each of the offices horizontally across the face of the ballot rather than in vertical columns. Plaintiffs stipulated that, when the candidates' names are arranged vertically, the name listed on top has a certain advantage, and, when arranged horizontally, the name at the far left has a certain advantage. Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969). The district court held that, based on the merits shown, there was not a sufficient likelihood of success concerning the manner of ballot placement in order to justify a preliminary injunction.

On appeal, the question before the court was whether the district court judge abused his discretion in making his decision. Kolz v. Board of Education, 576 F.2d 747 (7th Cir. 1978). In Weisberg as well as Sangmeister v. Woodward, 565 F.2d 460 (7th Cir. 1977), it was recognized that the first position on a ballot represents an advantage. However, the court found that the relief requested would simply substitute a horizontal disadvantage for a vertical disadvantage, since one candidate's name would continue to be listed first on the ballot. Furthermore, the court stated that the candidates did not present any evidence proving that one disadvantage is more severe than the other and that the plaintiffs' stipulation does not address the relative severity of the disadvantage. Because of the reasoning set forth above, the court stated that it had no greater confidence than the lower court that the plaintiffs would likely succeed on the merits of this case. Therefore, the court held that the district court judge did not abuse his discretion in denying a preliminary injunction.

Candidates - Filing Requirements

Skeen v. Hooper, 631 F.2d 707 (10th Cir. 1980)

Plaintiffs, Republican candidate for Congress and three resident electors, brought suit challenging New Mexico Statutes Annotated sec. 1-8-8(A)(Supp. 1979), which governs the filling of vacancies on a general election ballot occurring after a primary election. Plaintiffs challenged the statute after the secretary of state declined to accept the Republican candidate's certificate of candidacy and refused to place his name on the November 4, 1980, general election ballot for Congress. This case is before the court of appeals, since plaintiffs claimed that the statute was unconstitutional by violating art. 1, sec. 2, clause 1 of the U.S. Constitution and the first and fourteenth amendments to the Constitution: (1) by denying candidate access to the general election ballot; (2) by denying the other appellants equal protection of the law; (3) by denying the right to associate for political purposes; and (4) by burdening their right to cast a meaningful and effective ballot.

Section 1-8-8(A) of the New Mexico Statutes Annotated states that, if a vacancy occurs after a primary election because of resignation or death of a candidate for any public office to be filled in the general election, the vacancy may be filled by the Central Committee of the state political party filing its name with the proper filing officer. Since the Republican party failed to hold a primary election to nominate a candidate for the House of Representatives, the Democratic candidate was unopposed in the November 4, 1980, general election. However, the Democratic candidate died on August 5, 1980. It was after this event that the Republican party selected its candidate and the secretary of state refused to accept his certification of candidacy and place his name on the ballot.

Applying Storer v. Brown, 415 U.S. 724 (1974), the court found that there must be a compelling state interest for the statute in question to be valid. Relying on Bullock v. Carter, 405 U.S. 134 (1972), the court held that the present case meets the strict scrutiny test and does indeed serve a compelling state interest. The court held that such compelling state interest justified the secretary of state's action in denying plaintiff the right to have his name on the ballot and the correlative right of the other appellants to vote for the plaintiff. The court affirmed the lower court's decision concluding that there was no constitutional violation.

Candidates - Independent - Ballot Access

Hall v. Austin, 495 F.Supp. 782 (E.D. Mich. 1980)

Plaintiffs, candidates for the office of President and Vice-President of the United States, filed suit seeking an injunction to compel the defendants (the secretary of state and members of the board of canvassers of the State of Michigan and their agents) to place their names on the November 4, 1980, ballot. Plaintiffs contended that the defendants' admitted refusal to place their names on the ballot (which barred qualified voters from voting for

them) was a violation of their constitutional rights of freedom of political expression, due process and equal protection (First and Fourteenth Amendments) and that the exclusion of them was a form of censorship which affects the rights of members of the public who do not support and would not vote for the excluded candidates.

The court referred to McCarthy v. Briscoe, 429 U.S. 1371 (1976) (in which the Court conducted a de minimis review of Senator McCarthy's credentials before placing his name on the ballot), to determine whether equitable relief was warranted after finding violations of the plaintiffs' constitutional rights. The court held that, although the candidates had never approached substantial and significant popular vote totals, they were nationally-known and world-renowned public figures and there was reason to assume that they had the requisite degree of community support to have their names placed on the ballot. Further, since the candidates were earnest and experienced politicians who are recognized, interviewed and written about by the news media, placing the names of the two candidates on the ballot would not impair legitimate public interests in regulating the number of candidates on the ballot and in protecting the integrity of the political process from frivolous or fraudulent candidates.

Candidates - Independent - Federal Election Campaign Act

Anderson v. Federal Election Commission, 634 F.2d 3 (1st Cir. 1980)

Plaintiff, Independent candidate for the office of President of the United States, sought injunctive relief, arguing that certain sections of the Federal Election Campaign Act, 2 U.S.C. secs. 441a(a)(1)(B) and 441a(d)(1) were invalid because they infringed upon his first amendment rights of free speech and association by prohibiting solicitation of contributions. Plaintiff alleged that the Act favored national political party candidates by enabling political committees established and maintained by a national political party to receive amounts up to $20,000 from each individual contributor ($1,000 limit to an individual candidate) and by allowing such national committees to channel up to $4,700,000 to the party's presidential candidate, which violated their rights of equal protection under the fifth amendment.

The court affirmed the denial of plaintiff's request for a preliminary injunction, stating that there was a lack of facts upon which to base the plaintiff's constitutional claims. The court noted that, had the plaintiff sought an advisory opinion as late as September 6 (the date this action was filed in federal court), the Federal Election Commission would have been required to issue a ruling within twenty days (2 U.S.C. sec 437f(a)(2)). Because the presidential election was less than two weeks away and the contributions in question could only be determined within the context of a factual framework, denial of a preliminary injunction was appropriate.

Candidates - Independent - Filing Requirements

Anderson v. Poythress, No. C80-1671A (N.D. Ga. Sept. 26, 1980), appeal denied, No. 80-7766 (5th Cir. Oct. 9, 1980)

Plaintiff Anderson, an independent candidate for the office of President of the United States, twelve candidates for the office of elector pledged to Anderson and three registered voters allege that defendant secretary of state violated their first and fourteenth amendment rights to seek office and to vote for candidates of their choice. Plaintiffs claim that these constitutional rights were violated when defendant unlawfully refused to accept the nominating petition of Anderson and thereby prevented his inclusion on the Georgia general election ballot as a candidate for President.

In accordance with Georgia Code Ann. sec. 34-1011(b), Anderson was required to submit a nominating petition containing the signatures of at least 57,539 registered voters (2-1/2% of the number of voters eligible to vote in the last election for the same office) in order to have his presidential electors placed on the November 1980 Georgia ballot. Anderson, already on the ballot in 49 other states, submitted a nomination petition containing 70,649 signatures. Upon review, the secretary held that 16,170 of these signatures were invalid and determined that Anderson's petition contained 3,060 less than the total needed for Anderson to appear on the ballot.

In accordance with Georgia statutes, plaintiffs filed suit in a state superior court seeking to require the secretary to place them on the ballot. The state superior court upheld the secretary's determination, holding that the burden of proof lay with Anderson to prove that he had obtained the required number of valid signatures or that the secretary had abused his discretion in the manner in which he had determined the invalidity of the signatures. Anderson v. Poythress, No. C-67519 (Super. Ct. Fulton Co. Sept. 12, 1980). This decision was appealed to the Georgia Supreme Court. The supreme court affirmed the lower court decision. Anderson v. Poythress, No. 36807 (Ga. Sup. Ct. Sept. 25, 1980).

The district court enjoined the secretary from printing the November general election ballots without including the names of Anderson and his electors. The court held that it need not abstain from making a decision on the grounds of the doctrine enunciated in Younger v. Harris, 401 U.S.37 (1971), which instructs a federal court to employ a policy of equitable restraint when an exercise of its power would interfere with an ongoing state proceeding where an important state interest is at stake. The court stated that the Georgia Supreme Court handed down its affirmance during the trial of this case before this court. The only remaining direct avenue of review of the state court decision lies in petition for certiorari to the United States Supreme Court.

The district court also rejected defendant's second threshold issue that plaintiffs' current action is res judicata as a result of the state court judgment. The court stated that three plaintiffs who were not parties nor privies to any party in the state court proceedings possess two clearly established and independently protectable rights under the first amendment: the right of individuals to associate for the advancement of political beliefs, and the right of

qualified voters to cast their votes effectively for the candidate of their choice. Williams v. Rhodes, 393 U.S. 23 (1968). The court stated that res judicata cannot preclude these voter-plaintiffs from seeking to vindicate these rights by establishing that the secretary has unconstitutionally denied to the candidate of their choice access to the ballot.

The court determined that the procedure under which Anderson was forced to challenge the secretary's determination violated due process of law. The court did not rest this decision on any single improper element in the procedure such as shortness of time in which to garner evidence, imposition of the burden of proof on Anderson, etc., but on a combination of these elements that when considered together virtually foreclosed Anderson's opportunity to obtain meaningful review of the secretary's action. The court quoted Williams, supra, which stated, "Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote."

Candidates - Independent - Filing Requirements

Greaves v. Mills, 497 F. Supp. 283 (E.D. Ky. 1980)

In two separate cases, citizens desiring to have their names placed on the ballot as Independent candidates in the Kentucky general election brought suit against the secretary of state.

In the first action, John B. Anderson, Congressman from Illinois, and originally a candidate for the Republican nomination for President, announced publicly, on April 24, 1980, his intention to withdraw as a Republican candidate to run as an Independent candidate and have his name stricken in the Republican primary. However, the secretary of state said that his withdrawal was untimely, and he subsequently was defeated in the May 27, 1980, Republican primary. Anderson's supporters then presented a petition to the secretary of state to have his name placed on the November ballot. The secretary of state rejected the petition as being untimely, maintaining that it had to be filed on or before April 2, 1980, in accordance with sec. 118.365 (3), (4) of the Kentucky Revised Statutes (which requires that petitions be filed at least fifty-five days before the general election) and that Anderson was disqualified under sec. 118.345 of the Kentucky Revised Statutes (the "sore loser" law), as he had been defeated in the primary election.

In the second case, Percy L. Greaves, citizen of New York, and his supporters presented a petition on April 1, 1980, to the secretary of state for his placement as an Independent candidate on the November ballot. After examination, the secretary of state found that the petition had an insufficient number of signatures as required by sec. 118.515(2) of the Kentucky Revised Statutes (The petition had 1,086 signatures instead of the required 5,000.) Plaintiffs brought suit maintaining that the statute violated their rights under the first and fourteenth amendments to the Constitution, infringing upon their right to association and expression and denying them equal protection of the law and their right to franchise without due process of law.

