

The Burden of Proof of Non – Compliance and the Substantiality Rule in Electoral Contents in Nigeria and the USA

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Abstract

The purpose of an electoral petition is to obtain the correct expression of the intent of the voters. But a petitioner in an election petition has the burden to prove any alleged non-compliance, and that such non-compliance substantially affected the result of the election. This burden is herculean, as decided cases have shown. Electoral jurisprudence is often founded on the presumption of regularity of election results as declared by the electoral umpire, which implies that the law takes for granted that a credible election has been conducted. This presumption has made challenging the outcome of an election through the legal process, unfair. The consequence of this protection is that legal justice has scarcely redressed electoral injustice. The aim of this paper is to examine the present position in Nigeria and to suggest reforms. The paper adopted the doctrinal approach. Relevant legislations, local and foreign case law were explored for an understanding of the subject. The findings from the study revealed among other things, that the adherence to the present burden of proof and the substantiality rule, appears to have made the tribunals shut their eyes to injustice and to the general will of the electorate. It recommends reforms that would enhance electoral justice by using video evidence to prove the signing of election results by party agents, and the automatic electronic transmission of results. The paper concludes that there is a need to review of the presumption of regularity and the substantiality rule so that non-compliance can affect electoral outcomes.

Keywords: Burden of Proof, Election, Petition, Non-Compliance, Substantiality Rule.

1. INTRODUCTION

Elections in Nigeria are essentially a struggle for power to determine who would control the wealth of the country, by the politicians who are mostly corrupt, and who have no other means of livelihood other than politics, and its financial benefits. It has therefore become a fight for survival, and a fight to the death. Those who win political power become rich and famous overnight, while those who lose it become poor and forgotten.

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So, politicians do everything to win power, and even more to retain it. As President Obasanjo once described it, elections in Nigeria are a do or die affair. This struggle for power has often led to civil crisis, military coups, and even a civil war.¹

Politicians, with the connivance of the Independent National Electoral Commission (INEC), have always failed to comply with the relevant electoral laws in their bid to win elections by all means. However, the courts and tribunals do not only require proof of non-compliance, but also proof that the non-compliance complained of substantially affected the results of the election, which is a difficult burden and sometimes an impossible task.

The 2022 Electoral Act sought to lighten the burden by bringing in technology for accreditation using the Bimodal Voter Accreditation System (BVAS) and introducing electronic transmission of results. It also tried to remove the need to call oral evidence where the non-compliance is manifest on the face of the document.

But the recent cases of *Oyetola v. INEC*,² *Atiku v. INEC*,³ and *Obi v. INEC*⁴ made mincemeat of the whole reforms as the election tribunals again took refuge in the presumption of regularity, which placed an onerous burden of the proof of non-compliance on the petitioners. They also resorted to the substantiality rule, to dismiss most of the petitions. A study of these cases would reveal that the decks were stacked against the petitioners, and there was no way they could have got justice under the prevailing regime of the burden of proof.

For a proper discussion of the subject, this paper is divided into five parts including the introduction. Part two examines the burden of proof in election petitions in Nigeria with a view to show that while there is the general burden to prove a claim that the petitioner won the election, there is also a burden on the respondents to prove that an election actually took place by tendering the results. Part 3 deals with how to discharge the burden of non-compliance in Nigeria, and examines Section 137 of the Electoral Act 2022 which provides that it shall not be necessary for a party who alleges non-compliance with the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance. It also deals with what qualifies as non-compliance and shows that only a practice prohibited by the Act can be viewed as non-compliance. It examines the nature and function of the INEC Results Viewing portal (IReV), to clear the misunderstanding in that area, and concludes with a discussion of the application of the substantiality rule in proven cases of non-compliance. Part 4 examines the application of the substantiality rule in election contests in the United States of America, recounts, and the application of the doctrine of laches to deny

¹ The Nigerian civil war arose from the coup and counter coup of 1966 and 1967 which was a fallout of the disputed Western Nigeria elections of 1965 and the treasonable felony trial and imprisonment of Obafemi Awolowo.

² (2023) 11 NWLR 71

³ (2023) 19 NWLR 711 - 760

⁴ (2023) 19 NWLR 761 - 1652

remedy to a petitioner. Part 5 concludes the paper, and also provides recommendations.

2. **BURDEN OF PROOF IN ELECTION PETITION IN NIGERIA**

By virtue of section 131(1) of the Evidence Act 2011, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The burden of proof in election petition cases, just like in other civil cases is on the person questioning the results of an election to prove his claim.

In *Ngige v. INEC*⁵, the court held that there is a rebuttable presumption that any election result declared by a returning officer is correct and that the burden of rebutting that presumption is on the person who denies its correctness.

However this burden shifts from side to side, and at each time in the case, rests on the party whose case would fail if no further evidence is led. See *Awuse v Odili*.⁶

2.1. **Burden to Prove that Election Took Place**

The person who asserts that an election took place i.e. the respondent, has the onus placed on him to prove that fact. When a petitioner makes the usual submission and allegation of fact that elections did not in fact hold, and as such that the declaration of the respondent as winner was unconstitutional, the respondent usually responds with assertions of fact that elections actually held which he achieves by the presentation and tendering of the results, with the official seal and stamp of the electoral official. The burden therefore rests on the respondent to prove by evidence that elections actually held especially when the petitioner has made out a prima facie case.

2.2. **Burden to Prove a Claim for a Declaration that the Petitioner Won the Election**

In an election petition, where, by the pleadings of a party without more, he claims for a declaratory relief, it cannot be deemed to have been established even where it was admitted by the adverse party.

For example where in an election petition the petitioner alleged that the respondent, who was declared as the winner and returned elected in the questioned election, did not score a majority of the lawful votes cast at the said election but rather that it was the petitioner who scored the majority of the lawful votes cast and should be declared as the winner of the said election, he must prove that he polled the majority of the votes cast, and won the election.

