

History Lessons

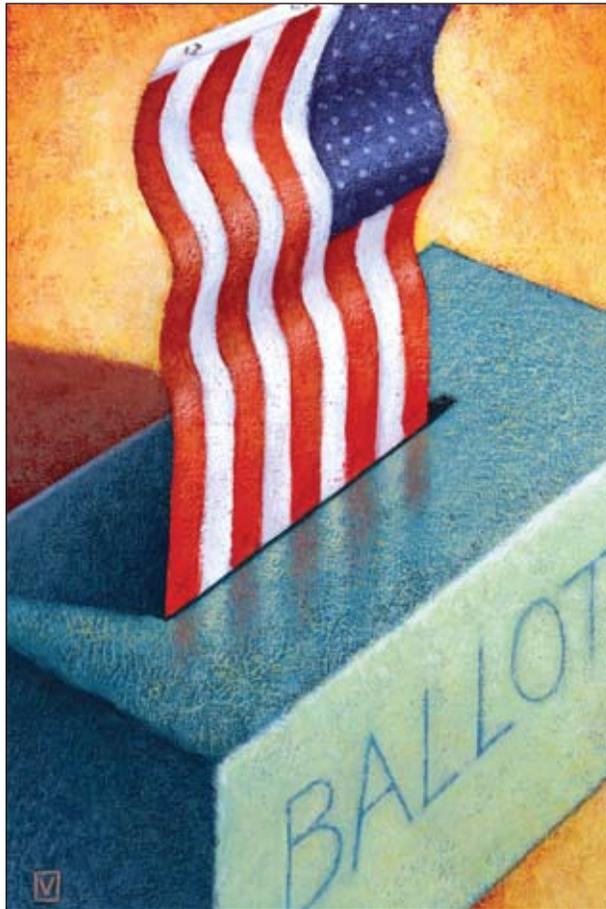
Unresolved Issues from 2000 and 2004 Will Inform Possibilities for 2008 Race

The legal chaos surrounding the 2000 Florida presidential election litigation led to major changes in voting methods and procedures, but the underlying cause of Al Gore's defeat was only indirectly addressed by Congress. Gore's defeat was the proximate result of monumental ballot-design errors committed by Democratic county election officials that led to the disfranchisement of thousands of Florida voters. The changes mandated by Congress have limited, but not removed, the impact of bad ballot design, and the new voting systems have created a new set of problems, including unresolved constitutional issues. And as happened in 2000, the federal statute imposing a rigid 35-day time frame to resolve a contested selection of electors might again in 2008 prevent the courts of a crucial state, and the U.S. Supreme Court, from having adequate time to resolve the issues with both the appearance and the reality of having reached an impartial result.

Although many Democrats continue to believe that the decision of the Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000), deprived Al Gore of Florida's crucial twenty-five electors, a painstaking review by a consortium of news media organizations, reported in *The New York Times* on Nov. 12, 2001, as "Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote," established that the recount pursued by Gore would have confirmed a George W. Bush victory.

Gore's Florida legal team sought a hand-recount of the undervote ballots cast in four heavily Democratic counties — undervote meaning a punch-card ballot for which no presidential choice was recorded when the ballot was counted by machine. The media

consortium concluded eleven months later that if Gore's request had been granted, Bush would have won by 225 votes — less than the final certified margin of 537, but still decisive. Moreover, if the Florida Supreme Court's broader remedy of a statewide recount of all undervotes had been completed, Bush would have won by 493 votes.



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Only a complete statewide recount of all rejected ballots, both undervotes and overvotes — ballots initially rejected because machine-read as being marked for more than one presidential candidate — would have resulted in a Gore victory by a narrow margin of 115 votes. But as *The Times* reported, "[t]here was no set of circumstances in the fevered days after the election that

would have produced a hand recount of all 175,000 overvotes and undervotes."

The media consortium results can be read to absolve the Supreme Court majority of depriving Gore of victory, but there is compelling evidence that Gore would have won in Florida if Democratic election officials in two Democratic counties had not committed two monumental errors in designing each county's ballots.

