Federal and Kansas Update on Election Law, Voting Rights and Campaign Finance

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RECENT FEDERAL AND KANSAS DEVELOPMENTS IN ELECTION LAW, VOTING RIGHTS, AND CAMPAIGN FINANCE

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This paper addresses developments in the law in 2014 and 2015 in Kansas and federal law on elections, voting rights, and campaign finance. These areas of the law are complex and constantly changing, sensitive to the political winds in the country.

A. Kansas Developments

1. Election Law

   a. Changing Party Affiliation

   During the 2014 session, the Legislature adopted HB 2210, which limits voters' ability to change party affiliation between the deadline for candidates to file for the primary, in which the political parties select their nominees for office, and the primary itself. Between June 1 (or the next business day if June 1 falls on a weekend) and the date on which the Secretary of State certifies the primary results (usually shortly after the primary is held on the first Tuesday in August, but not later than September 1), voters may not change their party affiliation.

   The purpose of the legislation was to end the practice of voters changing party affiliation, or declaring a party affiliation, so they could vote in the primary for a candidate of their preference, even though they are not good faith party supporters. Prior to this change, voters could change their party affiliation up to 14 days before a primary. Since Kansas runs "closed" primaries, that is, only declared members of a political party may vote in
that party's primary, declaration of party affiliation is a *sine qua non* to voting in a party's primary.

b. Dates for Municipal and County Elections

It has been common practice for municipal and local elections to be held at times of the year other than the traditional first Tuesday of November. The Legislature in 2015 adopted HB 2104, which will move municipal and local elections to November of odd-numbered years. All such elections would remain nonpartisan.

c. Replacement of Candidates That Have Withdrawn

The 2014 U.S. Senate election in Kansas saw the anomalous phenomenon of the candidate of a major political party, having won his party's nomination in a contested August primary, seeking to withdraw from the race. The candidate who won the Democratic primary, Chad Taylor, sought to withdraw from the nomination in late September, 2014, several weeks after the primary and a few weeks before the general election. It was speculated at the time that he sought to withdraw because his "vote" would go to a strong independent candidate, and those additional votes could lead to the defeat of the Republican incumbent. At least in part to prevent this situation from arising again, the Legislature included in HB 2104 provisions limiting the circumstances under which a candidate may withdraw (severe medical hardship or non-residence in Kansas) and requiring parties to fill nominations if a candidates withdraws.

HB 2104 specifies the process for designation of a new candidate. The party committee for the relevant voting district (Congressional, county, or state) must meet within 10 days of the vacancy and select a replacement candidate.

In a not-too-subtle poke at the Supreme Court, which in the Taylor candidate withdrawal litigation had held that the word "shall" in the statute on the method for withdrawal should be interpreted as "may," in HB 2104 the Legislature stated that with respect to the candidate replacement procedure, "the word 'shall' imposes a mandatory duty and no court may construe that word in any other way."

d. Elimination of the Presidential Primary
In HB 2104, the Legislature eliminated the Kansas Presidential Primary.

2. Voting Rights

a. Voter Identification Law

Kansas joined many other states in 2011 when it enacted a law requiring voters to produce photo identification when appearing at a polling place to cast a ballot. Kansas Safe and Fair Election Act, HB 2067, 2011 Session Laws, Ch. 56. Beginning in 2012, voters had present photo ID when casting a vote in person, and in 2013, a voter had to prove U.S. citizenship when registering to vote. The provisions of the voter ID law may be at K.S.A. 8-1324(g)(2), 25-1122, 25-2908, and 25-3002.

b. Ballots and Registration Forms

As noted above, in 2011 the Legislature passed HB 2067, which requires Kansans to provide proof of U.S. citizenship when they seek to register to vote. On the other hand, proof of citizenship is not needed to register to vote for federal candidates (President, Vice-President, U.S. Senate, and Congress).

In Arizona v. Inter Tribal Council of Arizona, Inc., 133 S.Ct. 2247 (2013), the Supreme Court had ruled that Arizona's voter registration law, which is quite similar to the Kansas statute, could not be used to require proof of citizenship for voter registration using a form issued by the federal Election Assistance Commission. Under the National Voter Registration Act, 42 U.S.C. Sections 1973gg – 1973gg-10, passed in 1993, a simple voter registration card is used to register to vote in federal races. In a lawsuit filed by Kansas and Arizona in 2014 in U.S. District Court in Wichita, the states sought an order requiring the EAC to modify federal the registration form to include the proof of citizenship requirement in the states' laws. The EAC had denied that request, so the states appealed to federal court.

Judge Melgrem granted the relief sought by the states. Kobach v. United States Election Assistance Commission, 6 F.Supp.3d 1252
The Tenth Circuit reversed that decision in November, 2014, holding that the federal registration form does not have to include the state law proof of citizenship requirement. On March 21, 2015, Kansas and Missouri filed a petition for a writ of certiorari with the U.S. Supreme Court. As of the date on which these materials were prepared, the case had not been set for conference by the Supreme Court to determine whether to grant certiorari.

