DISPUTED ELECTIONS POST *BUSH V. GORE*
Are Federal Courts Entering the Political Contest Thicket?

INTRODUCTION

The article will first briefly provide a broad view over of our system in the United States for the resolution of disputed elections. The aspiration is that this will frame an examination of four election disputes post the *Bush v. Gore* decision. Three of the disputes are used because they arguably are the most widely followed and extensively contested election results since 2000: Washington Gubernatorial (2004), Minnesota Senate (2008) and Florida 13th Congressional District (2006). The final is examined because it may be the only significant decision using *Bush v. Gore* as precedential authority in an election contest or recount: Hamilton County, Ohio Common Pleas Court Juvenile Judge.

Some scholars have predicted that *Bush v. Gore*, "is not likely to be precedent for much at all."[1] They believe *Bush v. Gore* would be strictly limited to the "'special instance' when there is a statewide recount ordered by a court and where it can be shown that there are diverse recounting procedures in various jurisdictions.[2] In fact, the Court in *Bush v. Gore* stated that the "larger question about variability of election practice among local entities is not before the Court, so it did not render judgment on the matter."[3]

If the decision in *Bush v. Gore* is limited to the narrow situation where equal protection issues are raised in a post-election statewide recount, its precedential value has obviously been limited. The one area of election law where *Bush v. Gore* may have some precedential impact other than interpreting a voter's intent on a ballot is provisional voting. As one of the scholars noted:

> But on other matters regarding provisional ballots, the Court might find itself faced with the same post-election discretion issues that it did in *Bush v. Gore*. Provisional ballots could be crucial to an election

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[1] John Fortier, SYMPOSIUM: Election Law and the Roberts Court: Election Administration: Foley on the Future of Bush v. Gore, 68 Ohio St. L.J. 1051 (2007).
[2] Id at 1052.
[3] Id. At 1053.

> outcome, and they will be litigated after the initial election results are known. Wide variations within a state on policy regarding the counting of provisional ballots, especially those based on the ground discretion of local officials, would have the feel of a recount.[4]

The four election recount/contest cases discussed below support this proposition.

The 2004 Washington Gubernatorial race followed the standard textbook path for a disputed election: count, machine recount and hand re-recount – all administrative but with various court disputes before and during each "count" concerning how or what to count. The certification of the election was followed by the filing of an election contest in a Washington district court. The 2008 Franken/Coleman Senate dispute also played out in a number of different court proceedings. It was classic recount litigation. The recount was principally a dispute about uncounted absentee ballots. The candidate that was behind at each stage was seeking to have additional ballots counted.

The 2006, 13th Florida Congressional District (Sarasota) dispute is the only House contested election since 1996[5], in which the U.S. House of Representatives has not summarily dismissed the contest without further investigation. It involved an administrative recount pursuant to state statutes with litigation in state court over that process followed by the loser filing an election contest in the US House of Representatives. At its conclusion, Florida, the home of the infamous 2000 butterfly ballot, provides another lesson in bad ballot design.

The fourth election dispute examined in the article is a 2010 dispute concerning a juvenile court judge election in Hamilton County (Cincinnati), Ohio. This may at first blush seem to be an odd choice to examine in detail, but the explanation is not complex. In the more high profile election disputes since the Supreme Court's *Bush v. Gore* decision, the opinion has played only a minor only minor or no role at all in the resolution of the s. The continuing Hamilton County judicial election dispute, however, has a significant focus on the equal protection principles and claims enunciated in *Bush v. Gore.*

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[4] *Id*. At 1061.

[5] *Robert Dornan/Loretta Sanchez*. Report of the Committee on House Oversight on H.R. 35 (February 12, 1998)

RECOUNT/CONTEST

The standard American pattern for determining election results, although not universal, is an election night tabulation at each individual polling or precinct location followed by a canvassing of ballots and tabulated results at a central location (usually a county board of election) with an official certification of the results. This is followed by a period in which a recount may be conducted and/or a contest filed. In some jurisdictions, the recount and/or contest must be filed prior to certification of the results.

There is no common law basis for either an election recount or a contest, so the rights of candidates or their supporters are principally set forth in state statutes[6] or regulations. The details vary greatly between the states, but they are similar in general framework. The terms "recount" and "contest" often are used interchangeably but they are more properly understood as two generally distinguishable processes.

Typically, a contested election is a formal challenge to the outcome of an election – a charge that the declared winner is, for any number of possible reasons, not the true winner. A recount is a re-tabulation of the vote, simply another count. A recount is usually employed when the challenger alleges mistakes/improprieties in the tabulation of the votes. Recounts are most often not a formal part of a judicial contest procedure, but a separate administrative process.

Although state election statutes generally provide for an administrative recount procedure, judicial involvement is occasionally set forth in statute and if not set forth in statute is often sought by the party unhappy with the proposed administration. The most prevalent recount system is mandatory or automatic recounts at the expense of the state or local governments if the difference in votes between candidates is less than a certain percentage figure. The alternative model is a recount done at the candidate's request (a number of states have a hybrid model with provisions for both automatic and candidate requests).