⁵(2015) 1 NWLR (Pt. 1440) 281

⁶(2015) 1 NWLR (Pt. 1440) 281

3. THE BURDEN OF PROOF OF NON-COMPLIANCE IN NIGERIA

3.1 Section 134 (1) (b) of the Electoral Act 2022, provides that a petitioner may question the validity of an election on the ground of corrupt practices or non-compliance with the Electoral Act. This paper will however focus on the second limb of Section 134 (1) (b) of the Electoral Act, that is to say, the pleading that the election was invalid due to non-compliance with the Electoral Act.

Non-compliance is a term of very wide significance and embraces all violations of the Electoral Act or the regulations which affect the validity of an election or the return, but does not include corrupt practices.⁷

Where there is an interplay of facts which go to establish corrupt practices with other cases of non-compliance, an election tribunal or court reserves the power, at the trial, to separate the constituent offenses of corrupt practices from cases of non-compliance and consider either case separately, so as not to confuse the standard of proof for corrupt practices with the standard of proof required to establish cases of non-compliance. See *Omisore v Aragbesola*.⁸

Non-compliance with the Electoral Act covers such things as outright violation of the Act and regulations made under the Act, proven manipulation of the electoral process to confer on one or more candidates undue advantage to the detriment of others, and other forms of malpractices or irregularities, such as over-voting, or other material allegations such as that voters were disenfranchised through the use of illegal or manipulated voters' register, failure or neglect to provide voting materials, or absence of designated polling stations.⁹ But it does not include non-compliance with directives or instructions of the Commission or its officials. See *INEC v Oshiomole*.¹⁰

3.2 Non-Compliance and the Burden of Proof in Nigeria

The onus is on a petitioner challenging the validity of an election on the ground of non-compliance with the Electoral Act and guidelines issued by the Commission for the conduct of the election, to establish his case by credible evidence. In discharging this onus, the petitioner is required to rebut the presumption in favour of the correctness of the result of the election declared by the Commission.¹¹

In *Udom v Umana*¹² the Supreme Court held that this presumption is not rebuttable by mere presumptuous postulations or rhetorical questions but only by cogent, credible and acceptable evidence. In the absence of any credible evidence to rebut this presumption, an election petition predicated on this ground will surely fail.

⁷ See *Goyol v INEC* (2011) 2 LREC 420; *Buhari v Obasanjo* (SC), [2005] All FWLR (Pt 273) 1.

⁸ [2015] 15 NWLR (Pt 1482) 205.

⁹ See *Fannami v Bukar* [2004] FWLR (Pt 198) 1210; *Imah v Malarina* (1999) 3 NWLR (Pt 596) 545.

¹⁰ (2008) 3 LREC 649 at 705

¹¹ *Nwole v Iwegbu* (2005) 16 NWLR (Pt 952) 543; *Onye v Kema* (1999) 4 NWLR (Pt 598) 198

¹² [2016] 12 NWLR (Pt 1526) 179 at 227-228, paras. H-D.

In order to obtain the nullification of any election on this ground, the petitioner has to prove, first, the particular breaches or infractions of the Electoral Act, and second, that the non-compliance substantially affected the result of the election.¹³ Section 135 (1) of the Electoral Act 2022, as amended provides that:

An election shall not be liable to be invalidated if it appears to the tribunal that the election was conducted substantially in accordance with the principle of the Act and that non-compliance did not affect substantially the result of the election.

The burden on the petitioner to prove non-compliance is three-fold. In *Waziri v Geidam*,¹⁴ the court held that for the petitioners to succeed in their allegation of non-compliance, they must first plead the kind of non-compliance alleged. Clear and precise pleading is necessary to sustain the evidence in proof of such allegations. Secondly, they must tender cogent and compelling evidence to prove that such non-compliance took place in the election. Thirdly, that the non-compliance substantially affected the result of the election, to the detriment of the petitioner.

In *Isiaka v Amosun*,¹⁵ the alleged evidence of non-compliance affected only 12 polling units out of 1672 polling units that were contested. This was held to be insufficient to negatively affect the election and the return of the 1st respondent.

In *Lanto v Wiwo*,¹⁶ it was found after a painstaking evaluation of the evidence, that the petitioner was only deprived, by a human error, of 2 (two) votes. It was accepted by the election tribunal and all the parties that if the two votes were added to the total votes scored by the petitioner, it would not change the result of the election. The Court of Appeal therefore held that the appellant had failed to satisfy it that the votes denied him, by mistake, prevented him from getting the majority of votes in his favour, and for that reason, the appeal must fail. However, the Court of Appeal stressed the point that if the two (2) votes would have changed the result of the election, certainly the election would have been vitiated on that score.

In order to overturn the result of an election, the petitioner has a duty to prove the non-compliance alleged, polling unit by polling unit, and this can only be done by calling direct eye witnesses at the affected polling units.

The Supreme Court held in *Ladoja v Ajimobi*,¹⁷ that a petitioner, who complains of non-compliance with the electoral process in specific polling units, has the onus to present evidence from eye witnesses at the various polling units who can testify directly in proof of the alleged non-compliance. See also *Gundiri v Nyako*.¹⁸

¹³Okechukwu v INEC [2014] 17 NWLR (Pt 1436) 255; Omisore v Aregbesola [2015] 15 NWLR (Pt 1482) 205.

¹⁴[1999] 7 NWLR (Pt 630) 227 CA.

¹⁵[2016] 9 NWLR (Pt 1518) 417 at 441 – 442, paras. F-A.

¹⁶[1999] 7 NWLR (Pt 610) 227 CA

¹⁷[2016] 10 NWLR (Pt 1519) 87 at 136, paras. A-B

¹⁸(2014) 2 NWLR (Pt. 1391) 211 at 252

To this writer however, the requirement to call eyewitnesses from each polling unit, is unreasonable, especially in presidential election cases. There are about 776, 000 polling units in Nigeria, and it is impossible to call eyewitnesses from each polling unit complained about. Also no election tribunal can take evidence from hundreds of witnesses within the 180 days allowed.