The district court held that sec. 118.345 did not apply to Presidential candidates, since a candidate for the Presidential nomination could not be defeated in a primary election--only at the convention. However, the court held that the 5,000 signature requirement was constitutional, since the number of voters necessary to sign the petition is less than one percent (about 0.03%) of the eligible pool of voters in Kentucky. The court noted that there were no geographical limitations, closed-in time limitations, or requirements for persons signing the petition other than that they be qualified voters and that they desire to vote for the candidate. The court ordered that the name of John B. Anderson be placed on the ballot but not the name of Percy L. Greaves unless, by the fifty-five-day limit, he presented a petition with the requisite number of qualified signatures.

Corrupt Practices - Fraudulent Registration

United States v. Cianciulli, 482 F.Supp. 585 (E.D. Penn. 1979), aff'd, No. 79-2552 and 79-2553 (3rd Cir. July 1, 1980). Certiorari denied 1/12/81 sub nom. Cianciulli v. U.S., Doc. No. 80-611

The court was presented with several post-trial motions of defendants who were convicted of violations of the Voting Rights Act, 42 U.S.C. sec. 1973i and 1973i(c), which provide that it is a criminal offense to conspire to encourage false registration or to give false information for the purpose of establishing eligibility to register to vote and 18 U.S.C. sec. 241, which provides that it is a crime to conspire to injure citizens in the exercise of their constitutional rights. It is important to this analysis to note that sec. 1973i(c) prohibits both false registration and illegal voting.

The case covered a pattern of conspiratorial and individual activities involving 25 defendants and approximately 15 unindicted actors. These events took place over a three year period beginning in 1975. The principal beneficiary of the registration fraud was defendant Cianciulli, who at the time of the indictment was a Pennsylvania state representative.

Defendants claimed, in one of the post-trial motions, that the false voter registration which occured in 1975 was not within the jurisdiction of the Voting Rights Act of 1965 because there was not a federal election in that year. Defendants relied upon the language found in sec. 1973i(c) that, "this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, [Member of Congress], ..."

The court held that false registration could be the basis of a violation under the Act. The court determined that the proviso in sec. 1973i(c) did not apply to the elements which dealt with registration. Congressional intent for including the proviso was that some Members had serious questions as to whether Congress had the power to insure fair election procedures in state and local

elections except to insure the guarantees under the fourteenth and fifteenth amendments. Congressional debates revealed that the bill as amended was meant to prohibit false registration.

The court then reviewed Pennsylvania registration law and applied the proviso in sec. 1973i(c) to the facts in this case in the light of the legislative goals. The court found that registration to vote, automatically qualified the registrant to vote in any election for a two-year period, unless there is a change of address. Furthermore, a single registration entitled the registrant to vote in local, state and federal election without the need for separate registrations for each election. The court stated that, "a registrant does not register for an election but rather secures a period of eligibility to vote in any election during that period." The court concluded that, "any false registration can be the basis of a violation of sec. 1973i(c) because it creates an eligibility to vote in a federal election. This is true whether or not that registration occurs in the same year as a federal election.

Corrupt Practices - Payment for Voting

United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981)

This case concerns the payment or offers of payments for voting (prohibited by 42 U.S.C. sec. 1973i(c) which governs elections in which federal officers are listed on the ballot) in an election which had federal, state and local candidates on the ballot. Defendant was indicted, tried and found guilty by the district court on three out of four counts of paying, conspiring to pay, and aiding and abetting other people to pay to vote in the November 7, 1978, general election. Defendant appealed on the ground that sec. 1973i(c) of the Voting Rights Act is unconstitutional because it is beyond the power of Congress to enact a statute which applies to any election in which there is a federal candidate on the ballot when there is no proof that the influence was directed toward the federal race. Defendant contended that the court erred when it refused to allow her to call certain defense witnesses under Rule 17(b) of the Federal Rules of Criminal Procedure and when the court refused to allow two defense witnesses to assert the fifth amendment in the presence of the jury.

In affirming the lower court's decision, the court of appeals referred to In re Coy, 127 U.S. 731 (1888), United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972), United States v. Barker, 513 F.2d 1977 (7th Cir. 1975), and United States v. Cianciulli, 482 F. Supp. 585 (E.D. Pa. 1979), which state that Congress may regulate any activity which exposes the federal aspects of the election to the possibility of corruption, whether or not the actual corruption takes place and whether or not the persons participating in such activity had a specific intent to expose the federal election to such corruption or possibility of corruption. Although defendant claimed that her only intent was to manipulate the local election, her action still had the definite potential to alter the outcome of the federal race. The court held that the court did not err in denying indigent defendant's request for subpoena of witnesses whose testimony would have been irrelevant

and cumulative (Rule 17(b)), United States v. Romano, 482 F.2d 1183 (5th Cir. 1973), and that the trial court did not abuse its discretion in refusing to permit defendant to call two witnesses to have them assert their fifth amendment privileges in front of the jury since neither side had the right to benefit from any inference which the jury may have drawn from the witness's assertion of the privilege. United States v. Lacouture, 495 F.2d 1237 (5th Cir. 1974), cert. denied.

Election Contest - Counting Votes

Saxon v. Fielding, 614 F.2d 78 (5th Cir. 1980)

In this suit the plaintiffs, the losing candidate for county sheriff and someone who voted for him, were seeking to annul a state election and asking that a new election be ordered. The district court ruled in favor of the defendants after finding that, despite some technical irregularities, the election has been fair and that no one had been prevented from voting as they desired. The district court also found that there had been an insufficient showing of irregular votes to show that the outcome would have been different had the election been error free.

The plaintiffs present three issues on this appeal: 1) Did the district count err in holding that the Alabama election laws shown to have been technically violated are directory and not mandatory?; 2) did the district court err in requiring the plaintiffs to prove that the outcome of the election would have been different without the irregularities?; and 3) was it reversible error for the district court to fail to hold a hearing on the issue of certifying this case as a class action?

The court of appeals affirmed the district court decision. The court stated that the present case simply does not involve the serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct, that would justify the intervention of a federal court. The court noted that this suit presented only "the usual simple case of counting votes and denying relief for want of affirmative proof of a different result." Bell v. Southwell, 376 F.2d at 664. The court stated that "in cases presenting only issues of state law, Hubbard v. Ammerman, 465 F.2d 1169 (5th Cir. 1972), cert. denied 410 U.S. 910 (1973), this court has refused to order the 'drastic, if not staggering' remedy of voiding a state election." Id. 376 F.2d at 662.

Government Employees - Political Activities

Otten v. Schicker, 492 F. Supp. 455 (E.D. Mo. 1980)

Plaintiff, a police officer with the City of St. Louis, filed suit seeking a preliminary injunction pursuant to 42 U.S.C. sec. 1983, claiming that defendants' regulations, Rule 7.010A of the Police Department, violated his

constitutional rights by prohibiting his political activities and interfering with the free elective process of the state.

Plaintiff filed to run in the Democratic primary for election as a state senator. Three weeks later plaintiff was suspended without pay from the Police Department for violation of Rule 7.010A. Rule 7.010A states that a member of the Police Department is prohibitied from "becoming a candidate for, or campaigning for, an elective office." Plaintiff claimed the the regulation was unnecessarily vague and overbroad by prohibiting his candidacy without showing that he was attempting to further his political interest by using his official position.

The district court, relying heavily on United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973), and Broadrick v. Oklahoma, 413 U.S. 601 (1973), denied the plaintiff's request for a preliminary injunction and rejected his contentions that the regulation in question: (1) violated his first amendment rights and the rights of those who would support him in his campaign; (2) was vague and overbroad; (3) unconstitutionally interfered with the free elective process of the state; and (4) was violative of equal protection.

Government Employees - Political Activities

United States v. Pintar, 630 F.2d 1270 (8th Cir. 1980)

Appellants, a husband and wife who were employees of "The Upper Great Lakes Regional Commission" (Commission), were convicted of conspiring to defraud the United States. The indictment and the evidence at trial focused primarily on allegations that Commission funds were used to pay for partisan political activities. The Commission is a federally-funded agency designed to encourage economic development in certain areas of Minnesota, Wisconsin and Michigan. The projects funded by Commission grants included the Northern Minnesota Small Business Development Center (NMSBDC) and Duluth Area Economic Development (DAED). Defendant husband was responsible for the initial review of grant proposals and recommendation of projects for funding. NMSVDC received approximately $1 million in Commission funds from 1971 to 1977. Defendant wife kept NMSBDC's financial records and was a signatory on NMSBDC's checking account.

Specifically, appellants were convicted of conspiracy to defraud the United States in violation of 18 U.S.C. sec 371, violation of the Hatch Act, 18 U.S.C. sec. 600 (for hiring a secretary for NMSBDC in consideration for performing political work), and four counts of embezzlement, 42 U.S.C. sec. 3220 (office space, federal grants, state funds and the services of agency secretaries were diverted for political functions). The defendant husband was also convicted of mail fraud, 18 U.S.C. sec. 1341. Appellants were in part appealing the sufficiency of the indictment and the sufficiency of the evidence.

The court vacated and remanded with directions in part and reversed and remanded in part. The court held that there was sufficient evidence to show a

conspiratorial agreement between the defendants to direct employees paid with Commission grant funds to perform and conceal political activity during office hours. These political activities included distributing Democratic Farmer Labor Party (DFL) raffle tickets, typing DFL precinct caucus lists, collecting gubernatorial candidate contributions, assisting with an "Octoberfest" campaign function for a specific candidate and preparing mayoralty inaugural invitations. The court held that the defendants' managerial role was reinforced by evidence that the defendants contacted, interviewed, recommended, and perhaps hired several secretaries for DAED, NMSBDC and one other state-funded economic development agency. There was testimony at the trial that during campaigns the defendants spent 90 to 95 percent of their time on political matters and that this amounted to a majority of their time over the years.

The court rejected defendants' argument that there was no conspiracy to defraud since all government work was performed and because there was no proof of gain to them and no proof of harm to the United States. The court stated that a conspiracy to defraud the United States need not anticipate cheating the government out of property or money; to defraud also means to interfere with or obstruct lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. Hammerschmidt v. United States, 265 U.S. 182 (1924). The court acknowledged that there was not convincing proof that the government's economic development efforts were prevented but that there was sufficient evidence of a scheme to divert resources from their intended purposes.

The court held that there was insufficient evidence to show a scheme to defraud through the mails on those counts of mail fraud which dealt with husband defendant's approval for the overall grant monies obtained by mailings.

