Election Law in the Era of Hyperpartisanship:

Fundamentals, Recent Developments and Best Practices

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1. 2022 – The Year of the Election Contest in Arizona

    - *Fillmore v. Pinal County* (Legislative primary)
    - *Townsend v. Pinal County* (Legislative primary)
    - *Lake v. Hobbs* (Gubernatorial race)
    - *Hamadeh v. Mayes* (Attorney General race that also went to a recount)
    - *Borrelli v. Hobbs* (Gubernatorial race)
    - *Finchem v. Fontes* (Secretary of State race)
    - *Barnett v. Hobbs* (Generic challenge to the election results)
    - *Golec v. Hobbs* (Generic challenge to the election results)
    - *Busch v. Diaz/Hobbs* (State legislative race)
    - *Davis v. Wadsack* (State legislative race)

2. 2024 – The Year of Pre-Election Process/Procedure Challenges

    - One "problem" that came up repeatedly in 2022's election contests was contestants taking issues with election processes and procedures that were in place before the election, and Arizona law – rightly – requires such challenges be brought before the election.
    - Like many other swing states, Arizona has seen a flurry of pre-election litigation challenging everything from the provisions of our Elections Procedures Manual authorizing ballot drop boxes to the alleged failure of the Secretary of State and Maricopa County Recorder to remove allegedly ineligible voters from the voter rolls.
    - Some examples:
        - *Arizona Free Enterprise Club v. Fontes* (What constitutes a voter's "registration record" for signature verification purposes)
        - *Arizona Free Enterprise Club v. Fontes* (Legality of early ballot drop boxes)
        - *Gould v. Mayes* (Legality of a county supervisor wanting to approve a full hand count of ballots in Mohave County)
        - *Toma/Petersen v. Fontes* (Challenge to various provisions of the Elections Procedures Manual)
        - *RNC/Arizona GOP v. Fontes* (Challenge to both the entire Elections Procedures Manual, and alternatively, various provisions thereof)

- *Arizona Free Enterprise Club v. Fontes* (Challenge to various provisions of the Election Procedures Manual, including various examples it provides of what might constitute conduct when criminal laws against intimidation in polling places could be enforced)
- *Mussi v. Fontes* (Challenge alleging the Secretary of State hasn't complied with the NVRA in maintaining voter registration rolls)
- *Strong Communities v. Richer* (Challenge alleging the Maricopa County Recorder hasn't performed required voter registration rolls maintenance)

3. Refusal to Certify Election Results – A Dangerous New Trend

- The country is facing a dangerous new trend of officials responsible for "canvassing" election results refusing to do so based on conspiracy theories and a refusal to accept lawful election results.
- In 2022, two county supervisors in Cochise County, Arizona refused to certify their county's election results. This led the Secretary of State to send a series of letters demanding that they do so because performing the canvass is a non-discretionary duty under state law.
- They refused, leading the Secretary to file a mandamus action (*Hobbs v. Cochise County*). After a brief hearing, the trial court ordered the supervisors to canvass.
- The two supervisors who initially refused to canvass were later indicted by the Arizona Attorney General with conspiracy and interference with an election officer (i.e., the Secretary of State). The cases are pending in Maricopa County Superior Court.
- A new provision of the Election Procedures Manual makes the non-discretionary nature of this duty clear. But another provision says that if a county refuses to certify and the Secretary's deadline to complete the statewide canvass arrives, the Secretary will canvass the statewide results WITHOUT that county. That provision is currently being litigated in federal court (*American Encore v. Fontes/Mayes*, No. 2:24-cv-01673-MTL).

4. Post-Election "Audits" and Full Hand Counts

- Post-2020, Maricopa County, Arizona was home to the infamous "audit" of the county's election results fostered by an Arizona Senate subpoena and "investigation" performed by leader contractor Cyber Ninjas. It was

an all-around disaster (remember the allegations of "bamboo fibers" in ballots?) and spawned years of public records litigation that is still pending (on issues related to attorneys' fees). It showed that the word "audit" has a very loose definition and ended up costing Maricopa County millions of dollars because it had to buy new tabulation machines after the machines used in 2020 were out of its custody and control and placed in the hands of unqualified "auditors."

- Then, in 2022, Arizona saw a push for various counties to conduct a full hand count. The center of the controversy was Cochise County (yes, the same county that refused to certify its election results). This led to litigation, and a judge ultimately enjoined Cochise County from performing a full hand count of its election results (*Arizona Alliance for Retired Americans v. Cochise County*). This will continue to be a national trend to monitor.