A petitioner may call a polling agent, a ward supervisor assigned to the polling unit by his political party, or even the polling agent or ward supervisor of his opponents, where they have useful evidence that will assist his case.¹⁹ He may even rely on police officers or officials of the Commission such as the Presiding Officers, and Polling Staff, where they have useful and direct evidence that will assist him in proving his case.²⁰

In *INEC v Oshiomole*,²¹ to establish his case, the petitioner subpoenaed two (2) officials of the Commission, one of whom was the Head of Operations in the State Office of the Commission. He testified as PW47 and tendered results of polling units, and all statutory forms for collation of the result of the governorship election in the twelve (12) Local Government Areas in contention. He also produced bags of ballots cast in the election which were counted on the orders of the election tribunal in open court.

The election tribunal believed the evidence of PW47, and the avalanche of documentary evidence tendered and other witnesses called by the petitioner. Consequently, it was held that the petitioners had proved their case on the preponderance of evidence before the tribunal.

Where the non-compliance comprises of mere infractions of the Electoral Act, which do not amount to electoral offences, the standard of proof shall be on the balance of probabilities, as in all civil cases.

It was held in *INEC v Oshiomhole*²² that the standard required of a petitioner to prove non-compliance which does not involve any crime is on the preponderance of credible evidence before the election tribunal. All the petitioner needs to establish is that his story was more likely to be true than the respondent's.

3.3 Section 137 Electoral Act 2022: No need for oral evidence when non-compliance is manifest on the original or certified true copies of documents tendered

Section 137 of the Electoral Act 2022 provides that:

It shall not be necessary for a party who alleges non-compliance with the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance.

¹⁹ Okechukwu v INEC [2014] 17 NWLR (1436) 255; Sijuade v Oyewole [2012] 11 NWLR (Pt 1311) 280 at 299

²⁰ See Ibrahim v Ogunleye & Ors [2012] 1 NWLR (Pt 1282) 489.

²¹ (n 11)

²² *ibid*

The above provision was no doubt introduced to cure the ridiculous situation wherein a petitioner is required to call eye witnesses from each polling unit complained of. Under section 137, he can tender documents showing non-compliance, irregularities, mutilations, or alterations manifest on the face of it.

However, the above provision has not absolved a petitioner of the need to lead credible evidence to prove non-compliance. It only provides that oral evidence may not be necessary if, and only if, the originals or certified true copies of the documents tendered manifestly disclose the non-compliance.

Otherwise, oral evidence is necessary to demonstrate the documents, and tie them to the non-compliance. In *Oyetola v INEC*²³ the Court held as follows:

Section 137 of the Electoral Act only applies where the non-compliance alleged is manifest from the originals or certified true copies of documents relied on. In the instant case, neither Exhibit BVR nor any other documents relied on by the Appellants remotely disclosed, non-compliance with the provisions of the Electoral Act. Hence the section cannot be of any assistance to them. In the circumstance, they still had a duty to call witnesses who witnessed the alleged acts of non-compliance to testify.

3.4 Only a Practice which is contrary to the Electoral Act can be a Ground to Question an Election

A pertinent point to note is that by Section 134(2) of the Electoral Act, 2022, only an act or omission which is contrary to the Electoral Act, 2022 can be a ground for questioning an election. Thus, complaints relating to non-compliance with provisions of the Regulations and Guidelines or the Manual of Election Officials are not legally cognizable complaints for questioning an election. In *Nyesom v Peterside*,²⁴ the Supreme Court held as follows:

While the Electoral Commission is duly conferred with powers to issue regulations, guidelines or manuals for the smooth conduct of elections, so long as an act or omission regarding such regulations or guidelines is not contrary to the provisions of the Act itself, it shall not of itself be a ground for questioning the election.

It should however be noted that INEC has taken an unfair advantage of this position to give false and insincere directives and assurances which candidates have relied on at their peril.

For instance, in the run-up to the 2023 presidential election in Nigeria, INEC through its chairman, assured everyone, including at the Chatam House, that there would be electronic transmission of results on election day. A promise they never kept, citing “glitches”. The same INEC thereafter later argued before the tribunals that they were not bound by the promise as electronic transmission was not made mandatory in the

²³(n. 3)

²⁴(2016) 66 NSCQR (Pt 3) 1325; see also *Jegade v INEC* (2021) LPELR-55481(SC) at 25– 26 at paras. A – D.

electoral Act, and they were within their rights to transmit manually. An argument upheld by the courts.

3.5 Nature of the INEC Result Viewing (IReV) Portal and whether the Unavailability of Election Results on the IREV Portal can be a Ground to Nullify an Election

There is sometimes a misunderstanding of the purpose of the INEC Result Viewing (IReV) portal. The Supreme Court, in *Oyetola v INEC*²⁵ made it clear that there is a difference between a collation system and the IReV portal though both are part of the election process. Whereas the collation system is made up of the centres where results are collated at various stages of the election, the IReV is not a collation system. It is simply a portal to give the public the opportunity to view the polling unit results.

What this means is that where the IREV portal fails, it does not stop the collation of results. The failure or malfunctioning of the IReV portal only deprives the public and the monitors the opportunity of viewing the results in real time, and to compare the results collated with the ones transmitted to the IReV.

In *Atiku v. INEC*,²⁶ the Supreme Court held that the electronic transmission of results of an election is not expressly stated anywhere in the Electoral Act, but was only introduced by INEC in its Regulations and Guidelines, 2022, and in the INEC Manual for Election Officials, 2023, and that by Section 134(2) of the Electoral Act, 2022, only an act or omission which is contrary to the Electoral Act, 2022 can be a ground for questioning an election.

But for a country that wants to make progress, Nigerians must query if the present use of hard copies for collation is not fraudulent from the onset. Are hard copies of results used in other climes? This is where the problem lies. INEC's coming up with the story of failure to upload results due to technical glitches, and then manually collating results that should have gone up to the clouds, leaves room for manipulation leading to agitations from the candidates and voters.

This writer is of the view that if we want to fight electoral malpractices, there is a need to digitalize the processes. If we can eliminate human interface as much as possible from our elections, we will see a better society.

It is therefore suggested that results not uploaded to the IReV should be considered incorrect and not announced. That is the only way rigging and manipulations can be checked, and confidence restored in the electoral body, because once the story of the failure of the IReV filters out, everyone would believe that the results had already been manipulated.