The court stated that the evidence shows that the purpose of the mailings was to arrange for the funding of legitimate Commission work and to provide funds for salaries and other governmental activities.

However, the court upheld one count against husband defendant to defraud through the mails. The court stated that there was sufficient evidence to find a scheme to defraud the government based on defendant's request for specific funds to hire an intern and one of the secretaries for DAED. This particular secretary did not work for DAED, which paid her salary. When not answering the phone or handling Commission mail, she worked exclusively on a mayoral campaign, doing scheduling and preparing a chart of appointive offices that the mayor could fill.

The court granted the defendants a new trial on the grounds that evidence of kickbacks, which did not meet the standards of relevant proof, came before the jury as a result of one witness's testimony and cross-examination. Although the trial court ruled that the kickback charge was not in the indictment and cautioned the jury that the evidence was admissible only to show the witness's reasons for bias, nonetheless, the cross-examination of the defendants left no doubt that the government was attempting to infuse into the trial an extensive kickback scheme. The court stated that, if the evidence was minimally probative to the issues of the case and if its

prejudicial effect so outweighs its evidentiary value, a defendant in a criminal trial may be denied a fair trial on the charges made.

Governmental Employees - Resign-to-Run Law - State Judges

Signorelli v. Evans, 637 F.2d 853 (2nd Cir. 1980)

Appellant, a New York state judge, challenged the constitutionality of three provisions of New York law which required his resignation from judicial office before he could take even the most preliminary steps toward obtaining his party's nomination as a Representative in the United States Congress. Appellant claimed that New York's regulatory provisions violated the qualifications clause of the United States Constitution by imposing the additional qualification for Congressional office that the person not be a state judge. Art. I, sec. 2, cl. 2, of the Constitution specifies that no person may be a member of the House of Representatives unless that person is at least 25 years old, has been a United States citizen for at least seven years, and, at the time of election, is an inhabitant of the state from which the person was chosen. The district court upheld the constitutionality of the challenged provisions.

The court of appeals affirmed the lower court's decision. The court stated that New York's regulatory provisions achieved the essential purpose of the incompatibility clause of the United States Constitution by adopting at the state level the prohibition against simultaneous holding of office of state judge while seeking an elective office. The court said that New York's concern for the independence of its judiciary serves interests as fundamental to a constitutional democracy as those served by the Framers' concern for the independence of Congress. The court noted that the sole difference between the Constitution's restrictions on federal officeholders and New York's limitations on state judges is a question of timing. While the federal incompatibility clause takes hold upon assumption of a seat in Congress, New York's regulations go into effect at the campaign stage. The court held that this distinction does not create a constitutional objection because the purpose of the New York challenged provisions is to protect the integrity of a branch of state government by the same principle of incompatibility that the Constitution itself has endorsed for the national government.

Political Parties - Non-party Member Endorsement

Mrazek v. Suffolk County Board of Elections, 630 F.2d 890 (2d Cir. 1980)

In this case appellants challenge the constitutionality of New York Election Law Sec. 6-120(3), which requires that a candidate soliciting the endorsement of a political party with which he or she is not affiliated (here the Conservative Party) obtain the approval of the appropriate party committee (here the thirteen member Executive Committee) before filing a petition with the county board of elections designating him or her as that party organization's endorsed candidate. When this backing is received, the candidate receives a certificate of authorization to file a petition with the County Board of Elections designating him as the party's endorsed nominee. New York Election Law secs.

6-136(2)(h) and (i) require that the petition must contain the requisite number of signatures of party members registered to vote within the district where the unaffiliated candidate will seek office (the number of signatures varies depending upon which office a candidate is seeking).

Appellants claim that the "one-person, one-vote" principle of the fourteenth amendment is violated by the Conservative Party's nomination procedure in that the candidacies of non-party members for intra-county state political offices had been authorized with the participation of Executive Committee members representing constituencies entirely unrelated to those districts where the elections were held.

The court of appeals affirmed the district court decision and held that the one-person, one-vote doctrine was not violated by the challenged statute; but the court held that, since the complaint failed to state a viable cause of action, it was unnecessary to address the constitutional issue as resolved by the lower court.

The court stated that, however diluted the votes of local party members may be by outside intervention into non-party nominations for their state representatives, their own votes, within the affected districts, remain entirely equal. The court held that the one-person, one-vote doctrine requires no more and does not create rights and privileges beyond this warranty of mathematical equivalency of votes.

The court noted that appellants did not challenge the composition of the Executive Committee on the ground that the votes of party members in the more populous, western sector of the county were not proportionately represented, nor was it asserted that given this regional imbalance some form of weighted vote was required.

Political Parties - Senatorial Committee as Agent of State Committee

Democratic Senatorial Campaign Committee v. Federal Election Commission, No. 80-2074 (D.C. Cir. Oct. 9, 1980). Certiorari granted 3/2/81 U.S. Sup. Ct. sub nom. Federal Elections Commission v. Democratic Senatorial Campaign Committee (Doc. No. 80-939), and sub nom. National Republican Senatorial Committee v. Democratic Senatorial Campaign Committee, Doc. No. 80-1129

Plaintiffs, the Democratic Senatorial Campaign Committee (DSCC), challenged a practice of a number of Republican State committees to execute agreements by which they purport to designate the National Republican Senatorial Committee (NRSC) as their agent for purposes of making campaign expenditures up to the legal limits. Plaintiffs contend that this practice is contrary to the letter and purpose of sec. 441a(d)(3) of the Federal Election Campaign Act of 1971 (FECA)(2 U.S.C. sec. 431 et seq.). Section 441a(d)(3) provides for separate spending limits for state and national party committees and makes no reference to "agency." The DSCC claimed that a clear purpose of the statutory scheme was to create an incentive to the development of vigorous state party organizations.

Before filing this suit, the DSCC filed a complaint with the Federal Election Commission (FEC). The FEC upheld the legality of the "agency" agreements. The DSCC then filed suit in the district court. The district court granted the FEC's motion for summary judgment on the grounds that the FEC must prevail unless its action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." The district court construed the decision of the FEC as resting on the inference, advanced by the General Counsel of the FEC, that the unlimited transfer of funds provision of sec. 44la(a)(4), when read in conjunction with sec. 44la(d)(3), revealed a congressional willingness to treat the funds and expenditures of various party committees as essentially interchangeable.

The court of appeals reversed the district court decision. The court based this reversal on an examination of the plain meaning of the statute itself and on the fact that the legislative history of sec. 44la(d)(3) did not support the kind of transfer of statutory authority at issue in this case. The court was concerned that the FEC had not presented a reasoned explanation of its decision and stated that it wasn't even clear whether the Commission had endorsed the reasoning of its General Counsel since it did not explicitly adopt the General Counsel's report.

The court stated the the relevant language of sec. 44la(d)(3) authorizes "the national committee of a political party, or a State committee of a political party, including any subordinate State committee" to make "any expenditure" of up to 2 cents per voting-age resident on behalf of the party's senatorial candidate. The court noted that the section not only designated spending limits with mathematical rigor but also conferred authority to reach those limits on two clearly identified committees. The court noted that the definitions of national and state committee, which are included in the Act, make it obvious that the NRSC is neither the "national" nor a "state" committee of the Republican Party. The court stated that the statute does not make reference to any other kind of permissible arrangement by which the state party organizations might convey their spending authority to any other organization.

The court refused to characterize the challenged relationships between the state committees and NRSC as ones of "agency." The court stated that the state committees do not, in the role of principal, raise and transfer funds to the NRSC as agent, nor do they give any direction as to how "their" funds ought to be spent. Rather, The court added, the NRSC raises and spends money as it sees fit; the state committees interact with the NRSC only in the initial agreement to the arrangement. Thereafter, the court said, the state committees serve as legal shells.

Primary Election - Qualifications to Vote

Young v. Gardner, 497 F. Supp. 396 (D. N.H. 1980)

Plaintiffs were registered Independent voters who elected to vote in a political party primary (Republican and Democratic respectively) and who then neglected to change their registration back to that of Independent in accordance with RSA 654:15 and RSA 654:34. The statutory scheme of RSA 654:15 and

RSA 654:34 provides that an Independent voter who has chosen to vote in the primary of a registered party may register again as an Independent before the next succeeding primary election by appearing before the Supervisors of the Checklist at least ninety-seven days before the next scheduled primary. Plaintiffs contend that New Hampshire has no "compelling state interest," (Dunn v. Blumstein, 405 U.S. 330 (1972), Newburger v. Peterson, 344 F. Supp. 559 (D. N.H. 1972) (three -judge court)), which requires that change of registration be held on certain dates between primary elections and that their constitutional rights are unduly burdened.

The district court granted summary judgment to the defendant. The court held that the provisions of RSA 654 do not deprive plaintiffs of their constitutional rights. The court stated that these statutes do not "lock" the plaintiff into an unwanted party affiliation between elections and any such confinement was clearly the result of plaintiffs' voluntary failure to take reasonable and timely measures to change their registration. Kusper v. Pontikes, 414 U.S. 51 (1973).

The court stated that New Hampshire's "closed" primary system is similar to the nominating procedure which prevails in the majority of states. Under such a system the statutes generally include some kind of affiliation requirement designed to exclude certain types of voters (e.g., party raiders, voters generally affiliated with another party but wishing to cross over to support a weak candidate who is likely to lose in the general election to the nominee of the voters' preferred party; cross over voters; or independent voters). See Smith v. Penta, 81 N.J. 65, 405 A.2d 350, appeal dismissed for want of substantial federal question, 444 U.S. 986 (1979).

The court cited Branti v. Finkel, 445 U.S. 507 (1980), to present the historical and present-day importance of political parties to our system. In Branti the Supreme Court stated that party organizations allow political candidates to muster donations of time and money necessary to capture the attention of the electorate. Strong political parties also aid effective governance after election campaigns end through the use of patronage--the right to select key personnel and to reward the party faithful. The Supreme Court stated that patronage serves the public interest by facilitating the implementation of policies endorsed by the electorate.

The court cited Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. (three-judge court), aff'd without opinion, 429 U.S. 989 (1976), in which a statute, which provided that no person could vote in a party primary unless he was on the last completed enrollment list of such party in his respective voting district, was unsuccessfully challenged.

Qualifications to Vote - Convicted Criminals

Allen v. Ellisor, No. 79-1539 (4th Cir. Jan. 6, 1981). Petitioned for certiorari 5/6/81, Doc. No. 80-1872

Plaintiff, a convicted forger, claimed that South Carolina Code sec. 7-5-120 (Proviso) (b) violated the equal protection clause of the fourteenth amendment

in its lack of uniformity in the statute's designation of voter disqualifying offenses. Plaintiff also alleged intentional discrimination on the basis of race in the enactment of the statute. Section 7-5-120(b) provides that certain persons convicted of certain specified crimes such as burglary, arson, perjury, forgery, adultery, bigamy, wife-beating, murder, etc., are disqualified from being registered or from voting unless such disqualification is removed by pardon.

