

By Joshua F. Nessen, Esq.

**TESTIMONY IN FAVOR OF LCO BILL 3112: AN ACT CONCERNING  
COURT REVIEW OF PRIMARY AND GENERAL ELECTION RESULTS**

The LCO Bill 3112 needs to be adopted by the General Assembly, with additional amendments to clarify the standards for Court review governing both General Elections, C.G.S.A. § 9-328, and Primary Elections, C.G.S.A. § 9-329a. My views reflect my experience as one of the attorneys who represented Bridgeport Mayoral Candidate Christopher Caruso and Toyka Simmons-Cook, City Council Candidate in the 135<sup>th</sup> District, before the Superior Court and the Connecticut Supreme Court in their challenges to the Democratic primary elections held in September 2007.

While the Supreme Court did not ultimately overturn those elections, it did adopt our argument for a single standard governing challenges for both general and primary elections based on the seminal case of Bortner v. Town of Woodbridge, 250 Conn. 241 (1999) with its stress on the reliability of the results. In addition, the Court made clear that conscious disregard of mandatory statutes by election officials, like good faith misinterpretations, constitute “rulings” which can be the basis to overturn a general or primary election.

Both the General Election Statute, C.G.S.A. § 9-328, and Primary Election Statute, C.G.S.A. § 9-329a need to be modified to incorporate the recent ruling of the Connecticut Supreme Court and ensure both clarity within and consistency between the two statutes to protect the paramount voter interest in integrity of the election process. As Justice Berdon stressed in his concurrence in Bortner, 250 Conn. at 278 (1999):

“Although the Majority is certainly correct to emphasize that all electors have a powerful interest in the stability of that election, the voters have an even more powerful interest in the integrity and accuracy of that election. Pursuant to the legislative mandate contained in C.G.S. 9-328, it is the duty of the trial court to elevate integrity and accuracy over stability.”

1) Adoption of Proposed Changes to C.G.S.A. § 9-329a on Primary Elections

The existing language of C.G.S.A. § 9-329a is confusing in that it differs from C.G.S.A. § 9-328 and would appear to make it more difficult to overturn a primary than a general election. Indeed as interpreted by the Supreme Court in Penn v. Irizarry, 220 Conn. 682 (1991), a primary election challenge, § 9-329a would appear to mandate that to overturn a primary election the challenger would have to show that but for the election impropriety (s)he would have prevailed, a position explicitly later rejected by the Supreme Court in Bortner, 250 Conn. at 258:

We conclude that C.G.S. 9-328 does not require a challenger, in order to secure a new election, to establish that, but for the irregularities that he has established as a factual matter, he would have prevailed in the election...We conclude instead that, in order for a court to overturn the results of an election and order a new election pursuant to 9-328, the court must be persuaded that: (1) there were substantial violations of the requirements of the statute...and (2) as a result of those violations, the reliability of the result of the election is cast in serious doubt.

The problem lies largely with the existing language in § 9-329a which the proposed bill would helpfully eliminate in the manner provided by the bracketed sections in subsection (b) lines 44-49:

Such judge may (1) determine the result of such primary; (2) order a change in the existing primary schedule; or (3) order a new primary if he finds **[that but for the]** error in the ruling of the election official, any mistake in the count of the votes or any violation of said sections. **[,the result of such primary might have been different and he is unable to determine the result of such primary.]**

The questionable bracketed language is not present in § 9-328 and would seem to mandate that more than serious doubts about the reliability of the election has to be shown to overturn a primary. The “but for” section makes it mandatory that a judge show that the result of the election might have been different and that he is unable to determine the result of such primary. First, “might have been different” is unclear and can be interpreted to mean that one

must make a showing of a different result. Even more problematic is the phrase “unable to determine the result of such primary”. It is unclear what that means and the central concern in Bortner about “reliability” of the results is absent. One can always determine the result of a primary; it is reliability that is at issue.

In my view the problem with the statute was illustrated by the result in Penn v. Irizarry, 220 Conn. 682 (1991). In that case it was shown that an election official had been coaching voters in the voting booth in a primary election decided by only two votes. The Supreme Court upheld the election, because the challenger could not show that “the intention of any voter was changed” as a result of the coaching. This basically meant that the challenger to overturn the result would have had to show he would have won “but for” the illegal coaching. This would be very difficult to prove, since one would have a hard time determining exactly who was coached, and obtaining the necessary evidence. Obviously, the results were very unreliable given the closeness of the vote and the coaching which appeared to have been extensive.

The problem here stems from the statutory language in § 9-329a which requires that the result “might have been different” which too easily shifts into a showing that it “would have been different”. This is particularly the case, when coupled with the additional requirement of being “unable to determine the result.” While the Court’s recent decision in the Caruso case, Caruso v. City of Bridgeport, et al, SC 18012 (2008) stated that the standards are the same for primary and general elections, this was a conclusion arrived at in spite of the language in § 9-329a and the decision in Penn v. Irizarry. To avoid future confusion, and needless parsing of the Supreme Court’s recent 25-page decision each time a primary challenge is brought, the removal of the questionable language as proposed in LCO 3112 is called for.