²⁵(n 3)

²⁶See also *Dayyabu v. INEC* (2023) LPELR-61547(CA).

It will however require legislative action by way of an amendment of the Electoral Act to make electronic transmission mandatory. Thankfully, many political parties and civil society groups are already advocating and proposing this amendment.

3.6 Non-Compliance and the Substantiality Rule

In addition to proving that the alleged acts or omissions of non-compliance occurred, the onus is also on the petitioner to prove that the alleged non-compliance affected the final result of the election to his detriment. He has a duty to prove to the election tribunal or court that the non-compliance affected substantially the result of the election.²⁷

Where the court, based on the strength and quality of evidence from the petitioner, comes to the conclusion that there was non-compliance but finds that it was not substantial enough to nullify the election, the petition will be dismissed for want of proof.

But where the petitioner proves that the alleged acts of non-compliance affected the election result substantially, the onus shifts to the respondents to prove that the conduct of the election complied substantially with the Electoral Act, and other lawful guidelines issued to regulate the conduct of the election.

Unless the petitioner effectively discharges the onus on him to show how the breaches affected or could have affected the result of the election, the burden of proof will not shift to the respondents to show that the election substantially complied with the Electoral Act.²⁸ See *Abubakar v Yar' Adua*.²⁹

Failure by a petitioner to prove such allegations and show how they affected the election negatively will defeat his case. He can only succeed where the non-compliance is of a degree which substantially affected the election result, and the respondent is unable to show that the non-compliance did not substantially affect the result.³⁰

In *INEC v Oshiomole*³¹ after evaluating the evidence, the election tribunal found that the petitioners had discharged the onus to establish their case. The Court of Appeal also found that the respondents failed to provide credible evidence to rebut the evidence of PW47, the Commission's Head of Operations in Edo State, who testified for the petitioners. The Court of Appeal, Therefore, confirmed the decision of the Tribunal that the petitioners proved the allegations of multiple voting and accreditation, which substantially affected the election result.

²⁷APGA v Uba (2012) 1 LRECN 358 at 404; CPC v INEC (2011) 4 LRECN 170 at 211; Fayemi v Oni (2011) 4 LRECN 455; Chime v Onyia [2009] All FWLR (Pt 480) 673; Ucha v Elechi (2012) 1 LRECN 281 at 305.

²⁸Buhari v Obasanjo [2005] All FWLR (Pt 273) 1 at 145; APGA v Uba (2012) 1 LRECN 358; Okechukwu v INEC [2014] 17 NWLR (Pt 1436) 255 at 308-309, paras. G-A.

²⁹[2009] All FWLR (Pt 457) 1 at 147, C-G; INEC & Ors v Oshiomole & Ors (2008) 3 LRECN 649 at 702, F-G.

³⁰Oke v Mimiko & Ors (No.2) [2014] 1 NWLR (Pt 1388) 332 at 391-392 paras, Per Onnoghen JSC.

³¹(2008) 3 LRECN at 702.

One thread established by case law is that it is the total effect of the non-compliance on the election result that determines the success of any election petition founded on this ground. No matter the magnitude of the alleged non-compliance, the burden is on the petitioner to tie same to the effect of such irregularity or non-compliance to the result of the election.

The law is that once the petitioner is unable to tie the non-compliance, even if proved, to the result of the election, the petition is bound to fail.

In *Buhari v Obasanjo*³² the court held that the nullification of the result in Ogun State did not affect the overall result of the election in the whole federation. What is needed to sustain an election petition on this score is a substantial non-compliance which affected the result of the election, not just a trivial breach of the Electoral Act with little or no visible impact on the election result.

It was also held in *Buhari v Obasanjo*³³ that the failure of two officials of the Commission to take the oath of loyalty contrary to the Electoral Act 2002, *per se*, will not lead to the nullification of an election.

The oath referred to is as provided in section 18 of the Electoral Act of 2002, which is in pari material with section 26 of the Electoral Act of 2022, and which provides that all electoral officers, presiding officers, and returning officers shall affirm or swear an oath of loyalty and neutrality indicating that they would not accept bribe or gratification from any person, and shall perform their functions and duties impartially and in the interest of the Federal Republic of Nigeria, without fear or favour.

The court held that the said section 18 of the Electoral Act of 2002, fell short of spelling out the consequences of its breach, and also that by virtue of section 4(1) of the Oaths Act, the omission of a public officer to subscribe to affirmation or oath of loyalty and neutrality does not affect any official act done by him, but any penalty would attach to him personally. The court also found that the electoral officers in question did not refuse to affirm or to take the oath, rather it was INEC which failed to administer the oath.

The court also held in the same case that the non-certification of voting materials, *per se*, is not enough to set aside an election unless where it is shown that it substantially affected the result of the election.³⁴

4. BURDEN OF PROOF IN THE UNITED STATES ELECTORAL CONTESTS

The burden of proof of non-compliance and the substantiality rule in electoral contests in the United States of America is also similar to the position in Nigeria, though with some peculiarities such as recounts, the application of the equal protection clause, and to the rule against laches.

³²(2005) 1 LREC 235; [2005] 2 NWLR (Pt 910) 241.

³³(2005) 1 LREC 235; [2005] 2 NWLR (Pt 910) 241.

³⁴*Ibid*.

In Election Contests in the United States of America, under the Federal Contested Elections Act, of 1969³⁵ the burden is on the contestant to prove that the election results entitled him to the contestee's seat, even where the contestee fails to answer the notice of contest or otherwise defend. See *Tunno v Veysey*.³⁶ This is also the position in Nigeria.

In the USA, where a contestant makes a claim to a seat, it carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone, could sit the contestant. He has to present sufficient evidence that the election result would be different, or that the contestant is entitled to the seat. See *Tunno v Veysey*.³⁷

Standard of "Fair Preponderance of Evidence"

In an election contest in the USA, a contestant has the burden of proof to establish his case, on the issues raised by the pleadings, by a fair preponderance of the evidence. See *Scott v Eaton*.³⁸

4.1 The Substantiality Rule in the USA: The Burden of Showing that the Results of an Election Would Be Changed By the Non-Compliance

In the absence of a showing that the results of the election would be changed, mere non-compliance will not void the results of an election in the USA.

