

**ELECTION LAW – Prof. Foley**  
**FINAL EXAMINATION – Spring 2008 (Question 3, excerpted)**

**Part A [you must answer both parts]**

Colorado turned out to be the decisive state in the November 2008 presidential election between Senators Barack Obama and John McCain. Without it, Obama had 264 undisputed Electoral College votes and McCain had 265 undisputed Electoral College votes. A majority of Electoral College votes, 270, is necessary to prevail. Colorado has 9 Electoral College votes, and therefore whichever candidate received them would be the winner.

On Election Day in Colorado, a severe and unusual ice storm hit Denver and surrounding suburbs, making driving conditions treacherous even for motorists used to difficult winter driving. The storm arrived in full force mid-afternoon, making after-work rush hour traffic exceptionally gridlocked.

At 4:53 pm, Denver Elections Director Michael Scarpello publicly announced that he had just notified by email all polling locations that he was directing them to stay open an extra two hours, closing at 9:00 pm instead of the previously scheduled 7:00 pm. He ordered them to make sure that all ballots cast by anyone arriving at a polling place after 7:00pm be a provisional ballot.

Under Colorado law, responsibility for administering elections in Denver belongs to the city's Clerk and Recorder, an elected official. The current Clerk and Recorder is Stephanie Y. O'Malley, a Democrat. As the city's Election Director, Scarpello reports to O'Malley, and he received her approval before issuing his directive concerning the extension of polling hours. O'Malley, before giving her approval, consulted with

Denver's elected mayor, John Hickenlooper, also a Democrat, about traffic conditions throughout the city and the need for extending polling hours.

Upon hearing of Scarpello's directive, Mike Coffman, Colorado's Secretary of State (an elected Republican), filed a lawsuit in state district court, asking the court to enjoin the extension of polling hours. (The suit was filed at 5:37pm.) Coffman argued that Colorado law has no provision to permit any extension beyond the regularly scheduled closing time. Colorado Revised Statutes § 1-7-101, entitled "Hours of Voting," states:

All polls shall be opened continuously from 7 a.m. until 7 p.m. of each election day. If a full set of election judges is not present at the hour of 7 a.m. and it is necessary for judges to be appointed to conduct the election as provided [elsewhere in the code], the election may commence when two judges who are not of the same political affiliation for partisan elections are present at any hour before the time for closing the polls. The polls shall remain open after 7 p.m. until every eligible elector who was at the polling place at or before 7 p.m. has been allowed to vote. Any person arriving after 7 p.m. shall not be entitled to vote.

No other statute addresses whether polling hours may be extended in an emergency, and no administrative rule promulgated by the Secretary of State provides for such a possibility. (Under Colorado law, the Secretary of State has responsibility for issuing statewide rules to implement the state's statutes concerning the conduct of the election.) Consequently, Secretary Coffman argued that Colorado law intends the time for closing the polls to be absolute, subject to the qualification that anyone who arrives by 7:00pm will be permitted to cast a ballot.

The state district judge, however, rejected Secretary Coffman's request for an injunction to nullify Director Scarpello's order. In a brief opinion, issued at 6:49pm (after telephone hearing with attorneys from both sides), the judge reasoned that, because Scarpello had ordered all ballots cast by individuals arriving after 7:00pm to be provisional, they could be disqualified during the official canvassing of election returns

without injury to any candidate, voter, or other interested party—assuming that Scarpello had acted unlawfully, as the Secretary alleged. Conversely, however, if Scarpello had been entitled to issue his order, then an injunction stopping its implementation would cause irreparable injury to both him, as a public official, and the voters whose interests he sought to protect by issuing the order. Consequently, the judge concluded that, according to the well-established test for whether or not to issue an injunction, the so-called “balancing of the equities” clearly favored permitting Scarpello’s directive to stay in effect, given the provisional status of all ballots cast pursuant to that directive.

Coffman took an immediate appeal to the Colorado Supreme Court, bypassing the state’s court of appeals, as is permitted in certain situations. (The appeal was filed at 7:15pm.) The Colorado Supreme Court, which has seven justices, issued a 5-2 ruling, upholding the district judge’s decision. The divided ruling, which was announced at 7:52pm, was along party lines. (The court presently has 5 Democratic appointees and 2 Republican appointees). The majority said that the district court did not abuse its discretion in “balancing the equities” as it did. The dissent asserted that it was “absolutely clear” that Scarpello had no authority to order an extension of polling hours, and his order should be voided immediately, lest the provisional ballots cast pursuant to that order cause unwarranted confusion over the proper winner of the state’s presidential election.

Coffman then immediately sought an emergency injunction from the U.S. Supreme Court, which the Court received by email at 8:12pm. At 8:46 pm, the Court issued this one-sentence ruling: “The application for an emergency injunction is denied

on the ground that any such relief at this point would be moot.” There was no indication of any dissents among the Justices as to this order.