The district court held that the statute was facially invalid under the equal protection clause. Because the statute was found to be facially invalid, the district court did not consider plaintiff's claim of racial discrimination.

The court of appeals reversed and remanded for further proceedings. The court held that in Green v. Board of Elections of City of New York, 380 F.2d 445 (2d Cir. 1967), cert. denied, 389 U.S. 1048 (1968), the court confronted the question of whether statutes disqualifying for crime such as the one under attack, which are expressly authorized under sec. 2 of the fourteenth amendment, were reviewable for compliance with the equal protection mandate imposed by sec. 1 of the same amendment on the basis of the lack of uniformity of offenses. The court pointed out that in Green it was established that review of such statutes under the equal protection clause was not required.

The court cited Fincher v. Scott, 352 F. Supp. 117 (3-judge ct. M.D.N.C. 1972), and Beachman v. Braterman, 300 F. Supp. 182 (3-judge ct. S.D. Fla. 1969), aff'd without opinion, 396 U.S. 12, as cases where state statutes were upheld which disqualified from voting either any person convicted of any crime which resulted in imprisonment in a state prison or which disqualified convicted felons. See also Richardson v. Ramirez, 418 U.S. 24 (1974), which is generally recognized as closing the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime.

The court rejected the argument that Richardson only extended immunization from equal protection review to those statutes which disqualify felons rather than to those statutes which identify the disqualifying crimes specifically. The court stated that there in no language either in sec. 2 or in Richardson which justifies this distinction. Nor is the logical foundation for this argument apparent. The court explained that, "if uniformity is the test, a classification of "felonies" is as vulnerable to a claim of a violation of equal protection as is a classification consisting of various specific crimes."

The court concluded that, since there was no record on which it could properly rule that the statute here is racially tainted, the cause was remanded to the district court for resolution of this claim.

School Elections - County School Board

Phillips v. Andress, 634 F.2d 947 (5th Cir. 1981)

Plaintiffs-appellants, voters residing in Tuscaloosa County, Alabama, were seeking an injunction to prevent residents living within the City of Tuscaloosa from voting for members of the county school board. The City of

Tuscaloosa has its own independent school system and city school board. The plaintiffs claimed that the equal protection clause of the fourteenth amendment was being violated. The Alabama Code, sec. 16-8-1 (1977), provides that members of county boards of education "shall be elected by the qualified electors of the county." The Alabama statutes are silent on the effect that the establishment of an independent city school system and board of education has upon the electoral process to determine members of the county school boards. The district court held that there was no unconstitutional dilution of the county electors' vote, and the plaintiffs appealed.

The court of appeals reversed and remanded the lower court decision. The court determined that its decision in Creel v. Freeman, 531 F.2d 286 (5th Cir. 1976), in which the court held that city residents were entitled to vote for members of the Walker County Board of Education, did not control its decision here because of the differing facts presented.

The court based this decision on the following facts: 1) from the point of view of student attendance in the two school systems, the systems are operated separately and the electors residing in the City of Tuscaloosa do not have a significant interest in the county school system; 2) the revenues found to flow from city residents to the county system do not create a substantial interest (less than one percent of the county system's budget flowed from city property tax revenue sources; it was also impossible to determine the residence of purchasers generating the payment of sales tax, one of the less important school board fund resources).

The court concluded that, although it did not decide that any of the lower court's findings of fact are "clearly erroneous," the court did determine that the residents of Tuscaloosa County have had their votes unconstitutionally diluted by the participation of the city electors in choosing the county school board members.

Voting Rights Act - Apportionment

Ramos v. Koebig, 638 F.2d 838 (5th. Cir. 1981)

This appeal involved the issue distinguishing between legislative and court-ordered reapportionment plans. Plaintiffs filed suit in 1978 to enjoin the City Council of Seguin, Texas, from conducting the 1978 elections under a system devised in 1962. According to the 1970 census, the city's population was approximately 40.02 percent Mexican-American and 14.67 black. Although the two minority populations constituted approximately 54.69 percent of the city's total number, the minority community has never been able to elect more than two representatives, or one-fourth of the council, at any one time. The 1962 plan contained a total population deviation between the most populated and least populated ward of 109 percent. The city council had redistricted the boundaries of two city wards in 1976 and submitted this plan to the United States Attorney General as is required by section 5 of the Voting Rights Act. The plan

was withdrawn from the preclearance process, however, and the 1977 council elections were held under the 1962 plan. Shortly after the plaintiffs filed their 1978 suit, the district court enjoined the use of the 1962 plan for the 1978 municiple elections and as a result the 1978 election was not held.

In 1979, both the plaintiff and the city council presented redistricting plans to the district judge. The district court adopted without modification the council's plan and ordered the council to divide the city into wards and conduct elections according to the plan. When it became apparent that the council did not intend to submit the plan for federal preclearance under section 5, plaintiffs in Trinidad v. Koebig, 638 F.2d 846 (1981) (see summary in this issue), brought an enforcement proceeding to compel preclearance and to prevent the city from conducting elections scheduled for August 1979 until preclearance had been obtained. The court in Trinidad held that the plan was a court-ordered, rather than a legislatively enacted plan and was therefore exempt from the section 5 process. Consequently, the district court dismissed the suit and the 1979 election was held as scheduled.

Plaintiffs argue that the plan submitted by the council and approved by the district court diluted minority voting strength and therefore violated the strict standards applicable to court-ordered plans.

The court of appeals reversed and remanded. The court, noting the sharp differences evident in the various opinions in Wise v. Lipscomb, 437 U.S. 535 (1978), also recognized the one area of common ground which is apparent and which rests upon established precedent: the business of redistricting and reapportioning legislative bodies is a legislative function "which the federal courts should make every effort not to preempt." The court described several types of situations in which it would be necessary for a district court to order into effect its own apportionment plan. The court stated that such a court-ordered plan would be a temporary measure and would not preclude the legislative body from devising a plan that reflects its legislative judgment.

The court stated that there was no reason why the district court could not have devised a temporary court-ordered plan for the purpose of allowing the 1978 election to go forward. The court held that the district court erred in passing upon the constitutionality of the plan before affording the city council an opportunity to follow the procedures necessary to enact a valid legislative plan, including compliance with the preclearance requirements under section 5. The court stated that on remand the district court should refrain from passing upon the constitutionality of the plan until the council has had a reasonable opportunity to obtain preclearance. The court stated that, should the council be unable to obtain preclearance or should some other exigency, such as an intervening election, arise, the district court would be required to devise and impose a temporary plan in accordance with the strict standards generally applicable.

Voting Rights Act - Apportionment

Trinidad v. Koebig, 638 F.2d 846 (5th Cir. 1981)

This case is associated with Ramos v. Koebig, 638 F.2d 838 (5th Cir. 1981), in which plaintiffs brought suit on behalf of all eligible voters in Seguin, Texas, to force the Seguin City Council to formulate a redistricting plan for the city ward system that was not malapportioned and that did not dilute minority voting strength. The district court in Ramos subsequently adopted a redistricting plan which had been presented by the council and ordered the council to implement the plan (see summary in this issue). When it became clear that the council did not intend to submit the plan for federal preclearance under section 5 of the Voting Rights Act, plaintiffs filed this enforcement proceeding.

Plaintiffs argue that under Wise v. Lipscomb, 437 U.S. 535 (1978), the plan adopted by the district court is a legislative, or court-approved plan, rather than a court-ordered plan, and that federal preclearance therefore is necessary. The district court, relying upon East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), concluded that the plan was a court-ordered plan and was therefore exempt from the preclearance requirement. The court also denied plaintiffs' motion to convene a three-judge district court and dismissed the complaint on the grounds that plaintiffs' section 5 claim was "insubstantial."

The court of appeals reversed and remanded. The court stated that, in light of its holding in Ramos, the district court's refusal to convene a three-judge court and its dismissal of plaintiffs' complaint were erroneous. The court stated that, since the Ramos decision already determined that the challenged plan was subject to preclearance requirements, it was not necessary to convene a three-judge court. In the interest of judicial economy the court held that the plan was subject to federal preclearance.

Voting Rights Act - Apportionment

Watson v. Commissioners Court of Harrison County, 616 F.2d 105 (5th Cir. 1980)

Several black plaintiffs filed a class action against the Commissioners Court (the county governing body) of Harrison County, Texas, alleging that malapportionment of Harrison County had resulted in dilution of the blacks' voting strength in violation of the fourteenth and fifteenth amendment and 42 U.S.C. sec. 1983 (the Voting Rights Act). The Commissioners Court adopted a reapportionment plan on May 2, 1975, replacing a plan adopted September 1965. This reapportionment plan split Census Bureau Enumeration Districts and no alternative measures were followed to ascertain or count the number of people affected by this method. It was not possible to demonstrate with any degree of accuracy the number of persons residing in each realigned precinct in the county. The district court ordered that no reapportionment be undertaken until after the 1980 census.

The court of appeals reversed the district court decision and remanded the case for prompt reapportionment. The court stated that according to Allen

v. State Board. of Election, 393 U.S. 544 (1969), disputes involving the sec. 5 provision of the Voting Rights Act are to be resolved by a district court of three judges. However, the court stated, a three-judge court is unnecessary in an adversary action invoking the equity jurisdiction of a district court to order a plan of reapportionment. See Zimmer v. McKeithen, 467 F.2d 1381 (5th Cir. 1972).

The court held that the district court's delay of reapportionment until after the 1980 census could not be upheld. The court stated that any elections held before the census bureau data was available would have to be held on a plan based on the 1965 reapportionment, a plan which all parties and the court seem to agree is unconstitutional. The court stated that holding the scheduled May 1980 primary election under a plan based on the 1960 census, updated to 1965, would further voting dilution and would subject the people of Harrison County to four more years of government by Commissioners elected under an outdated, inequitable, unconstitutional apportionment plan.

The court directed the district court to enjoin the May 1980 election and to formulate an equitable apportionment plan as speedily as possible.

Voting Rights Act - At-Large Elections

McMillan v. Escambia County, Fla., 638 F.2d 1239 (5th Cir. 1981). Petitioned for certiorari 5/19/81 sub nom. City of Pensacola, Fla. v. Jenkins, Doc. No. 80-1946.