In *Logerquist v. Board of Canvassers for Town of Nasewaupee*,³⁹ it was held that post election challenges "are permissible provided that they may affect the election results."

4.2 The Substantiality Rule in Evidence Compelling Examination of Ballots in the USA

To entitle a contestant in an election case in the USA to an examination of the ballots, he must establish (a) that some fraud, mistake or error had been practiced or committed whereby the result of the election was incorrect, and a recount would produce a result contrary to the official returns; and (b) that the ballots since the election have been so rigorously preserved that there has been no reasonable opportunity for tampering with them.

³⁵ 1969 2 USC ss 381 et seq.

³⁶H. Rep. No. 92-626 at 3. Online report <<https://www.congress.gov/104/crpt/hrpt852/CRPT-104hrpt852>> accessed 27 March 2025.

³⁷Ibid.

³⁸[Deschler's Precedents, Volume 2, Chapters 7 - 9] [Chapter 9. Election Contests]

³⁹150 Wis. 2d 907, 916, 442 N.W.2d 551 (Ct. App. 1989),

4.3 Where A Recount Cannot Be Accomplished In A Constitutionally Valid Way Within The Time Allowed for the Certification of Results

The substantiality rule however becomes irrelevant where even though a recount may lead to change in the result, such recount will either violate the equal protection clause in the constitution of the United States, or the recount itself may not be carried out in time to meet the deadline for certification of results.

In *Bush v. Gore*,⁴⁰ the celebrated 2000 election case between Republican candidate George W. Bush and Democrat candidate Al Gore, the state of Florida reported that Bush had won the state by 1,784 votes. Since this margin was less than one-half of one percent, Florida law required an automatic machine recount. Two days later, the machine recount showed that Bush's margin of victory had shrunk to 327 votes. In this situation, a candidate may request a manual recount under Florida state law. Gore requested a manual recount in the four traditionally Democrat-leaning counties of Volusia, Palm Beach, Broward, and Miami-Dade.

While the counties began to comply with this request, they became concerned that they could not meet the state deadline for certifying election returns to the Florida Secretary of State within seven days of the election. The Florida court upheld the deadline but allowed the counties to amend their returns and found that the Secretary of State could use the amended returns. Palm Beach, Broward, and Miami-Dade Counties missed the seven-day deadline.

The Florida Secretary of State required counties seeking to make a late filing to submit a written explanation for why it was necessary. She found that none of the explanations met the criteria that she had imposed on herself for determining whether late filings would be admitted. She thus certified Bush the winner of the election in Florida after receiving overseas absentee ballots.

A few weeks later, Gore's campaign obtained an order from the Florida Supreme Court for a statewide manual recount.

George Bush immediately appealed to the US Supreme Court. And the next day, the U.S. Supreme Court ordered a stay of the recount.

In its judgment, the Court by a majority of seven Justices, held that a manual statewide recount would violate the Equal Protection Clause of the Fourteenth Amendment. The Court emphasized that standards for manual recounts varied arbitrarily across counties and even precincts, so individual voters could not be sure that their participation in the democratic process would be given the proper weight.

It further held that since the state could not finish the recount within the deadline set by state law, the recount was ended.

⁴⁰531 U.S. 98 (2000) online report accessed 27 March 2025.

It held that equal protection applies as well to the manner of its exercise, and that having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another.

To this writer however, stopping a recount because it may not meet the deadline set by state law or the Secretary of State is very harsh on the contestant whose fault it is not, that the time is too short to carry out a manual recount. Surely the time can be extended by the courts to meet the ends of justice, or election time tables can be redrawn to give sufficient time for manual and electronic recount, lest justice be sacrificed on the altar of haste. Let justice be done though the heavens may fall.

4.4 Laches as a Bar to any Relief for Proven Cases of Irregularities in the USA

Another rule that puts the substantiality rule in the shade in the USA is the rule against laches. By the said rule, even if a recount will substantially affect the result of the election, the court will not order same if the petitioner was aware of the irregularity before the election but did not challenge it in court.

In *Trump v. Biden*,⁴¹ during the 2020 US presidential election, officials in Wisconsin, ignored statutory provisions which tightly regulate absentee balloting, identified by the Legislature as "mandatory," such that ballots in violation of these statutory provisions "may not be counted." The law requires that absentee ballots be delivered only by mail, or by hand, to the clerk, that photo i.d. must be supplied to obtain ballots, and absentee ballots missing the required witness address may be "cured" only by the voter, and not by the clerk.

Wisconsin law allowed some voters to declare themselves indefinitely confined, provided they met the statutory requirements, and these individuals were not required to provide photo identification to obtain an absentee ballot. However on March 25, 2020, the Dane and Milwaukee County Clerks issued guidance on Facebook suggesting that all voters could declare themselves indefinitely confined because of the COVID '19 pandemic and the governor's Safer-at-Home Order.

Collectively, this non-compliance with the statutory provisions resulted in the counting of at least 50,125 absentee ballots in heavily Democrat areas, in violation of the directives of the Wisconsin Legislature - more than enough to have affected the outcome of the presidential election in Wisconsin, in which the vote margin stood at 20,682.

Donald Trump went to the District court to challenge the illegal ballots but failed. He appealed to the Supreme Court of the state of Wisconsin, and though the court agreed with him that the Wisconsin Electoral Commission issued instructions contrary to the law, which enabled illegal ballot harvesting, obtaining ballots without photo i.d., and wrongful claim of indefinitely confined status to illegally obtain ballots without

⁴¹Online report <https://www.supremecourt.gov/DocketPDF/20/20-882/164938/20201229165341814_No.%2020-PetitionForAWritOfCertiorari.pdf>accessed 7 September 2025.

identification, illegal curing of ballots, it nevertheless dismissed his case on grounds of laches because his campaign was aware of these cases of non-compliance before the election, but did not challenge same.

Upon further appeal to the US Supreme Court, the Court upheld the judgment of the Supreme Court of the state of Wisconsin which held that the challenge to the indefinitely confined voter ballots was without merit, and that laches barred the relief the Campaign sought on the three remaining categories of challenged ballots.