The media consortium concluded that the confusing design of the Palm Beach County butterfly ballot not only caused voters "to cast an unusually high percentage of votes for Patrick J. Buchanan," but also caused "many voters to double vote at more than three times the rate of voters in other coun-

ties using the same [punch card] voting method but with a less-confusing design." Balancing the 1,651 Palm Beach ballots double-marked for Bush and an adjacent candidate and the 8,168 ballots double-marked for Gore and an adjacent candidate, the consortium concluded that the incompetent Palm Beach ballot design deprived Gore of a net margin of at least 6,286 votes (without even considering the thousands of voters in predominantly Jewish precincts of Palm Beach who cast ballots single-marked for Buchanan). In Duval County, an erroneous instruction told voters to "vote every page" of a multipage ballot design with presidential candidates on two pages. That error caused "20 percent of the ballots from African-American areas that went heavily for Mr. Gore" to be invalid because "voters followed instructions to mark a vote on every page of the ballots," thus costing Gore a net margin in Duval County of 1,999.

Another complicating factor, investigated separately by *The New York Times*, was that hundreds of late-arriving overseas absentee ballots were counted, the "vast majority" in counties that favored Bush, even though "680 of the late-arriving ballots did not meet Florida standards," including that the ballots had actually been voted *after* the day of the election. Gore chose not to challenge the late ballots because many were from members of the military overseas. That decision cost Gore as many as 290 additional votes.

Congress reacted to the Florida controversy by enacting the Help America Vote Act ("HAVA"). Punch-card ballots were prohibited, as was any other voting method that did not create an auditable record of each vote cast (which required scrapping the traditional mechanical lever voting machines). Congress appropriated funds to subsidize the purchase of new voting systems. To deal with erroneous omissions of voter names from precinct voter rolls, each state was required to permit a voter whose name was not found on the precinct roll to cast a sealed paper "provisional ballot" to be opened and counted if subsequent review showed that the voter was indeed registered. Voters who registered by mail were required, when voting for the first time at a polling place, to provide documentary proof of their identity, but states were also permitted to impose stricter identification requirements.

Many jurisdictions used the HAVA subsidy to purchase "direct recording electronic" ("DRE") voting machines in which the voter chooses among candidates by touching the face of the voting machine. Pushing a "VOTE" button causes the voter's selections

to be recorded in the electronic memories of the voting machine. Academic criticism of the accuracy and security of such machines, including whether they were subject to hacking or insider cheating, led to a movement to require that DRE machines include a mechanism for a "voter-verifiable paper au-

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dit trail" ("VVPAT), by which the machine would permit the voter to see and approve, prior to finally casting the vote, a printed paper record of each of the candidates selected by the voter. Some "voter-verifiable paper audit trail" systems use a continuous paper tape; others use a mechanism that prints a separate mini-ballot that is separated and filed in a box inside the voting machine.

Other jurisdictions have adopted optical scanning systems, in which the voter marks a paper ballot by filling in a circle next to

each preferred candidate's name, and the completed paper ballot is scanned by an optical reader in the precinct polling place that records the voter's choices and places the paper ballot in a sealed box.

Problems attributed to ballot design have continued to occur, especially with DRE machines. In a 2006 Congressional election in a Florida district, with a winning margin for the Republican of 369 votes, more than 18,000 voters in predominantly Democratic Sarasota County did not vote for a Congressional candidate, likely because of the placement of that race at the top of the second screen on the multi-screen ballot image.

Pennsylvania implemented the first-time voter identification requirement under HAVA allowing use of a wide variety of documents, ranging from official photo identification to utility bills and bank statements. But some states, purportedly to restrict fraud, have required every voter appearing at a precinct polling place to present a government-issued photo-identification, either a driver's license or a non-driver photo identification. Indiana's procedure to obtain non-driver photo identification requires the

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voter to present a copy of a birth certificate bearing an embossed seal. A registered voter without the required government-issued photo identification can cast a provisional ballot, but that ballot will be counted only if the voter goes to a specific county office within ten days after the election and complies with the procedures to obtain the non-driver photo identification. Proponents of these more onerous requirements generally have been Republican legislators who articulate a need to limit fraud resulting from voter impersonation. Democrats complain that the unstated Republican purpose is to limit voting by persons who lack driver's licenses and who will be dissuaded by the bureaucratic burdens of obtaining the non-driver alternate identification.