Plaintiffs, black voters of Escambia County and the black voters of the City of Pensacola, Florida, brought class actions alleging that the at-large election systems which are used to elect the county commission, county school board and the city council are unconstitutional as violative of the first, thirteenth, fourteenth and fifteenth amendments and as violative of the Voting Rights Act of 1975, as amended (42 U.S.C. sec. 1973). Plaintiffs allege that, because of racially polarized voting and because of the at-large system of elections, the votes of the black population, which comprise one-third of the city population and one-fifth of the county population, are being diluted.

The Board of County Commissioners is composed of five members who serve staggered four-year terms. Candidates must run at-large for numbered places in the required party primaries (corresponding to the districts in which they live), and a majority vote is requisite for the party nomination. There is no majority vote requirement in the general election. The School Board of Escambia County is composed of seven members who serve staggered four-year terms. Five of the members must reside in residential districts but two may reside anywhere in the county. Otherwise, the election process is the same as that for the county commission. The Pensacola City Council has ten members. Candidates must run for numbered places corresponding to the five wards and must live in the corresponding ward. The election, however, is at-large. There are no primaries for the city council but there is a majority vote requirement.

The district court held that the at-large election systems used to elect each of the three governmental bodies was unconstitutional.

The court of appeals affirmed in part and reversed in part. The court adopted Justice Stewart's opinion in City of Mobile v. Bolden, 446 U.S. 55 (1980). The court noted that, although no one analysis captured five Justices in the Bolden decision, the majority of the Court (four votes) did agree that, if, in addition to discriminatory impact, a discriminatory purpose exists in the enactment or operation of a given electoral system, the system is unconstitutional.

The court of appeals acknowledged that the district court in reaching its decision had anticipated that the teachings of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), which specified that the requirement of purposeful discrimination must be met as well as the factors regarding discriminatory impact which are specified in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). In Arlington Heights the Court suggested several possible evidentiary sources for determining the existence of purposeful discrimination. Among them are: 1) the historical background to the action, particularly if a series of actions has been taken for invidious purposes; 2) the specific sequence of events leading up to the challenged action; 3) any procedural departures from the normal procedural sequence; 4) any substantive departures from normal procedure, i.e., whether factors normally considered important by the decisionmaker strongly favor a decision contrary to the one reached; and 5) the legislative history, especially where contemporary statements by members of the decisionmaking body exist.

The court determined that the evidence fell short of showing racial motivation for the at-large election of the county commissioners. The court held that the district court judge was entitled not to believe the county commissioners when each of them testified that racial consideration played no role in their rejection of the charter proposal but that in the absence of contradictory evidence disbelief of that testimony was not sufficient to support the decision that the system was unconstitutional. See Moore v. Chesapeake and Ohio Railway, 340 U.S. 573 (1951).

The court stated that the district court was correct in its holding that the at-large system of electing school board members was developed with a discriminatory purpose and was being utilized by the white majority population for such a purpose. The court looked at the change from single-member districts from 1907-1945 to at-large districts in 1945, when the decision in Davis v. State ex rel. Cromwell, 156 Fla. 181, declared that white primaries were unconstitutional. The court determined that the history of the county suggested a substantive policy which favored single-member districts; the abrupt, unexplained departure from that forty-year policy upon the heels of the white primary's demise justified the district court's conclusion that the change was racially motivated.

The court also agreed with the lower court in finding that race was a motivating factor in the 1959 changing of the city council from five

members being elected from single-member wards and five being elected from at-large wards to all the members being elected from at-large wards. The court based this decision on the events leading up to the change and to the fact that editorials written contemporaneously with the action, and which suggested that one ward might conceivable elect a Negro councilman though the city as a whole would not, was probative evidence of the racial motivation of the action.

The court concluded that after Bolden it would seem that whether whites campaign for black support or whether the people in elective positions are responsive to minority needs is irrelevant to the constitutional inquiry. The court also regarded as irrelevant the finding that the at-large system is not being perpetuated to minimize black voting strength. The court stated that, if the system was unconstitutional in its inception and if it continues to have the effect it was designed to have, then the pure hearts of current council members are immaterial.

Voting Rights Act - At-Large Elections

U.S. v. Uvalde Consolidated Independent School District, 625 F.2d 547 (5th Cir. 1980). Certiorari denied 5/18/81 sub nom. Uvalde Consolidated Independent School District v. U.S. Doc. No. 80-1237

The United States Attorney General filed a complaint under sec. 2 of the Voting Rights Act of 1965, alleging that an at-large system of electing representatives to a local school board in Texas "has been implemented with the intent and purpose of causing ... irreparable injury to Mexican-American voters ... by effectively and purposefully precluding them from meaningful access to the political process...."

Section 2 provides that no voting qualification or prerequisite to voting, or standard, practice, or procedure will be imposed or applied by any state or political subdivision to deny or abridge the right to any citizen to vote on account of race or color. The 1975 amendments to the Voting Rights Act specified that members of a language minority group were included in this sec. 2 provision. The Attorney General is authorized to sue to prevent violations of sec. 2.

The district court dismissed the suit for failure to state a claim upon which relief could be granted. The district court acknowledged that at-large systems of selecting voters may violate the fourteenth amendment and that, if the complaint had been filed by an aggrieved voter, the allegations might state a fourteenth amendment claim. The district court held that sec. 2 of the Voting Rights Act does not prohibit the maintenance of an at-large method of election for school board members.

The court of appeals reversed and remanded. The court of appeals stated that the Supreme Court's "rejection of the fifteenth amendment and section 2 claims in City of Mobile, Alabama v. Bolden, 446 U.S. 55 may rest entirely upon the conclusion that no discriminatory motivation was shown." The court added that

"the ambiguity of the plurality opinion [in Bolden] is alleviated by the various dissents and concurring opinions, each of which indicates that in a proper case an at-large districting plan may be held to violate the fifteenth amendment and, therefore, section 2."

The court stated that "the fundamental reasoning of our decision in Bolden, and its companion, Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), survives the Supreme Court's decision intact. Thus, 'a showing of racially motivated official action that infringes the right to vote is sufficient to state a cause of action.' Our precedent recognizes that at-large districting may result in substantial dilution of minority vote and therefore constitute unconstitutional infringement of the right to vote if discriminatory purpose is shown." See United States v. East Baton Rouge Parish School, 594 F.2d 56 (5th Cir. 1979).

The court stated that legislative discussion preceding the adoption of the 1975 amendments to the Voting Rights Act show that a central concern of the Congress was the need to protect language minority groups from practices that deprived them of equal political participation. The problem of 'dilution of the vote' of language minority groups by voting structures including 'the at-large structure' was catalogued. The court concluded that, "whatever the scope of section 2 as a fifteenth amendment enforcement statute, its amendment in 1975 to expand its reach to fourteenth amendment violations was intended to bring within its scope allegations of purposeful discrimination in at-large election schemes."

In answering the school district argument that government units such as school districts are not defined as "political subdivisions" in the Voting Rights Act, the court held that the term is restricted to the narrow interpretation (a county or any other subdivision which conducts registration for voting) only when it appears in certain parts of the Act. Absent this limiting definition, the broad sweep of sec. 2 would certainly embrace school boards.

Voting Rights Act - Racial Discrimination

United States v. South Dakota, 636 F.2d 241 (8th Cir. 1980). Certiorari denied 6/15/81 sub nom. South Dakota v. United States, Doc. No. 80-1712

Originally, the United States brought action in the district court against the County of Fall River and its auditors, asserting that the residency policy established by the defendant county was both a violation of the Voting Rights Act (42 U.S.C. sec. 1971(a)) and the Constitution's equal protection clause for refusing to allow residents of the unorganized attached county (Shannon County) to run for offices in the defendant county. The district court held that there must be proof of racial discrimination in the defendant's residency policy in order to establish a claim under sec. 1971(a) and that, since the unorganized attached county is part of an Indian reservation (all but fourteen percent is federal or Indian land), the authority of the defendant county is severely restricted. Therefore, the district court granted the defendant's motion for summary judgment, and the United States appealed.

The court of appeals reversed the lower court's decision. Before doing so, it applied the compelling state interest test (which requires that candidate

restrictions affecting the right to vote must cause discrimination "of some substance" before the test is applied) in order to assess whether an equal protection violation had occurred. The court found that such real and appreciable impact existed in the present case since approximately forty-three percent of those eligible to vote for Fall River County offices resided in Shannon County. The residents had sufficient interest in the affairs of both counties and therefore had the right to vote.

Referring to Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), the court of appeals held that the South Dakota laws which denied the residents of Shannon County the right to become candidates for River County offices and prevented the residents of the unorganized counties from voting for county officers of the organized county to which their county was attached was unconstitutional as violative of the equal protection clause of the fourteenth amendment.

Voting Rights Act - Section 5

Eccles v. Gargiulo, 497 F. Supp. 419 (E.D. N.Y. 1980)

Plaintiffs, candidates for public and Democratic party offices, filed suit in district court against the commissioners of elections for the city of New York for voiding their designating petitions on the basis of fraud and removing their names from the ballot of the September 9, 1980, primary election. Plaintiffs claimed a violation of the Voting Rights Act of 1965 (42 U.S.C. sec. 1973 et seq.) (the Act), since the removal constituted a change in post-1968 election procedures that had not been approved by the Federal District Court for the District of Columbia or the U.S. Attorney General and a violation of their rights to due process and equal protection of the law. Plaintiffs sought an order directing that the stricken names be placed on the ballot or an order enjoining the holding of the primary until a three-judge court hears the merits of the action.

The Voting Rights Act states that, before any covered state or subdivision may change its election laws, it must obtain "a declaratory judgment from the U.S. district court for the District of Columbia that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color..." (42 U.S.C. sec. 1973c).

The district court dismissed the suit stating that it lacked the jurisdiction to grant the relief the plaintiffs sought. The court held that (1) if plaintiffs' claim that the action of the defendants in removing their names from the primary ballots constituted a change in election procedure since 1968, they were not susceptible to review under the Voting Rights Act of 1965, since the Act was intended to regulate alterations in election procedures by legislative enactment or administrative action and not actions taken by the New York Supreme Court that were carried out by commissioners in obedience to judicial order. The state supreme court decision may not be considered a change in election procedures covered by the Act, Gangemi v. Sclafani, 506 F.2d 570 (2nd Cir. 1974); therefore the court is without jurisdiction to grant relief; (2) the Act was intended to prevent the abridgment of the "right to vote on

account of race or color," Powell v. Power, 436 F.2d 84 (2nd Cir. 1970). Since racially discriminating intent is required before the court can proceed to consider the relief plaintiffs seek, their complaint raised questions of purely state law to be determined by the state courts.