According to the court, the Trump Campaign's argument that all voters claiming indefinitely confined status since the date of the erroneous Facebook advice should have their votes invalidated, whether they are actually indefinitely confined or not was without merit because to apply this blanket invalidation of indefinitely confined voters as a class without regard to whether any individual voter was in fact indefinitely confined had no basis in reason or law.

On the issue of laches, the court held that the challenges failed under the doctrine of laches, which is founded on the notion that "equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party." It held that extreme diligence and promptness are required in election-related matters, particularly where actionable election practices are discovered prior to the election.

It held that the doctrine was applied because the efficient use of public resources demands that a court not allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process.

It held that if a party seeking relief in an election-related matter fails to exercise the requisite diligence, laches would bar the action, and that the Campaign's delay in raising these issues was unreasonable in the extreme, and that to some extent, this requirement focuses on the ability of the asserting party to mitigate any resulting prejudice when notice is provided.

It held when the "Democracy in the Park" events, wherein ballots were illegally harvested, were announced, the Trump Campaign could have challenged its legality. Instead, it waited until after the election, after municipal officials, the other candidates, and thousands of voters relied on the misrepresentations of their election officials that these events complied with the law.

It held that the time to challenge election policies such as these was not after all ballots have been cast and the votes tallied, and that election officials in Dane and Milwaukee Counties reasonably relied on the advice of Wisconsin's statewide elections agency and acted upon it, and voters reasonably conformed their conduct to the voting policies communicated by their election officials. But rather than raise its challenges in the

weeks, months, or even years prior, the Campaign waited until after the votes were cast, and that such delay in light of these specific challenges was unreasonable.

It held that the Campaign was challenging the rulebook adopted before the election season began, and that election claims of this type must be brought expeditiously, but the Campaign waited until after the election to raise selective challenges that could have been raised long before the election.

It opined that parties bringing election-related claims have a special duty to bring their claims in a timely manner, and that the issues raised in this case, had they been pressed earlier, could have been resolved long before the election, and that failure to do so was fatal.

It also held that the delay put courts in a difficult spot, as interpreting complicated election statutes in days was not consistent with best judicial practices. These issues could have been brought weeks, months, or even years earlier.

The US Supreme Court therefore dismissed the appeal.

Criticism of the Trump v Biden decision

This writer is however of the view that the US Supreme Court was wrong to have thrown the cloak of laches over the issue of whether the absentee ballots were lawfully cast, or could be legally counted. The court cowardly abdicated its responsibility to decide the issues presented in the case, because the suit was a challenge of specific ballots that were cast in the election, contrary to the law, under a statute commanding that such ballots cannot be counted.

Also, the court's view that this lawsuit could have been brought years earlier, is unjustified, as only post-election ballots can be reviewed, and the "rules" the court claimed should have been challenged earlier, consisted merely of non-binding guidance by an unelected election commission, which cannot supplant statutory mandates.

As Justice Bradley observed in her dissenting opinion in the same case at the Supreme Court of Wisconsin, "When the state's highest court refuses to uphold the law, and stands by while an unelected body of six commissioners rewrites it, our system of representative government is subverted."

The petitioners' case was that a sizable number of absentee ballots, more than enough to make the difference in the election, were cast in violation of mandatory Wisconsin statutes. When then could they have asked for the illegal ballots to be struck out if not after they had been cast? It is my view that the claim was proper and timely, yet the court opted to throw the cloak of laches over the case, and refused to resolve it on the merits.

This abdication has since that election caused a large section of the American public, and indeed the world, regardless of party sympathies, to harbour serious doubts about the integrity of the November 2020 US election. Such questions are only exacerbated

when judges lack the courage to resolve election disputes on the merits, thereby allowing serious questions to fester, unaddressed, as was permitted to occur in this case. The common-law doctrine of laches cannot be squared with legislation, or the Constitution,

The plain language of the applicable statutes required that all involved must apply the “mandatory” substantive requirements imposed by the Wisconsin statutes to guard against fraud and abuse in absentee balloting and, where those requirements are not met, must refuse to count the affected ballots. The court, by invoking the doctrine of laches to avoid a decision on the merits, failed in its duty to apply the law enacted by the Legislature to the facts of the case, and to rule on the merits.

Surely, the clearly expressed intent of the should have prevailed, and the court committed a grave error by according the Wisconsin Electoral Commission’s guidance the force of law, albeit by default.

The court was wrong in my view to excuse proved violations of the election code on the ground that an administrative agency, the Wisconsin Elections Commission (“WEC”) had issued guidance documents endorsing the practices, which petitioners supposedly could have challenged earlier.

The effect, of the court’s reliance on laches, would be to impose a burden on presidential candidates, to monitor all election practices in numerous municipalities, and bring litigation before election day against any practice that might end up later impacting the vote count, or risk being told later that they waited too long to sue, and would not be permitted to challenge unlawful ballots in a post-election proceeding.

This is an added burden on the right of a citizen to run for public office by seeking to persuade other citizens to cast their votes for him or her. To force a candidate, in the midst of the campaign, to continuously monitor ever-shifting election procedures and guess at which ones may impact the result, and expend scarce resources on preemptive litigation for fear of later being deemed barred from filing a petition based on laches, would create a cloud of confusion, uncertainty, and ambiguity.

It is our view that the judgment was an interference with the right of a citizen to run for public office without being forced to expend enormous resources on pre-election litigation, a burden which has been created by the court’s reliance on the doctrine of laches to avoid a decision on the merits. It is therefore necessary for the US Supreme Court to review the application of this doctrine to avoid a negative impact on the outcome of the future presidential races.

In the opinion of this writer, the US Supreme Court should have in place of laches, considered the rule in the case of *Thirty Voters of Kauai Cnty. v. Doi*,⁴² where the court held that the general rule is that if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, the

⁴²599 P.2d 286, 288 (Haw. 1979) online report accessed on 26th September 2025

plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward.