When all the returns were in on Election Night from Colorado, McCain had 1,134,657 votes, and Obama had 1,121,294—for a difference of 13,363 votes (out of 2,255,951). But 104,655 provisional remained to be counted, 70,434 of which were from Denver, including 62,729 that were cast pursuant to Director Scarpello’s order by voters arriving at the polls after 7pm. Of the regular ballots cast in Denver, Obama had won over 70 percent of them: 149,993 for Obama, to 58,331 for McCain. If the same percentage applied to the as-yet-uncounted provisional ballots from Denver, Obama would net over 50,000 additional votes, far more than enough to overcome McCain’s statewide lead in regular ballots. It was unlikely that McCain would do well enough among the 34,221 provisional ballots outside Denver to overtake this advantage. Nor was it likely that enough of the provisional ballots cast for reasons other than Director Scarpello’s order would end up being disqualified. In 2006, for example, Colorado disqualified only 15% of provisional ballots.

On Thursday, November 6 (two days after Election Day), Secretary Coffman announced that he would not accept any certified results from Denver that counted as valid votes any of the provisional ballots that had been cast by individuals arriving at the polls after 7pm, pursuant to Director Scarpello’s order. (Under Colorado law, the Secretary of State has the authority to certify the results of all statewide, including presidential, elections in the state.) Coffman pointed out in his announcement that in no other county neighboring Denver, or indeed elsewhere in the state, had polling hours

been extended after 7pm, even though some of those localities suffered from the same ice storm.

Scarpello, in turn, insisted that the “post 7pm” provisional ballots from Denver should be counted as long as the individual voters were otherwise qualified. Scarpello argued that driving conditions in Denver during rush hour on Election Day had been much worse than in neighboring localities. Whereas voters elsewhere could make it to their polling places by 7pm, many Denver voters could not, he asserted. The extraordinarily high rates of turnout in all of the state’s non-Denver counties, averaging over 90%, proved his point, he said. Without the 62,729 provisional ballots cast by voters arriving after 7pm pursuant to his directive, turnout would have been only 67%. With those ballots, turnout rises to 87%, making Denver comparable to elsewhere. Thus, Scarpello contended, his order was necessary to redress the uniquely acute effect of the ice storm on Denver, and his order merely put Denver back on level terms with the rest of the state.

To adjudicate his dispute with the Secretary of State, Director Scarpello went back to the state district judge who had ruled in his favor. This time, however, the district judge simply certified the question to the Colorado Supreme Court: “Under the laws of this state, and of the United States, in determining the state’s presidential electors, should the certified vote totals for each presidential candidate include provisional ballots cast by individuals arriving at polls after 7pm pursuant to the directive of the Denver Elections Director, if there is no other basis for disqualifying those provisional ballots?”

The Colorado Supreme Court scheduled oral argument on the certified question for Tuesday, November 18. Meanwhile, both the McCain and Obama campaigns

intervened in the litigation to protect their interests. The McCain campaign submitted a brief accusing the Obama campaign of using the two extra hours provided by Scarpello's order to rustle up extra Democrats who had never attempted to go to the polls earlier in the day. The Obama campaign responded by saying that they had simply advised Democratic voters who may not have heard of the order extending polling hours that they now would be able to vote until 9pm if they wished to do so.

Also, while the case was pending before the Colorado Supreme Court, the state's General Assembly (both houses of which were controlled by Democrats) passed a non-binding resolution stating: "The counting of provisional ballots cast pursuant to the instructions of Denver's Elections Director on November 4, 2008, accords with the laws and constitution of Colorado." This resolution was signed by the state's Governor (also a Democrat). "If these provisional ballots aren't counted," the Senate majority leader Ken Gordon was quoted as saying, "we'll have to look into whether the General Assembly can remedy such a travesty of justice, by exercising directly our legislative authority under the U.S. Constitution to appoint Colorado's presidential electors."

On Friday, November 21, the Colorado Supreme Court issued a 4-3 decision in Obama's favor. (One of the Democratic justices who had joined the earlier 5-2 majority now joined the two Republicans in dissent.) The majority opinion stated:

It would deny Denver voters Equal Protection not to count these provisional ballots. As cogently explained by Denver's Election Director, if polling hours had not been extended in the city, Denver voters would have been denied an equal opportunity to cast a ballot when compared to voters elsewhere in the state. Permitting those voters to cast a provisional ballot after 7pm protected these voters from wrongful disenfranchisement, serving the purpose of provisional ballots as required by Congress in the Help America Vote Act of 2002. It would cause the same wrongful disenfranchisement of these voters—who are indisputably eligible, registered, and at their correct polling location—to now toss their ballots in the trash without bothering to count them. Like their

fellow citizens elsewhere in the state, they sought to exercise their high civic duty of participating in a presidential election, and they did so under the most extreme of weather conditions. As the U.S. Supreme Court recognized in *Bush v. Gore*, the Equal Protection Clause protects right of all citizens to have their votes count equally. To refuse to count the provisional ballots cast by these dutiful voters would violate this constitutional right as well as subvert the very essence of democracy.