Voting Rights Act - Voting Dilution

Simkins v. Gressette, 631 F.2d 287 (4th Cir. 1980)

Appellants, eleven black citizens and registered voters of the State of South Carolina, alleged that South Carolina's present senate reapportionment plan dilutes their vote in violation of the first, thirteenth, fourteenth and fifteenth amendments and 42 U.S.C. secs. 1971, 1973 and 1983. Appellants sought to have a three-judge district court convened pursuant to 28 U.S.C. sec. 2284 to have the reapportionment plan declared unconstitutional and to enjoin its enforcement.

The senate reapportionment plan under attack was adopted by the South Carolina legislature in 1972 following the decision in McCollum v. West, No. 71-1211 (D. S.C. April 7, 1972), which struck down as unconstitutional the South Carolina Senate reapportionment plan drawn up after the 1970 census. The 1972 plan was approved by the McCollum court and ordered used for conducting the South Carolina Senate election until it was revised by the state's general assembly or until the next census or until further order of that court. This plan provides for the reapportionment of South Carolina's forty-six counties into sixteen senatorial districts for election of the state's forty-six senators. Three are single-member districts and the remainder are multi-member districts containing two to five senators from each of those districts. Each seat is separately numbered, with candidates eligible to run for only one seat.

The district court denied appellants' request for a three-judge court and dismissed their complaint. The district court relied on the guidelines set out in Maryland Citizens for a Representative General Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970), in determining that a three-judge court was not required.

The court of appeals affirmed. The court stated that most of the claims made had been previously rejected by the McCollum court, i.e., that the establishment of a multi-member senatorial district system has the effect of diluting the black vote because of the racial polarity pattern in South Carolina; that the numbered seat requirement, majority runoffs and retention of county boundaries enhance the dilution of their vote. The court noted that, although technically McCollum may not be res judicata nor may these plaintiffs be estopped by its judgment, that decision is very persuasive, because the identical issues presented here were decided in McCollum in the defendants' favor. The court noted that the only new claim, that no blacks had been elected since 1972, was not sufficient to state a claim. See City of Mobile Alabama v. Bolden, 446 U.S. 55 (1980).

Finally, the court stated that the plaintiffs' delay in filing suit (only two days before the opening of the filing period for the primary election),

foreclosed the grant of any equitable relief. Supra, Maryland Citizens. The court noted that the record reflects no good reason to cause such a major disruption in the election. The court concluded that this disruption, coupled with the fact that 1980 is also the year of a national census which will likely require reapportionment in South Carolina, places this case squarely within the holding in Maryland Citizens.

Advertising and Solicitation - Anonymous Political Campaign Literature

Schuster v. Imperial County Municipal Court, 167 Cal. Reptr. 447 (Ct. App. 1980) Certiorari denied 4/6/81, sub nom. California v. Schuster Doc. No. 80-1366

In this case the court affirmed the judgment of the lower court in holding that the provisions of West's Ann. Elections Code sec. 29410, which prohibits all anonymous political campaign literature, was unconstitutional. The court held that the statute, in attempting to regulate political speech, touches the core of first amendment protection. The court stated that the first amendment exists to protect free discussion of governmental affairs. Mills v. State of Alabama, 384 U.S. 214 (1966). The court held that, since disclosure requirements undoubtedly tend to restrict the freedom to distribute and consequently deter free speech, the latter right encompasses the right to remain anonymous. Talley v. State of California, 362 U.S. 60 (1960).

The court, aware that the state has a compelling state interest in the integrity of the electoral process, held that his governmental interest cannot sustain the sweeping impact of the regulation on protected speech. The court stated that the legislative finding that source disclosure assisted the electorate in making rational decisions at the polls cannot justify a blanket prohibition of all anonymous campaign literature. The court stated that compulsory disclosure will silence the voices of advocates of not only minority but novel views, reducing the quantity and diversity of participants and perspectives within an election contest and thus frustrating the compelling state interest of obtaining an informed electorate while seriously infringing upon its right to receive divergent ideas. Brown v. Superior Court, 96 Cal. Rptr. 584 (1971).

The court held that the governmental interests of assisting the electorate in distinguishing between truth and falsity, facilitating redress for libel, and discouraging through criminal punishment campaign falsity can be furthered through more narrowly constructed statutes without the criminalization of anonymously uttering the truth.

The court stated that courts of other jurisdictions confronted with the identical issue have reached the same conclusion that a legislative prohibitive of anonymouns campaign literature is unconstitutionally overbroad. See People v. Duryea, 351 N.Y.S.2d 978 (1974); State v. North Dakota Ed. Ass'n, 262 N.W.2d 731 (1978); State v. Fulton, 337 So.2d 866 (La. 1976); and Commonwealth v. Dennis, 329 N.E.2d 706 (Mass. 1975).

Advertising and Solicitation - Reference to Opposing Candidate

Commonwealth v. Coyle, 421 A.2d 716 (Pa. Sup. Ct. 1980)

Appellant, a candidate for election to the Pennsylvania House of Representatives, appealed a guilty judgment of a violation of 25 Pennsylvania Statutes Annotated sec. 3234 (now sec. 3258). This statute provides in part that a candidate or a candidate's political committee cannot place any advertisement

in a weekly newspaper which refers to an opposing candidate during the eight days immediately prior to an election, unless he has first given a copy of the material to the opposing candidate and to the appropriate County Board of Elections in sufficient time for a reply advertisement to be published in the same issue of the publication as the original advertisement. Appellant admitted that he delivered an advertisement to three weekly newspapers which were scheduled for publication five days prior to the election without notifying his opponent or the election board.

The court affirmed the judgment of the lower court. The court held that, while the advertisement did not mention the appellant's opponent by name, it did specifically refer to "our present state representative" who was the only opponent for the office he sought. The court referred to its decision in Commonwealth v. Wadzinski, 403 A.2d 91 (Pa. Super. 1979), rev'd, 422 A.2d 124 (Pa. 1980), in holding that the statutory provision was not unconstitutional on the grounds that it was overly broad and in violation of the equal protection clause in the Pennsylvania and Federal Constitutions.

(See Commonwealth v. Wadzinski, 422 A.2d 124 (Pa. 1980), in the State Ct. Cases section).

Advertising and Solicitation - Reference to Opposing Candidate

Commonwealth v. Wadzinski, 422 A.2d 124 (Pa. 1980)

Appellant, a candidate for mayor, appealed his conviction of violation of 25 Pennsylvania Statutes Annotated sec. 3234 (now sec. 3258) on the grounds that the statute violated his free speech protected by the first amendment. Section 3258, provides in part that candidates placing any advertisement which refers to an opposing candidate and which is to be broadcast during the forty-eight hours immediately prior to an election must first give a copy of the broadcast material to the opposing candidate and the appropriate County Board of Elections in sufficient time for a reply advertisement to be broadcast at the same approximate time as the original advertisement and prior to the election. This requirement applies regardless of whether the statements made about the opposing candidate are true or false. Appellant made a political radio broadcast on the day before election without prior notice to the opposing candidate or the election board. In this broadcast appellant noted that a charge of perjury was pending against the incumbent mayor, criticized his performance as mayor, and attacked his indebtedness to "special interests."

The court held that sec. 3258 unreasonably restricted protected speech in violation of the first and fourteenth amendments. The court stated that the following principles which were forcefully applied by the Supreme Court in Mills v. Alabama, 384 U.S. 214 (1966), and Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974), and which were being challenged by the statute were: 1) that free discussion of candidates for political office is essential to the functioning of democratic society; 2) that political campaign discussions are afforded "the broadest protection" in order to "assure [the] unfettered interchange of ideas for the bringing about of

political and social changes desired by the people"; 3) that the broad grant of protection given to political campaign discussion reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."; and 4) that the first amendment guarantee of free speech "has its fullest and most urgent application to the conduct of campaigns for public office."

The court stated that any state law regulating campaign speech requires the most exacting judicial scrutiny. The court recognized that certain regulation may be applied to political speech (e.g., laws of defamation in political speech in order to protect reputational interests. Also, the court pointed to Buckley v. Valeo, 424 U.S. 1 (1976), in which federal statutory limitations on political contributions and requirements that candidates disclose the source of their campaign funding were sustained against first amendment challenges). The court hastened to add that these interests would not justify any law that places a substantial burden on protected political speech.

The court judged that unlike valid time, place and manner regulations, sec. 3258 was likely to inhibit substantially the decisions of political candidates regarding the content and timing of their final communications to the electorate immediately before the election. The court held that although the statute is content neutral in that it applies without regard to the particular content or message of advertisements making reference to an opponent, it is indeed content specific in that the notice requirement itself is triggered only by political advertisements that engage in character-oriented as opposed to issue-oriented debate.

The court concluded that the broad sweep of the sec. 3258 notice requirement places a substantial burden on the candidate's ability to engage in protected political discourse. Further, the inhibitory effect of that requirement would in many cases work directly counter to the governmental interest in providing voter access to accurate information about candidates and to robust debate on the issues.

Apportionment and Redistricting - County Plan

Story v. Anderson, 93 Wash.2d 546, 611 P.2d 764 (1980)

In this case the court granted reconsideration and vacated an earlier opinion, Story v. Anderson, 91 Wash. 2d 667, 588 P.2d 1179, 590 P.2d 1272 (1979), and affirmed the trial court's holding that the Island County district scheme for electing county commissioners violated the equal protection clause of the fourteenth amendment.

Respondent, a resident of district two in Island County, claimed that the primary election scheme as applied to Island County violated the equal protection clause of the fourteenth amendment because the inequality of populations of the three districts resulted in more strongly weighted votes for the residents of the smaller districts. Island County, located in Puget Sound, consists primarily of Whidbey Island, Camano Island, and two small, relatively

unpopulated islands. The first district is made up of central and south Whidbey Island (population, 9,228), the second of northern Whidbey Island (population, 24,646), and the third of Camano Island (population, 3,589). District two has a large naval airfield within its boundaries and also contains the city of Oak Harbor.

In accordance with the statutory provisions governing elections of county commissioners in this state, Revised Code of Washington Annotated 36.32.010 et seq., every county must be divided into three commissioner districts. The board of county commissioners consists of three commissioners, each of whom resides in one of the three districts. The candidates for each position are nominated by the qualified voters of their district either through the primary election or a minor party convention. The voters in the entire county then vote in a general election to select commissioners from the pool of candidates for each position. The general requirement for drawing district lines is that each of the three districts in the county must comprise as nearly as possible one-third of the population of the county. However, a special statutory exception, RCW 36.32.020(1), permits counties which are composed entirely of islands to draw district lines without regard for population.

Respondent claims that the combination of the primary and general elections assures the voters from district three that, even though they comprise less than 10 percent of the total electorate and just over 15 percent of the registered voters, a candidate chosen by that district alone in the primary election will exercise one-third of the voting power of the entire county as an elected county commissioner.