In this case, the court having found that there was major misconduct by the Wisconsin Electoral Commission in issuing guidelines contrary to state legislation, ought to have brought the petitioners' case under the exception of fraud or misconduct, and heard the case on the merits.

5. THE SUBSTANTIALITY RULE AND VITIATING NON-COMPLIANCE

The rule that a petitioner must establish that the particular non-compliance proved was substantial enough to affect the result of the election, is called the substantiality rule.

It has however been strongly argued in *Buhari v INEC*,⁴³ though unsuccessfully, that it is not in all cases that a petitioner is expected to establish that the particular non-compliance was substantial enough to affect the result of the election.

In the said case of *Buhari v INEC*⁴⁴ the petitioner challenged the 2007 presidential election on the ground that it was invalid by reason of non-compliance with the Electoral Act 2006, among other grounds. The non-compliance proved at the trial was that the election was conducted with ballot papers that were not serialized and also not bound in booklets as prescribed by section 45 of the Electoral Act 2006.

The Supreme Court after an exhaustive review of previous decisions on non-compliance, by a majority decision of four Justices against three, held that the petitioner had not proved non-compliance that was substantial enough to invalidate the result of the election.

Many jurists, including Oguntade JSC, are however of the opinion that where acts or omissions, which amount to non-compliance, are so fundamental that the alleged non-compliance vitiates the electoral process and its outcome, or the result, in such circumstances, there should be no burden on the petitioner to establish that the non-compliance substantially affected the election result, and that if the election suffers a vitiating vice which renders it null and void, in such circumstances, there should be no obligation, anymore on the petitioner to prove that the non-compliance affected the result of the election.

This principle of a vitiating vice rendering an election null and void without proof by the petitioner that the vitiating vice affected the result of the election has however only elicited the approval of some Justices of the Supreme Court in either dissenting judgments, or as mere *obiter*.

⁴³[2008] 19 NWLR (Pt 1120) 246;

⁴⁴[2008] 19 NWLR (Pt 1120) 246; (2009) 3 LREC 1 at 170

Oguntade JSC, himself, one of the three Justices which delivered a dissenting judgment in *Buhari v INEC*⁴⁵ (with Onnoghen and Muktar JJ.SC) held that the approach of the Supreme Court in such cases was wrong and therefore needed to be re-visited.

He preferred the approach of the Supreme Court, per Coker JSC in *Swem v Dzungwe*,⁴⁶ where it was held that if a court is satisfied that the petitioner had established an alleged non-compliance which might affect the result of an election but was unable to say whether the non-compliance, in fact, affected the result, the non-compliance would be held as proved, and the onus of proof would shift to the respondent to show that the said non-compliance did not affect the result of the election.

Oguntade JSC therefore concluded that the substantiality rule, as applied by courts of law presently, puts a heavy burden on the petitioner and was “unduly favourable to him and lenient to the respondent who is the perpetrator of the disobedience.”

Concerning the non-compliance alleged in *Buhari’s case*,⁴⁷ Oguntade JSC found that the respondents, by their traverse admitted that the election was conducted with ballots not bound in booklets and which did not have any serial numbers contrary to section 45 of the Electoral Act 2006. He therefore, held that the said non-compliance being of a fundamental character rendered the ballots invalid because as opined by him, the use of invalid ballots for the election constituted non-compliance that was so fundamental that it violated the principles of the Electoral Act.

He held further that the Court of Appeal should have nullified the said election for this reason without placing the burden on the petitioners to show how the non-serialization of the ballots papers and non-binding of the said ballots papers in booklets substantially affected the result of the election. According to him, the said act “was a condition precedent to the holding of the election” without which it was impossible to have a valid election. He reasoned that an invalid ballot paper cannot yield a valid vote. He said thus:

An invalid ballot paper cannot yield a valid vote. Clearly, therefore, the petitioner/appellant in my view succeeded in making the case that non-compliance with section 45 (1) of the Election Act 2006 substantially affected the result of the election.

Both Muktar and Onnoghen JJ.SC concurred with Oguntade JSC on whether the case established by the petitioner required the application of the substantiality rule.

On whether the appellant had discharged the onus to prove that the alleged non-compliance substantially affected the election, Onnoghen JSC, held thus:

I hold the view that it has. There are non-compliances that go straight to the fundamentals of an election thereby affecting the condition precedents to the holding of an election while others may just affect the result of the election where one had been validly held. In other words, some non-

⁴⁵[2008] 19 NWLR (Pt 1120) 246; (2009) 3 LREC 1 at 170

⁴⁶(1966) NMLR 297 at 303, (1966) CLR 2(A) SC

⁴⁷(n 46)

compliance may render an election void in which case there is no result of the election to be substantially affected by the non-compliance while the others may substantially affect the result of an election validly conducted.

In essence, the purport of the dissenting judgments of the three (3) Justices of the Supreme Court was that where a petitioner has established a fundamental breach which negates the principles of the Electoral Act, it constitutes a substantial breach which does not place on the petitioners the onus to prove whether or not the breach substantially affected the result of the election.⁴⁸ The reason for the above reasoning of their Lordships is that the non-compliance rendered the election a nullity *ab initio*, and thus, obviated the necessity to further establish how it affected the election. In effect, no valid election was conducted *ab initio*, that could be subjected to the substantiality rule.

In *Oke v Mimiko* (No. 2),⁴⁹ a decision of the Supreme Court, Onnoghen JSC, in his concurring judgment, still stuck to his views, hitherto expressed in *Buhari's case*,⁵⁰ that there is a class of non-compliance that does not call for the application of the test of the substantiality rule, such as when an election is conducted with an invalid voters' register.

Nonetheless, he agreed with the lead judgment that, in the instant case, the injection of names in the voters' register, illegally, did not bring the case of the petitioners within that class of non-compliance which absolutely vitiates an election *ab initio*.

Until these weighty judicial opinions on the non-applicability of the substantiality rule to certain cases of non-compliance receive the affirmation of the majority opinion of the Supreme Court, applying the substantiality rule to petitions predicated on non-compliance with the Electoral Act still remains good law to be followed by all courts in Nigeria.