Moreover, the Colorado constitution, no less than the U.S. Constitution, protects a citizen's equal right to vote. On numerous occasions, this court has stated that it is a "fundamental right of the first order." [citing many precedents] Thus, even without regard to *Bush v. Gore* and the Equal Protection Clause of the U.S. Constitution, we would be compelled to rule that these provisional ballots must be counted. Yet there is no conflict between state and federal law on this point, as both yield the same conclusion.

The dissent responded:

This case should be simple. There is no authority under Colorado law to permit anyone arriving after 7pm to vote. Therefore, any ballot cast by a person in this situation is unlawful, void, and must be disqualified. (The legislature's nonbinding resolution, by definition, has no effect on this determination, and in any event, the legislature cannot change the rules for casting and counting ballots after Election Day has passed.) To disqualify these unlawful ballots does not deny Equal Protection. On the contrary, to close the polls uniformly at 7:00pm, permitting only those standing in line at that time to cast a ballot, would uphold equality, not deny it.

In answering the certified question "Yes," the Colorado Supreme Court remanded the case with instructions to the district court to enter an order requiring the Secretary of State to accept vote totals from Denver containing the contested provisional ballots. On its own motion, the court stayed the effect of its mandate until such time as the U.S. Supreme Court conclusively disposed of any proceedings that it might undertake to address the matter, or Monday, December 1, whichever is earlier.

After the Colorado Supreme Court ruled, both the McCain campaign and Secretary Coffman immediately went to federal district court, seeking an injunction to stop Secretary Coffman from including the contested provisional ballots in any final

certification of the state's vote in the presidential election. The federal district court, however, ruled that it did not have jurisdiction under principles of *res judicata* (claim preclusion) and that only the U.S. Supreme Court could entertain the matter further, in petitions to review directly the judgment of the Colorado Supreme Court. The federal court of appeals quickly affirmed this jurisdictional determination, and thereafter both the McCain campaign and Secretary filed petitions for certiorari in the U.S. Supreme Court to review the Colorado Supreme Court's decision.

The Supreme Court has since granted these petitions. As it takes only four votes to grant certiorari, and these votes came quickly from Chief Justice Roberts, and Justices Scalia, Thomas, and Alito, it was unnecessary for Justice Kennedy to cast a vote on this preliminary matter. But now that certiorari has been granted, and the case is before the Court on the merits, Justice Kennedy must decide how to rule on the issues presented: (1) whether the Colorado Supreme Court's decision misconstrued the Equal Protection Clause of the Fourteenth Amendment and in itself violates the Equal Protection Clause; and (2) whether the Colorado Supreme Court decision violates Article II of the U.S. Constitution insofar as it conflicts with the right of Colorado's legislature to determine the "Manner" in which the state's presidential electors shall be appointed.

You are a law clerk to Justice Kennedy. He has asked you to write him a bench memo analyzing these issues, identifying the strongest arguments on both sides, and recommending how he should rule. He has specifically admonished you that, in writing the memo and making your recommendation, you should not let personal or partisan feelings influence your analysis, addressing the constitutional questions solely on their objective merits. (You may discuss facts about the party affiliations of various actors in

this political drama, as described above, as long as these facts are relevant to your nonpartisan analysis.) Above all else, he wants his ruling in the case to be principled and impartial, one issued without regard to partisan preferences or which candidate he personally would like see win the White House.

**Part B [you must answer both parts]**

Assume everything set forth in Part A, above, is the same *except that McCain has 269 undisputed Electoral Votes and Obama has 260 undisputed Electoral Votes.* (The difference in this result, compared to the one in Part A, is that McCain, not Obama, wins New Hampshire's 4 Electoral Votes.) Therefore, if McCain receives Colorado's 9 Electoral Votes, he becomes President by virtue of receiving an outright majority of votes in the Electoral College. If, however, Obama receives Colorado's 9 Electoral Votes, the consequence is a 269-269 tie in the Electoral College. In this situation, pursuant to the Twelfth Amendment to the U.S. Constitution, the U.S. House of Representatives determines the presidency, *with each State's delegation to the House having one vote.* Assume that on January 6, 2009, the Democrats are a majority in 28 of the 50 delegations and thus would be expected to select Obama as President if called upon to do so as a result of an Electoral College tie.

Were this scenario, rather than the one in Part A, to confront the U.S. Supreme Court at the time it granted the petitions for certiorari to review the Colorado Supreme Court's decision, would the analysis and recommendation in your bench memo to Justice Kennedy change in any way? In other words, does a potential tie vote in the Electoral College affect how Justice Kennedy should rule on the legal questions now before the Supreme Court? (END OF EXAM. HAVE A WONDERFUL SUMMER!)