The court held that the Island County primary election procedure is subject to the one-person, one-vote requirement. The one-person, one-vote principle requires that the Island County districts be of "substantial equality of population" in order to permit voters in each district to exercise approximately equal voting strengths in nominating candidates. The court was guided by Moore v. Ogilvie, 394 U.S. 814 (1963), which stated that, in nomination procedures as in election procedures, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one-man, one-vote basis of our representative government." The Court also stated in Moore, that "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."

The court added that a further basis for requiring substantial equality of population is that the inequality of population also has an indirect effect on the general election. The court said that, as a result of the single-district primary procedure as applied, the voters in the county-wide general election are presented with a group of candidates for one of the commissioner positions which has been preselected by the disproportionately low population of district three. The court explained that these candidates need not necessarily have expressed views that would be attractive to a substantial part of the county, and may in fact be committed to the narrowest of regional interests.

To determine whether the inequality in this case was so substantial as to require invalidation of the district scheme, the court applied the one-person, one-vote analysis (the degree of inequality of voter representation was measured by the ratio of the largest district to the smallest and by the combined percentage deviation from the average). The court stated that in this case the ratio of largest district to smallest was 6.87 to 1, and the percentage deviation was 168.62 percent. The court noted that an examination of prior case law revealed that the disparity in this case greatly exceeded disparities that have been struck down as impermissibly large. See Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964), in which the Court struck down an election scheme with a ratio of 3.6 to 1 and a percentage deviation of 115.44 percent. Also, See WMCA, Inc. v. Lomenzo, 377 U.S. 633, (1968), in which the Court invalidated an election scheme with a ratio of 2.6 to 1 and percentage deviation of 88 percent.

The court granted a writ of mandamus directing the commissioners of the county to redraw district lines so that each of the three districts would comprise as nearly as possible one-third of the population of the county.

Ballot - Political Designation

Bachrach v. Secretary of the Commonwealth, 415 N.E. 2d 832 (Mass. 1981)

In this case of first impression the court declared that Massachusetts General Laws Annotated, chap. 53, sec. 8, and chap. 54, sec. 41, violated plaintiff's constitutional rights of freedom of expression, association and equal protection. Sections 8 and 41, which had prohibited unaffiliated candidates from using the words Democrat or Republican in any combination on the ballot, was amended in 1979 to prohibit the term "Independent" as well. The word Independent was forbidden as any part of the designation on nominating petitions or on the ballot; failure to make a political designation resulted in the term "Unenrolled" being used on the ballot.

The court stated that, with respect to the political designations of the candidates on nomination papers or the ballot, it is possible that a state not become involved and leave it to the educational efforts of the candidates during the campaigns. But, the court stated, as soon as the state admits a particular subject to the ballot and commences to manipulate the content, it must take account of protected rights. The court allowed that it was acceptable for the state to require that candidates of political parties appear on the ballot by their party names, while others, not having an affiliation with such a party, are permitted designations of their choosing of not more than three words. But to prohibit the term Independent to be used is unlawful on much the same basis as a statute which might undertake to forbid political candidates to discuss a given subject, e.g. religion or nuclear power.

The court stated that the constitutional vice was deepened because in practical effect an element of invidious discrimination was added (any other candidate was allowed to use a designation on the ballot conforming

to the rubric he used during the campaign). The candidate who chose, quite legitimately, to campaign under the label Independent was singled out and denied that expression on the ballot. The court added that the deprivation was not inconsiderable, for Independent is a customary title long availed of in American politics, having a "positive connotation."

The court stated that, if freedom of expression was impaired, damage would also be done to associational rights, and thus to the right to vote, e.g., voters who during the campaign might have been favorably impressed with the candidate as an Independent would be confronted on the ballot with a candidate who was called Unenrolled. The court stated that ultimately the 1979 regulation might be expected to discourage from the beginning an appeal to voters on grounds of the candidate's independence from established parties and thus to protect those parties from a conventional style of criticism and attack. The court cited Cohen v. California, 403 U.S. 15 (1971), and refused to "indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." The court stated that governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."

Campaign Financing - Contributions - Limitations

Citizens Against Rent Control v. City of Berkeley, 27 Cal.3d 819, 614 P.2d 742 (1980). Certioriari granted 2/23/81, Doc. No. 80-737

Defendants, the City of Berkeley, Berkeley Fair Campaign Practices Commission and others, appealed a summary judgment of the lower court, which declared that sec. 602 of the Berkeley Election Reform act of 1974 was unconstitutional as violative of the first amendment rights of free speech and association. Section 602 provides that no person may make a contribution which exceeds $150 in support of or in opposition to any measure.

Plaintiffs, a political committee known as the "Citizens Against Rent Control/ Coalition for Fair Housing" (CARC), had received contributions from a number of individuals in excess of $250 with the aggregate sum of such contributions amounting to $18,600. Defendant, Berkeley Fair Campaign Practices Commission, had ordered that CARC forfeit the $18,600 to the City of Berkeley as required by sec. 604 of the Act. Plaintiffs sought and received first a temporary restraining order and then the summary judgment.

The court reversed the judgment of the lower court. The court applied the strict scrutiny test, which requires that the law be supported by a compelling state interest and that this interest be promoted by means which are closely drawn so as to avoid unnecessary interference with protected freedoms.

The court stated that the claim that a campaign committee's right to engage in effective political advocacy is affected by a contribution ceiling was answered by the decision in Buckley v. Valeo, 424 U.S. 1 (1976). The Supreme Court recognized the problems that would result if a contribution limit did prevent effective advocacy, but stated: "The overall effect of the Act's

contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potential available to promote political expression."

The court held that the law under attack did not interfere with effective advocacy or dissemination of information by all sides to a ballot measure controversy, but instead was designed to preserve initiative and referendum elections for the purpose for which they they were created, and tended to prevent corruption of the political process. The court rejected the argument that mere disclosure of contributions was sufficient for this purpose.

The court also held that the ordinance did not impermissibly limit associational rights guaranteed by the first amendment. The court stated that in Buckley, id., the Supreme Court observed that contribution ceilings leave the contributor "free to become a member of any political association and to assist personally in the association's efforts...."

Candidates - Ballot Access - Filing Requirements

State ex rel. Smart v. McKinley, 412 N.E. 2d 393 (Ohio 1980)

Plaintiff, candidate for the unexpired judicial seat on the Fifth District Court of Appeals, brought suit seeking a writ of mandamus to prohibit a judge on the Court of Common Pleas of Stark County from enjoining the placing of the candidate's name on the ballot. Originally, plaintiff filed petitions of candidacy as a Democratic candidate for the new judicial seat (created after the Governor of Ohio signed into law Am. Sub. S.B. No. 13) but later withdrew and filed petitions of candidacy as an independent for the unexpired seat. The board of elections unanimously voted to place the candidate's name on the ballot for the unexpired seat after several electors brought action to keep her name off the ballot. It was then that the visiting judge on the Court of Common Pleas issued a permanent restraining order enjoining the placing of the candidate's name on the ballot for not meeting the sixty-five day time limitation for filing as an independent candidate as required in R.C. 3513.30 (the statute regarding candidate withdrawal).

The court held that the board of election's decision to place candidate's name on the ballot for the unexpired seat should not have been overturned in the absence of fraud, corruption or abuse of discretion. The sixty-five day limitation in R.C. 3513.30 could not apply when the officeholder vacated the office only forty days before the election. See State ex rel. Gongwer v. Graves, 107 N.E. 1018 (1914). Based on the reasoning of Sullivan v. State ex rel. O'Connor, 181 N.E. 805 (1932), and State ex rel. Bass v. Board of Elections, 105 N.E. 2d 414 (1952), a writ of mandamus was issued prohibiting the respondent from enjoining the placing of the candidate's name on the ballot as an independent candidate.

Candidates - Disqualification of

Kitsap County Republican Central Committee v. Huff 620 P.2d 986 (Wash. 1980)

In this case, plaintiffs, a political committee, its chairman and a voter, filed suit seeking injunctive relief against the county auditor for substituting the name of the Democratic party's nominee for state senator on the ballot until the candidate (found guilty of three counts of felonies with sentencing set for a date after the general election) is formally convicted, which would automatically disqualify him from running for office. Declaratory judgment was also sought so that the candidate would not be disqualified until the judgment and sentence had been entered in the federal case.

The question to be resolved in this case is whether the candidate has been "convicted" when a jury verdict has been returned against him. Using Matsen v. Kaiser, 443 P.2d 843 (Wash. 1968) (which states that the entry of a judgment and sentence after a guilty plea constitutes a conviction warranting disqualification from office), the supreme court affirmed the lower court's opinion holding that the candidate cannot be relieved of his office, his right to vote or his position on his party's ticket until the trial court enters a judgment and sentence confirming the jury's verdict.

Candidates - Petition Requirements

Bush v. Salerno, 412 N.E.2d 366 (N.Y. 1980)

Application was filed to invalidate a petition designating an individual as a candidate for the office of state senator. The supreme court granted the application, and the candidate appealed.

Petitioner filed the objection on July 28, 1980, and it was received by the state board of elections on July 31, 1980. In a letter post-marked Autust 5, 1980, and received by the board of elections on August 7, 1980, petitioner filed specifications of the objections. Objection on the ground that the specifications were not timely filed (subdivision 2 of sec. 6-154 of the election law provides that specification of the grounds of the objections shall be filed within six days after the objection is filed and if not timely filed such objection shall be null and void) was then made by candidate and overruled by both the trial judge and the supreme court. Appeal was then made.

The issue was the determination of the date when the six-day period for filing specifications began. Subdivision 1 of sec. 1-106 of the election law provides that "all papers sent by mail in an envelope postmarked prior to midnight of the last day of filing shall be deemed timely filed and accepted for filing when received" and "if the last day for filing shall fall on a Saturday, Sunday or legal holiday, the next business day shall become the last day for filing." Petitioner argued that the phrase "accepted for filing when received" required the conclusion that her objections were filed July 31, 1980, when received, rather than on July 28, 1980, when mailed. Using Gwynne v. Board

of Education, 181 N.E. 355 and East End Trust Co. v. Otten, 174 N.E. 655 in which it was apparent that the legislature enacted subdiv. 12 of sec. 143 of the election law to make "the time limitations provided therefore absolute and not a matter subject to the exercise of discretion by the courts", the court held that the petitioner's specifications were not timely filed within six days after the general objection was filed and that the court was without jurisdiction to invalidate a petition designating an individual as candidate for the office of state senator. The court dismissed the petition.