The US courts facing such situations, in which election officials, animated by partisan motives, have intentionally violated the law, but the impact of the wrongdoing is difficult to measure with exactitude, have resolved doubts against those officials in one of two ways. One way is to shift the burden of proof by holding that all the affected ballots must be excluded unless the election officials can prove that some of them were cast legitimately.⁵¹ Another way is simply to void the election result.⁵²

⁴⁸ *Na-Bature v Mahuta* (1992) 9 NWLR (Pt 263) 85; (1992) 1 LREC 1

⁴⁹ [2014] 1 NWLR (Pt 1388) 332 at 391-392 paras.. Per Onnoghen JSC.

⁵⁰ (n 48)

⁵¹ See *Warf v. Bd. of Elections*, 619 F.3d 553, 561-62 (6th Cir. 2010) online report accessed on 10/9/2025

⁵² See *Marks v. Stinson*, 19 F.3d 873, 886-87 (3d Cir. 1994) online report accessed on 10/9/2025

6. CONCLUSION

During the election crisis of 1876-77, US President Ulysses Grant observed that “either Party can afford to be disappointed in the result, but the country cannot afford to have the result tainted by suspicion of illegal or false returns.”

But from the foregoing, it is obvious that the presumption of regularity and the substantiality rule and generally the burden of proof of non-compliance under the Electoral Act of Nigeria, has made election results to be tainted by suspicion of illegal or false returns.

It is also unfortunate that INEC has taken an unfair advantage of the fact that the Act did not make electronic transmission of results mandatory to practice deception and even fraud on unsuspecting candidates and voters.

The litmus test of whether the result of an election is surely the perception of the reasonable man on the street as to whether it is a true reflection of the will of the voters, and it is the duty of the courts to review complaints and redress malfeasance wherever found.

The Supreme Court must therefore give judicial weight to the view that where a petitioner has established non-compliance but was unable to say whether the non-compliance in fact, affected the result, the onus of proof should shift to the respondent to show that the said non-compliance did not affect the result of the election. It must also approve the view that fundamental non-compliance should vitiate the result of elections.

7. RECOMMENDATIONS

Based on the above, the following recommendations and suggestions are made for reform:

1. Video evidence of the signing of result sheets by polling agents:

Under the electoral law the best proof that an election was conducted is the original result or the certified true copy thereof of form EC8A, etc. The said form EC8A, etc recorded by INEC and signed by the polling and collation agents of the parties are therefore admissions that the election took place and that the result is authentic. And it has been held that the said form EC8A signed by such agent binds the party. Thus signature of the party agent authenticates the result, and he cannot turn around to deny the contents of the result sheet. Therefore the said result sheet or form EC8A, etc. produced by INEC is an admission by the parties

of the genuineness of the result. For where the result tendered or certified by INEC does not bear the signature of the party agent, it is worthless and inadmissible, and even if admitted, it has no weight simply because it was not signed or made by the parties as their admission of the results.

Thus the signed EC8A, EC8Betc, are akin to confessional statements or acknowledgement by the party agents of the signatures as their own. And just as is the case with confessional statements in criminal trials, in an election petition, where the electoral official or INEC or the respondent tenders in evidence a result sheet or form EC8A etc, signed by the petitioner's agent, the respondent is simply relying on the signature as the petitioner's agent's acknowledgment or admission or confession of the result as being made by him.

It is therefore recommended that there be a requirement of tendering video evidence of the making and taking of the result sheet, and it's signing by the party agents to prove that it was indeed signed by them, and that it was signed voluntarily. Thus a respondent and INEC should produce video evidence of how the election result was made and signed before the result tendered or certified by INEC can be presumed as regular, and taken to be correct.

It should be noted that INEC and the declared winner already have a burden to prove that election was conducted, and that a winner emerged which burden can only be discharged by tendering the result sheet. This further requirement of tendering the video of the making and taking of the result sheet, showing the polling agents, and the INEC presiding officer, signing same will shift the burden of proof of compliance to INEC as the similar burden to prove the voluntariness of confessional statements, is presently placed on the police. No petitioner has the enormous powers of INEC which is similar to that of the police, so INEC should bear the burden to prove that the agents actually signed the result sheets without duress, since it is an admission by the agents that the result sheet is correct, which admission is binding on the petitioner, and therefore it should be treated as a confessional statement which in effect it is.

2. CCTV:

Another recommendation is that CCTV cameras should be mounted at polling stations, local government, senatorial, state and national collation centers, to monitor the movement of men and materials on election days. This CCTV recording should be tendered by the respondents where the petitioner alleges non-compliance, etc. The burden should also be on the respondents to tender the recordings, since they would be installed by INEC, and therefore would be their property, and in their possession.

3. Body Camera:
Another recommendation is that electoral officials should be made to wear body cameras or bodycams, throughout the day of the election, not just at the polling station but wherever they go, so that all their movements, actions and conversations would be monitored. This will show if they did anything wrong or conspired with politicians to subvert the election. It would show where they went, who they met, what they said and what they did. It would show them altering the results, if they attempt to do so.
4. Automatic electronic transfer or transmission of results:
Results should automatically and electronically transferred or transmitted to party offices, candidate campaign offices, High Courts, Courts of Appeal, Supreme Court, Police, Army, NBA and other observers, UN, EU, AU, ECOWAS, etc. emails or systems or websites, to create duplicate copies which can be retrieved to confirm the final result posted by INEC.
5. The Burden of proof should be on the slightest evidence:
It is also recommended that the burden of proof should be at the slightest evidence or allegation backed with a certified true copy of the result, video recording, bodycam, CCTV or affidavit. The burden should then shift on the production of these materials, which should be produced by INEC at the tribunal.
6. BVAS should be for both accreditation and voting:
BVAS should be reconfigured to not only accredit voters, but also to record their votes immediately. It should act as a voting machine.
7. Immediate certification of election results:
Forms EC8A, EC8B and EC8C, EC8E by the presiding officers at the polling unit, local government, state and national collation centers.
8. There is a need to review the authorities applying the substantiality rule to proved cases of fundamental non-compliance which should vitiate the results of the election in line with the will of the people, the intendment of the Electoral Act, and common sense.