B. Federal Developments

1. Election Law

   a. Constitutionality of State Redistricting Commissions

   Under Article I, Section 4 of the U.S. Constitution, state legislatures determine the boundaries of districts for the election of members of the U.S. House of Representatives. Each state also determines district boundaries for elections to the state House and Senate, as well as to other elections to positions involving district representation (for example, the Kansas Board of Education, whose ten members represent districts, each of which is made up of four State Senate districts under Kansas Constitution Article 6 Section 3(a).

   Several states, including Arizona, have chosen to use non-partisan commissions to draw the district lines. The Arizona Independent Redistricting Commission is responsible for redrawing district lines after the results of the decennial Census are made available (the results of the Census must be available before redistricting may begin, because only at that point can Congress determine whether to reallocate each state’s share of the 435 Congressional seats, in light of shifts in population). The five members of the Commission are appointed by the leaders of the state House and Senate, and one of the members cannot be a member of the Democratic or Republican Parties. The Commission was instituted in 2011 by popular initiative, and its constitutionality was soon challenged by the Arizona Legislature, from which the duty of redistricting had been taken by the popular initiative.

   The constitutionality of those non-partisan commissions is now before the U.S. Supreme Court. The argument is that Article I requires the state legislatures to do the work, and that the work may not be delegated to any
other body. A three-judge panel in Arizona federal district court upheld the constitutionality of the Arizona Commission process. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 997 F.Supp.2d 1047 (D. Ariz. 2014), cert. granted. The Supreme Court granted certiorari and oral argument was heard on March 2, 2015. A decision from the Court is expected before the Court ends its term in June, 2015. If the Court finds the commission redistricting to be a violation of Article I, presumably those states that have utilized the commission structure will have to revert to legislative action in the next redistricting, and, depending on the Court’s view of past redistricting, may have to revisit the district lines drawn in the post-2010 Census process.

2. Voting Rights

   a. Voting Rights Act:

      In *Shelby County v. Holder*, 570 U.S. ___(2013), the Supreme Court found unconstitutional the formula used to determine application of the preclearance procedure in the Voting Rights Act. The Voting Rights Act, 52 U.S.C. Sections 10301-10314, was passed in 1965 to implement the Fifteenth Amendment to the Constitution, forbidding the states from adopting procedures that infringe on the right to vote on the basis of race or color. Section 5 of the Voting Rights Act provides that certain states, and all of the political subdivisions of those states, must seek prior approval from the Department of Justice or the U.S. District Court for the District of Columbia before they may institute any changes in their election processes or procedures. This approval process is referred to "preclearance," and has been a source of substantial frustration for the states subject to the procedure.

      The states subject to Section 5 preclearance were determined by application of a formula set forth in Section 4(b), which focused on the percentage of the voting age population registered to vote or actually voting in the 1964 Presidential election. Congress chose to readopt the Section 4(b) formula when it renewed the Voting Rights Act in 2006. The states subject to the formula, and thus the Section 5 preclearance requirement, include Texas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, Arizona, Alaska, and much of Virginia (the Act's preclearance requirement
also applies to states where a substantial percentage of the population has a primary language other than English).

In *Shelby County*, an Alabama county brought a direct challenge to Section 5. Rather than find Section 5 preclearance unconstitutional, however, the Court majority found the Section 4(b) formula was so old, and its application so out of date, as to constitute an unconstitutional law, even though Congress had only 7 years earlier renewed its provisions after an extensive study of the continued existence of race-based voting procedures in southern states.

By finding Section 4(b) unconstitutional, the Court effectively ended Section 5 preclearance, ending for the time being (until Congress chooses to adopt a formula that will withstand judicial scrutiny) the practice of preclearance. Thus, the states that were unhappy about preclearance have effectively obtained the relief they were seeking.

b. Voter ID Law Litigation

Since 2008, when the Supreme Court upheld an Indiana photo ID law in the face of Voting Rights Act and Equal Protection challenges in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), many American states have adopted laws that require voters to produce some form of photo ID upon appearance at a polling place to vote. Kansas enacted a photo ID law in 2011. 2011 Session Laws, Ch. 56.

Several of the state photo ID laws have been challenged in court. As an illustration of that litigation, Wisconsin enacted a photo ID statute in 2011, soon after the Governorship and both Houses of the State Legislature passed from Democratic to Republican control in the 2010 elections. 2011 Wis. Act 23, to be found at Wis. Stat. Sections 5.02(6m) and 6.79(2)(a). The Wisconsin law requires voters to produce at least one piece of photo identification at the polling place. Included among approved identification are a valid Wisconsin driver’s license, Wisconsin college ID (with proof of present enrollment), U.S. Passport, U.S. Military ID, and Wisconsin-based Indian Tribe ID.