Candidates - Qualification - Dual Candidacies

In Re O'Pake, 422 A.2d 209 (Pa. Commw. Ct. 1980)

Petition was filed to set aside the nomination petitions of a candidate for the Democratic Party's nomination for both the offices of senator in the general assembly and attorney general. Relying on sec. 910(d) of the Pennsylvania Election Code (which requires each candidate to file with his nominating petition an affidavit stating that he is eligible for such office), petitioners claimed that it was impossible for a candidate to take the oath of office for two imcompatible offices.

Art. II, sec. 6 of the Pennsylvania Constitution provides that no person holding any office in the Commonwealth to which a salary is attached shall be a member of the general assembly, and art. IV, sec. 6 provides that no person holding any office under the Commonwealth shall exercise the office of attorney general. Referring to Misch v. Russell, 26 N.E. 528 (Ill. 1891), State ex rel. Neu v. Waechter, 58 S.W.2d 971 (Mo. 1933), and Kelly v. Reed, 355 P.2d 969 (Nev. 1960), which have upheld dual candidacies, the court stated that there was no rule in Pennsylvania law prohibiting dual candidacy and no reason to make such a law. The court concluded that the candidate was not prohibited from seeking the party's nomination for both offices even though the constitution would not permit him to hold both of the offices at the same time.

Candidates - Qualifications - Residence Requirement

Matthews v. City of Atlantic City and State of New Jersey, 84 N.J. 153 (1980)

Plaintiff, a registered voter who filed a petition of nomination for the office of city commissioner, challenged the constitutionality of a provision of the New Jersey Statutes Annotated, 40:72-1, which provides that in an applicable municipality a member of the board of commissioners, the elected governing body, "shall have been a citizen and resident of the municipality for at least two years immediately preceding his election." The provision is part of the Walsh Act, which sets forth the commission form of government. Plaintiff claimed that this restriction on eligibility for public office violated the equal protection clause of the fourteenth amendment. Plaintiff became a resident of Atlantic City five or six months before he filed his petition of nomination for the office of city commissioner.

The trial court and the appeals court upheld the constitutionality of the Act. These courts based their finding on the fact that in Stothers v. Martini, 6 N.J. 560 (1951), the Supreme Court of New Jersey had upheld sec. 40:72-1 against a similar attack.

The court reversed the lower court's holding. The court based this reversal on the fact that, since the court decided Stothers, state legislation affecting the electoral process has been subjected to closer constitutional scrutiny. The courts stated that the reassessment of reasoning in the light of contemporary approaches to issues of equal protection requires both a fresh analysis of the competing interests involved and a reconsideration of the proper standard for reviewing the legislature's balancing of those interests.

The court decided that the threshold task in evaluating the durational residency requirement is selecting the appropriate standard of review. The court stated that the character of the classification was not based on any "suspect" criterion that would require the minimum of judicial deference embodied in the notion of strict scrutiny. Rather, the court noticed that the classification drew a distinction between residents solely on the basis of length of residence. The court also said that the individual interest involved in being a candidate has never enjoyed "fundamental" status. Nevertheless the court recognized that the relationship between the right to vote, which is "fundamental," and the right to run for elective office could not be ignored and that the extent to which the interests of the state may infringe upon the individual's freedom of electoral choice determines the proper standard of judicial review.

The court adopted an intermediate standard of review such as the court stated was used in Bullock v. Carter, 405 U.S. 134 (1972). This standard maintained that a requirement or restriction for candidates for elective office must be reasonably and suitably tailored to further legitimate governmental objectives. The court said that like age, residence or citizenship restrictions on public office holding, a durational residency requirement is directed at maintaining the integrity of the ballot by preventing fraudulent and frivolous candidacies. It ensures that candidates have some knowledge of local affairs and, conversely, that local voters have an opportunity to learn about a candidate to assess intelligently his fitness for office. The court stated that these are valid governmental objectives. They remain, however, subject to the requirements imposed by the Constitution, including the equal protection clause. The court stated that, once a residency requirement is found justified, the precise time period selected need only fall in the reasonable range. The court determined that it need not resolve whether a two-year residency requirement passes constitutional muster. The alleged justifications for the residency requirement lose meaning when it is observed that the statute applies to only 40 out of 567 municipalities in the state with a commission form of government.

The court held that the vast majority of municipalities have no durational residency requirement for candidacy. There has been no showing that, because of the structure of the governing body in Walsh Act municipalities, an additional two years is reasonably necessary for a candidate to become

familiar with local problems or for the voters to become familiar with the candidates. The court concluded that the state has failed to provide any sound justification as to why municipalities under the Walsh Act and other forms of local government should be treated differently. It is for this reason that the court held that the statute must fail.

Election Contests - Residency Requirement

Gordon v. Blackburn, 618 P.2d 668 (Col. 1980)

Plaintiff, mayor-elect of the City of Woodland Park, brought action after the district court judged the election null and void and held that two votes were cast illegally, since electors were not "residents" of the municipality and were not qualified to vote under secs 31-10-102(8.5) and 31-10-201(3)(a) of the Colorado Revised Statutes. (Note: the election was won by a majority of two votes.)

The supreme court held that the electors (husband and wife) who cast the two contested votes did not do so illegally on the ground that they were not "residents" of the municipality. Sec. 31-10-201(3)(a) of the Colorado Revised Statutes provides that the residence of a person is the principal or primary home or place of abode of a person and that one does not lose voting rights by reason of a departure or absence from the primary home once it has been established. The court stated that all circumstances must be considered before reaching a decision regarding the electors' intention to establish a new principal or primary home. See People v. Turpin, 112 P. 539 (1910). The court noted that (1) the electors had established their principal or primary home within the limits of the municipality for over eight and one-half years and that during that time they considered themselves and were treated by others as residents; (2) their business operation and self-employment were located within the limits of the municipality; (3) their marital status was continuous and localized within the municipality; and (4) they owned and continued to own real property within the municipality and they did not plan to establish an official place of residence elsewhere. The court held that the electors never abandoned their principal or primary home within their voting precinct and that they preserved their right to vote.

SECTION IV - STATE ATTORNEY GENERAL OPINIONS

FLORIDA - Attorney General Jim Smith

Apportionment and Redistricting - Annexations Without Referendum - Number AGO 081-22, issued 3/12/81.

Provides that the City of Inverness may annex unincorporated property only in accordance with the procedures outlined in Ch. 171, F.S., and may not require an ordinance annexing property and redefining the boundary lines of the city pursuant to the provisions of sec. 171.044, F.S., relating to voluntary annexations, to be submitted to a referendum on such annexation.

Governmental Employees - Dual Officeholding - Number AGO 080-97, issued 12/5/80

Under the dual officeholding provision of the state constitution, a municipal officer is prohibited from being appointed to or holding office as a member of a semi-autonomous board which exercises a portion of the city's governmental power. However, the legislative body of the city may designate such officers to perform ex officio the duties of the office of a member of such board provided that these duties are not inconsistent with the duties already being performed.

IOWA - Attorney General Thomas J. Miller

Campaign Financing - Disclosure Requirements - Number 80-7-2, issued 7/8/80

A proposed question becomes a "ballot issue" for purposes of triggering campaign finance disclosure requirements when the government entity charged with the responsibility of presenting the measure to the electorate complies with its statutory duty to be submitted at a scheduled election.

Governmental Employees - Candidates for Political Office - Number 80-7-4, issued 7/8/80.

A deputy sheriff covered by civil service is required to take a 30-day leave of absence or may elect to take vacation and receive already accrued vacation pay, immediately prior to the primary and general election in which he or she is a candidate for a partisan elective office for remuneration. A chief deputy is not required to take such leave.

Primary Elections - Absentee Voters - Number 80-10-12, issued 10/30/80

A written, mailed request for an absentee ballot in a primary election does not itself constitute a written declaration of a change of party affiliation under § 53.51. A qualified elector applying for an absentee ballot in person after the close of registration for a primary election may not cast the ballot for the nominee of a party for which he or she is not registered, except as provided in § 43.42, which permits the elector to change or declare a party affiliation only at the polls on election day. The procedures set forth in §§ 43.41 and 43.42 do not involve a denial of equal protection for absentee voters in primary elections.

MASSACHUSETTS - Attorney General Francis Bellotti

Governmental Employees - Leave of Absence to Serve in Elective Office - Number 80/81-13, issued 2/10/81

A school committee is not required to grant a leave of absence to a public school teacher who is serving in an elective state office.

NEW YORK - Attorney General Robert Abrams; opinion written by
Assistant Attorney General Robert W. Imrie

Apportionment and Redistricting - Consolidation - Number 81-14, issued 1/29/81

Upon the creation of the Town of East Rochester to be coterminous with the Village of East Rochester, the coterminous town and village must apply the provisions of section 17-1703-a(3)(c) of the Village Law when filling the offices and conducting the election of officers in the town.

Governmental Employees - Dual Officeholding - issued 12/1/80

The same person simultaneously may hold the two offices of elected town assessor and appointed deputy town superintendent of highways; that the town board, in a town where there is a vacancy in the elected office of town superintendent of highways, may create that deputy office and, five or more days later, appoint a deputy.

Governmental Employees - Dual Officeholding - Number 81-11, issued 1/21/81

The same person simultaneously may hold the elective village office of mayor and the elective county office created by county local law of County Supervisor from the town in which all or a part of the village is situated so long as the county supervisor from the town does not hold any elective town office, sit as a member of the town board or perform any town function.

Governmental Employees - Dual Officeholding - Number 81-17, issued 2/4/81

Provides that there is no incompatibility between the office of school board member and village trustee of a village in the school district and there is no inherent conflict of interest in the simultaneous holding of the two elective offices by the same person, which would disqualify him from voting on a plan, inter alia, to move the school district administrative offices to a school located in the village.

NEW YORK - Attorney General Robert Abrams; opinion written by Assistant Attorney General James Cole

Governmental Employees - Dual Officeholding - Number 81-22, issued 2/11/81

Provides that a village may establish the elective office of village justice by resolution or local law, subject to permissive referendum. Statutory residency requirement precludes a person from serving as justice in two or more villages.

Initiative and Referendum - Town Administrator - Number 81-10, issued 1/21/81

Provides that a local law establishing the position of town administrator or manager as the head of an independent executive branch of town government is subject to mandatory referendum. A local law delegating administrative powers to the administrator or manager, subject to control by the town board, is not subject to referendum.

WYOMING - Attorney General Steven Freudenthal

Initiative and Referendum - Procedural Requirements - Number 81-005, issued 5/15/81

It is not required that an initiative be introduced as a bill in the legislature prior to being placed on the ballot. All that need occur for an initiative to be submitted to the electorate is that proper petitions be timely filed with the Secretary of State containing the appropriate number of signatures prior to a budget or general session of the legislature.

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