One lesson from 2000 is that the time within which to dispute the vote for presidential electors prior to the Electoral College vote is much shorter than the Gore side took into account. One holding in *Bush v. Gore* was that the contest over presidential electors must end on the thirty-fifth day following the election, because a federal statute enacted after the Hayes-Tilden contested presidential election of 1876 created a so-called "safe harbor" requiring Congress to accept the result if a state appoints its electors no later than six days prior to the electoral college vote.

Although the Supreme Court's Saturday, December 9, 2000, stay had the practical effect of preventing any further recount, the "safe harbor" date was only three days away on December 12. Professor Steven F. Huefner has urged that "Congress move back the Electoral College timetable to make the 'safe harbor' date December 31," with the electors casting votes on January 3, without affecting the January 20 inauguration date. There seems to be little momentum in Congress to enact this reform.

As of July 2008, states identified as potentially decisive include Florida, Michigan, Ohio and Pennsylvania. If the 2008 election ends with a very close popular vote in one or two states and the electoral votes in those states will determine the national outcome, there will likely be an all-out effort by both campaigns to litigate, in state and federal courts, about votes that were cast on election day but not yet counted in the totals.

Provisional ballots, little used prior to 2000, will attract litigation in a close 2008 contest. If the vote in Ohio is close, Obama

might attempt to relitigate whether a provisional ballot should be rejected if cast in a precinct different from the precinct assigned to the voter in the registration records. Since each state is required by HAVA to have a statewide registry of voters, there is no reason to refuse to count such ballots, and many states, including Pennsylvania, count provisional ballots if the voter is registered in any precinct. If in November 2008 the number of "wrong precinct" provisional ballots, which in Ohio would be rejected, is larger than the margin for president, renewed litigation on this issue would be likely on the grounds that rejecting "wrong precinct" ballots violates constitutional standards because there is no compelling reason for the state to reject them.

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Some provisional ballots are cast because the voter, although listed on the precinct roll, lacks the documentary identification required by state law. Indiana's identification requirement was litigated in the last term in the Supreme Court, but ended on April 28 in a fragmented result allowing the statute to stand. If a few thousand provisional ballots cast in a state with a similar identification requirements might swing the presidential result, the Obama campaign would attempt a constitutional challenge based on the burden on voters; such a challenge might require the Supreme Court, on an expedited basis, to revisit the issue.

If a narrow margin results from votes cast on electronic machines with a "voter verified auditable paper trail" feature, the parties will likely litigate over whether the electronic totals or paper record should be controlling. But tabulating millions of votes from the paper records would be a logistical nightmare, likely fraught with errors created by mechanical breakdowns in the printing mechanisms, based on the few instances to date in which the task has been tested. Gore's reluctance in 2000 to challenge late-voted overseas military absentee

ballots will not be followed by the Obama campaign if the outcome is uncertain. The campaign would vigorously resist counting any absentee ballots, military or civilian, that appear to have been marked the day after the election.

And in any close state, even if no constitutional issues are present, the losing side will attempt to obtain a normal recount with as much detail as the law of the particular state provides. Pennsylvania reacted to the 2000 election by enacting, for the first time, a procedure for an automatic recount if the statewide vote totals differ by more than one-half of one percent, thus liberalizing the former procedure requiring recount proponents to proceed precinct by precinct by filing in the court of common pleas a

petition signed by three voters who voted in each precinct and who also post a deposit of \$50, to be forfeited if the recount does not substantially change the result in that precinct. Under the new procedure, if an automatic recount has been ordered by the Secretary of the Commonwealth because the statewide results differ by more than one-half of one percent, a petition filed by three voters of a county will result in the recount of all precincts in that county, supervised by the

Commonwealth Court.

There is strong reason to believe that Pennsylvania, strengthened by this centralized control of the recount process, would be able to comply with the thirty-five day time frame held to be mandatory in *Bush v. Gore*. Should the election fight be brought to Pennsylvania's doorstep, any dispute in November will test these measures — and the commonwealth's legal community — on a national stage. ■

Gregory Harvey (gharvey@mmwr.com) is senior counsel and chair of the Public Election Law practice at the law firm of Montgomery, McCracken, Walker & Rhoads, LLP. He is a Democratic Party officer in Philadelphia's 8th Ward.

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