

# MISSOURI LAWYERS WEEKLY

## Voter ID decision denounced as 'activist'

*Republicans, Democrats disagree on how ruling will be used in other states*



**Attorney Don Downing represented the Democratic Party in opposing voter ID law.**

BY SCOTT LAUCK

It didn't take long to blame the downfall of Missouri's voter ID law on the court. An hour after an Oct. 16 Missouri Supreme Court decision striking it down, the Missouri Republican Party issued a press release calling it a "direct attack on free and fair elections by activist judges."

Perhaps such a reaction is to be expected for a law that sparked a bitter partisan battle from the moment of its conception. The voter ID law's swift journey through the courts was essentially a legislative war by other means, with the Democratic and Republican parties openly supporting their respective sides of the lawsuit.

Republicans, whose brainchild was struck down 6-1, say the majority opinion goes against precedent and ignores the will of the Missouri Legislature.

"I think that this decision certainly, by almost any analysis, falls into that category of an activist court decision," said Thor Hearne, an attorney with Lathrop & Gage who represented the voter ID bill's sponsor, Sen. Delbert Scott, R-Lowry City.

But Don Downing, the Gray, Ritter & Graham attorney who represented the Democratic Party in opposing the voter ID law, said that's an improper charge to level at a court that was merely doing its duty.

"I think it's a disservice to our judicial system and our legal system for anyone to avail themselves of our legal system and then, when they don't prevail, claim that somehow the result is not the function of a proper analysis of our constitution, but some other motivation," Downing said.

The voter ID law, which went into effect Aug. 28 before being enjoined by a Cole County court, would have required voters to present a valid form of photographic identification starting with the Nov. 7 election. For the first few years, people who didn't have IDs would have been able to cast a provisional ballot. Starting in 2008, that form of voting would only have been available to the disabled, those who have religious objections to carrying a photo ID and those born before 1941.

The decision in *Weinschenk et al. v. State of Missouri* came less than two weeks after the court heard arguments in the case. In its ruling, which affirmed that of the trial court, the court said the law violates the Missouri Constitution's equal protection clause and its guarantee of the right of qualified and registered citizens to vote.

"While this Court fully agrees with Appellants that there is a compelling state interest in preventing voter fraud, the evidence supports the trial court's conclusion that the Photo-ID Requirement is not narrowly tailored to accomplish that purpose," the court wrote in a per curiam opinion.

In a dissenting opinion, Judge Stephen N. Limbaugh Jr. wrote that the law's transitional provisions were constitutional, and that they could have been enforced separately. As to the full provisions of the law, which would have gone into effect in 2008, he said the case was "not yet ripe for adjudication" because the Legislature would have time to "alleviate the perceived deficiencies."

Republicans pitched the law as a way to combat voter fraud and restore voters' faith in the election process. Democrats fought it on grounds that it stripped those without IDs of the right to vote, especially the elderly, the disabled and minorities.

Cole County Judge Richard Callahan struck down the law Sept. 14 as an unconstitutional burden, largely on the grounds that it imposed costs on voters. Although the state offered free ID cards to anyone not already possessing a driver's license or other valid ID, the underlying documents to receive those IDs, such as certified birth certificates, cost \$15 or more. For women who must document one or more name changes, or people born outside of Missouri, the barriers are higher.

The Supreme Court decision backed that line of reasoning, something previous voter ID cases elsewhere in the nation have not done. Federal courts in Georgia and Indiana came to opposite decisions on voter ID laws in those states - Indiana upheld its law, while the Georgia court enjoined its version.

Nonetheless, neither court agreed that the cost of incidental documents needed to obtain an ID counted as a "poll tax" - a fee to vote. The Missouri court concluded that in Georgia and Indiana there were alternative, free ways to obtain an ID. In Missouri, there weren't alternatives.

"While requiring payment to obtain a birth certificate is not a poll tax... it is a fee that qualified, eligible, registered voters who lack an approved ID are required to pay in order to exercise their right to free suffrage under the Missouri Constitution," the court wrote.

That Missouri's case diverged from those in Georgia and Indiana is not all that surprising. Those were federal cases brought under alleged violations of the U.S. Constitution, while Missouri's was fought in state court over violations of the Missouri Constitution. As the court

noted, Missouri's constitution contains specific protections of voting rights not found in its federal counterpart.

But as legal arguments over voter ID laws rage in courts across the nation, lawyers disagree on the Missouri decision's impact.

Hearne said he thinks last week's opinion will have "zero relevance outside the borders of Missouri." He said the court "essentially invented" its own standard of review, ignoring the "flexible" test the U.S. Supreme Court set forth in the 1992 *Burdick v. Takushi* case, which held that the court should weigh the magnitude of the injury to the rights against the specific interests of the state.

"The majority certainly seemed eager to go out of their way and strike this down," Hearne said. "I think they did so, as they themselves say, uniquely under Missouri constitutional law. As such, this decision really has no application outside of Missouri."

Downing, though, said that the Missouri court had considered - and rejected - using the *Burdick* test, ruling that even under that test the burdens of the voter ID were too severe. He said other state courts wrestling with photo ID laws will look to Missouri for guidance.

"I think our Supreme Court sent a message loud and clear that these types of laws, which place an undue burden on the exercise of a fundamental right, merit very close constitutional scrutiny," Downing said.

The voter ID law was also the subject of a federal lawsuit filed in September, alleging U.S. Constitutional violations. The lawsuit was stayed pending the outcome of Missouri's case. Hearne noted that, since the state law it is based on no longer exists, the federal case may be moot. David Becker of People for the American Way, which filed the suit, said lawyers in the case were discussing how to proceed and that no actions were scheduled.

Whether or not the Missouri court's opinion was correct or not will likely be a continued topic of debate as the Legislature begins crafting a new voter ID bill that would meet the "activist" court's standards.

Dr. John Petrocik, a political science professor at the University of Missouri-Columbia, said such charges have been a part of the nation's political landscape since the days of *Marbury v. Madison*. The activist label, he said, is "red meat to Republicans" - though he said liberals are often just as guilty of reacting the same way to decisions they don't like.

Ultimately, he said, the charges of politicization of the courts mean a lot to the small number of people who closely follow politics, but not much to everyone else.

"The long-term loss, I suppose, is at some point you get an omnibus coalition of people who see the judiciary as not much more than a political body," Petrocik said. "That is certainly a perception that the most politicized elites have, but it's not an image that exists in the population at large."