This is particularly the case in light of the new optical scan technology that now must be used in Connecticut primary and general elections. Under that new technology, voters sign in and then receive a ballot which is scanned into an optical scan machine. The most important check on the system is proper supervision of the sign in process to ensure that only one ballot is scanned in for each signed voter. A major way to improperly influence the result of an election is to fill in and scan additional ballots to favor one candidate over another. Indeed, while it was not enough to overturn the result in the Bridgeport primary, we showed that at some polling places there were more votes scanned in the machine than voters who signed in.

In the situation where extra ballots are scanned in, it is impossible for a challenger to show for whom there were extra votes. Under the current language in § 9-329a, a challenger could not show there “might have been a different result” since the challenger could not actually prove any impact on the result without making the impossible showing of whom the extra votes were for. Similarly, the additional requirement that the “results of the primary cannot be determined” would also not be met, despite the obvious unreliability of the results where extra ballots are scanned into machines.

In Simmons-Cook v. City of Bridgeport et al, SC 8011 (2008), which I argued before the Supreme Court, we presented evidence that there were 13 more scanned in votes at Read School than voters who signed in. In an election decided by two votes, this created serious doubt as to the reliability of the results. However, the language in the statute (as well as the lower court’s refusal to consider the evidence) made it difficult to overturn the result.

In future cases, in order for the law to keep pace with the new methods of cheating under the new technology, it is critical to remove the language in § 9-329a that mandates more than a showing of serious doubt as to reliability: the standard for a general election as interpreted by Bortner v. Woodbridge. LCO 3112 accomplishes this by removing the excess language.

2)

Additional Proposed Language for

C.G.S.A. § 9-328 and § 9-329a

As mentioned above, the recent Supreme Court decision in the Caruso case upheld our position that “conscious disregard of mandatory statutes” are implicit interpretations and thus election official “rulings” that form a basis to overturn both primary and general elections. In both the general election and primary statutes, there needs to be an amendment spelling out that the conscious disregard or indeed any violation of an election statute by an election official can provide a basis to overturn an election.

Rather than stating that this is because such a violation is “implicitly a ruling”, it would be more clear-cut to modify the statutes to simply provide that violations of statutes form a basis to overturn an election. In addition, I propose that the Bortner standard on reliability be spelled out in both the general election, § 9-328, and primary election statutes, § 9-329a.

Thus, in § 9-329a to the existing language under subsection (a) in the proposed LCO 3112 I would add the bolded text so that that proposed subsection would read as follows:

(a) Any (1) elector or candidate aggrieved by a ruling of an election official **or violation of any Connecticut election statute under Title 9** in connection with any primary held pursuant to (A) section 9-423, 9-425 or 9-464 of the 2008 supplement to the general statutes, or (B) a special act, (2) elector or candidate who alleges that there has been a mistake in the count of the votes cast at such primary, or (3) candidate in such a primary who alleges that he is aggrieved by a violation of any provision of sections 9-355, 9-357 to 9-361, inclusive, 9-364, 9-364a or 9-365 in the casting of absentee ballots at such primary, may bring his complaint to any judge of the Superior Court for appropriate action.

C.G.S.A. § 9-328 dealing with general elections would be modified in the parallel section to have the exact same language as proposed for the primary statute under LCO 3112.

To spell out that the Bortner v. Town of Woodbridge standard on reliability applies to primary elections under § 9-329a, I propose adding the following bolded language to subsection (b) of the currently proposed LCO 3112 at line 49 (note the bracketed portions refer to text in the existing statute that would be removed under the bill):

Such judge may (1) determine the result of such primary; (2) order a change in the existing primary schedule; or (3) order a new primary if he finds [that but for the] error in the ruling of the election official, any mistake in the count of the votes or any violation of said sections. [,the result of such primary might have been different and he is unable to determine the result of such primary.] **The election shall be overturned and a new primary ordered if as a result of the error in ruling of the election official, mistake in the count of the votes or violation of any election statute under Title 9, the judge finds that the reliability of the result of the election is cast in serious doubt.**

I propose that the bolded language also be added at the appropriate subsection of the General Election statute, § 9-328, to provide the appropriate guidance to challengers and the courts and clarify that the same standard pertains in both statutes.

### Conclusion

The Connecticut Supreme Court used the occasion of the recent Caruso and Simmons-Cook appeals to clarify that the same standards and protection for voters apply in primary and general elections. This Committee and the General Assembly now have an opportunity to codify that principle by removing the inconsistent requirements under § 9-329a. In addition, the Legislature can now codify the critical finding of the Court that violations of mandatory statutes by election officials, like good faith misinterpretations in the context of rulings, also provide a basis to overturn both primary and general elections. Of equal importance will be making explicit the standard of serious doubt as to reliability of election results as the basis for overturning primary or general elections. Taken together these proposed changes will provide election challengers and the courts with clearer guidance for ensuring the paramount democratic interest in the integrity of the election process.