The statute was challenged by several advocacy groups, and has now made its way through the courts until final resolution in March, 2015, when the Supreme Court denied certiorari. *Frank v. Walker*, 17 F. Supp.
3d 837 (E.D. Wis. 2014), rev’d, 768 F.3d 744(7th Cir. 2014), cert. denied, ___ U.S. ___ (2015). Although the District Judge found that up to 9% of the eligible electorate in Wisconsin lacks the requisite ID, the three-judge panel of the Seventh Circuit reversed, finding no violation of Section 2 of the Voting Right Act, 52 U.S.C. Section 10301, or the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court denied certiorari in March of this year.

The most interesting judicial opinion issued in the course of the Frank v. Walker litigation was a dissent from the Seventh Circuit's denial of rehearing *en banc*. The full court was evenly divided, 5-5, and thus rehearing *en banc* was denied. Judge Richard Posner, one of the most prominent judges in the U.S., wrote a scathing opinion about the Circuit's decision to deny rehearing. In 2007 Judge Posner had written the Seventh Circuit opinion that the Supreme Court affirmed in its Marion County decision in 2008, and in that dissent Judge Posner wrote that he had changed his mind about photo ID laws and that his 2007 opinion was wrong. He stated his present belief that photo ID laws are intended to suppress the vote of individuals who will probably vote against the candidates of the party that is pushing this legislation: "There is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens." *Frank v. Walker*, No. 14-2058 and 2059, On Suggestion of Rehearing *En Banc* (7th Cir. October 10, 2014), at 28.

3. Campaign Finance

   a. Cap on Individual Contributions to Federal Candidates and Parties

   In McCutcheon v. FEC, 572 U.S. ____ (2014), the Supreme Court invalidated 2 U.S.C. Section 441a(a)(3), a provision included as a part of the Bi-Partisan Campaign Reform Act of 2002, popularly known as McCain-Feingold, that limited the total amount an individual could contribute to candidate campaign committees and other political committees. The Court found this limitation to be an unconstitutional infringement of the contributor's First Amendment right to express support for political candidates and committees. In that case, Shawn McCutcheon, an
Alabama electrical contractor, argued that the limitation on his contributions to federal political campaigns was a violation of his First Amendment rights. For example, under the rule at the time of the decision, individuals could contribute no more than $23,400 during a two-year election to candidates for Congress and the Senate. If the individual chose to make the maximum contribution of $2,600 per election (or $5,200 in total for two elections during the cycle), he could contribute to no more than 5 candidates. McCutcheon chose to give each of the candidates he supported a contribution of $1,776, so he was limited to contributing to 9 candidates.

The Supreme Court found these limitations unconstitutional. As it was not asked to invalidate the limit on contributions to individual candidates (the $5,200 limit per cycle), the Court found that increasing the number of candidates to whom an individual could contribute would not corrupt the candidates. The Court focused on the existence of *quid pro quo* corruption of candidates as the relevant consideration in determining whether a contribution limit was constitutional. As the Court found no prospect of corrupting individual candidates because the individual contribution limits were not being challenged, the Court found that the government argument against candidate corruption did not apply to the aggregate contribution limit. Thus, the limit was declared unconstitutional.

By the end of the 2014-15 election cycle, slightly less than 1,000 individuals had taken advantage of the uncapped aggregate contributions. These individuals made individual contributions to candidates and political parties that exceeded the aggregate limit invalidated in McCutcheon.

b. Increase in Per Election Contributions

The Federal Election Commission announced in January, 2015 that the amount an individual can contribute directly to a candidate campaign committee would increase from $2,600 per election to $2,700 per election, for the 2015-16 election cycle. The amount of individual contributions is, under 2 U.S.C. Section 441a, indexed for inflation, and the FEC has routinely increased the per election amount in recent cycles. The amount was originally $1,000 per election when campaign finance legislation was originally enacted in the early 1970’s, so inflation has had a significant impact on contributions.
The amount of contributions is set at a per election amount, so candidates for federal elective office (Congress and Senate) who have both a primary and general election may receive up the $5,400 from individuals donors, or $2,700 per election. The amount that Political Action Committees (PACs, not to be confused with SuperPACs, which are not allowed to contribute directly to candidate committees, but may only spend money independent of candidates) may contribute did not change: $5,000 per election. Similarly, the amount that individuals may contribute to PACs remained at $5,000 per year. Only individual contributions to candidates committees are indexed for inflation.

c. Increase in Permitted Contributions to Campaign Committees and Political Parties

In the Omnibus Budget Reconciliation Act of 2014, enacted by Congress and signed by the President in December, 2014, the two major political parties inserted a last-minute provision to allow large donors to make increased donations to the political parties for specified purposes. Donors may give up to $101,200 every year to following party entities, for each the following purposes: (1) to the national party (Democratic National Committee or Republican National Committee) for (a) construction or maintenance of buildings used by the party, (b) the cost of national conventions, and (c) to pay legal fees generated in recount disputes, and (2) to each of the party’s Congressional campaign committees for (a) buildings and (2) legal fees. Thus, donors may contribute up to $506,000 more annually than they could before the Budget Act.

The parties have already seen an influx of funds as a consequence of this change in the law. For example, through the end of the first quarter of 2015, the Republican Party had already raised more than $5,000,000 under these new provisions.