[6] The only relevant federal statute is the Federal Contested Election Act, 2 U.S.C §§ 381-391 (House); U.S. Constitution Article I, Section V, Clause 1. The U.S. House of Representatives and Senate have the express and final authority to judge the election returns and qualifications of their members, but only the House has actual rules for election contests.

Because most recounts must be conducted prior to the issuance of any certificates of nomination or election, the initiation of the recount process is governed by strict statutory timelines. In the states where an election official starts the process, the statutes usually require the official to order the recount as soon as it is clear that the race was close enough and no later than the day set aside for the official canvass of the vote. In practice, election officials generally order a recount as soon as they know one is warranted in order to minimize a delay in the official certification of the election. In states where candidates or voters initiate the process, the law spells out deadlines for filing the recount request or petition. The specified period for filing is relatively short, with no state permitting a recount request to be filed beyond 10 days from the date of the canvass. Primary election deadlines are sometimes shorter than those for general elections since in many states nominees must be certified promptly in order to allow sufficient time to print the ballots and to mail absentee ballots for a general election.

Only a very small percentage of the total number of elections in the nation are recounted, and an even smaller number are contested. Because of the large number of elected offices and ballot measures in the U.S., however, every election year results in a number of recounts. Very few of these recounts receive national attention because most involve only local candidates or ballot issues. Also, very few recounts result in reported judicial opinions because most recounts are administrative in nature; very fact-driven with strict statutory time limits.

Only a small percentage of recounts lead to formal contest actions. The candidates who are the apparent losers usually are too physically, emotionally, financially and politically exhausted. The "political sore loser" label is not easily shed. The contestant always has the burden of proof and the regularity of election results is a strong presumption to overcome, with judges commonly expressing their desire that the voters, not themselves (judges) decide the elections. These factors combine to make actual election contest actions rare in comparison to recounts.

Although most recounts are local, many recent election cycles have had at least one statewide recount.[7] By contrast, the 2010 Congressional races were among the most widely and seriously contested races in recent American political history, though no election contest actions were

[7] Examples 1981 NJ Gov.; 1984 Ill. Gov.; 1994 Ala. Chief Justice, 1996 Hawaii Gov., 1998 N.V. Sen., 2000 Pres. Fla/New Mex.; 2004 Wash. Gov., 2008 Minn. Sen.

filed in the U.S. House or Senate. Moreover, there were fewer than ten House recounts, no governor recounts and only a single U.S. Senate recount.[8]

Although there is an unlimited number of ways for voting and vote tabulations to miscarriage, they can be placed into three general categories: 1) Malfeasance; 2). Mistakes/Misfeasance; and 3) Acts of God.

It is beyond the scope of this article to discuss them in detail, however, a brief outline may be useful.

I. MALFEASANCE

A. Candidate/agents — *Tunno v. Veysey,* H. Rep. Wo. 92-626, 92d Cong. (1970). Also see: *Moreau v. Tonry*, 433 F. Supp. 620 (E.D. La 1977)

B. Election Officials — *Stevenson v. Thompson*, In re Contest for Governor, 444 N.E.2d 170 (Ill. 1983)
*Roe v. State of Ala. Evans(*11th Cir. 1997*)*/Alabama/*Chief Justice*
Anderson v. United States, 417 U.S. 211 (1974)

C. Third Parties/Voters — *United States v. Franklin*, 181 F.2d 182 (7th Cir. 1951)
United States v. Girdner, 754 F.2d 877 (10th Cir. 1985)
United States v. Clapps, 732 F.2d 1148 (3rd Cir. 1984)
Dornan/ Sanchez, U.S. House (1998*).*

II. MISFEASANCE/MISTAKES

A. Mistake Officials

1) Math/counting. *Thorsness v. Daschle*, 285 N.W. 2d 590 (S.D. 1979)
2) Missed or uncounted ballots (Absentee/emergency/provisional/regular)
3) Wrong districts - VA Rep., Dist. 14, 1984
4) Ballot printing errors: *Hendon v. N. Carolina St. Bd. of Election*, 710 F.2d 177 (1984); *Kohler v. Tugwell,* 292 F.Supp. 978 (E.D. Lc 1968); Aff'd 393, U.S. 531 (1969). In Re Election Atty. Gen. of Ohio 569 N.E. 2d.447 (Ohio 1991)
5) Machine failure/ Voting machine setup. *Buonenno v. DiStefano*, 430 A.2d 765 (1981).
6) Absentee ballots *Akizaki v. Fong*, 51 Haw. 354 (1969)
7) Registration Errors
In Re General Election - (531 A. 2d. 836 Penn. 1985)
8) Non eligible voters (felons, aliens)

[8] Senate election in Alaska.

B. Mistake Voter

1) absentee ballots
2) Identifying marks
3) Illegible/unclear
4) Over vote

III. ACT OF GOD

A. Weather

B. Power outage

C. Fire.

Recounts have a standard specific resolution that is a new tabulation of votes with a new official result. Election contests can have three possible alternative outcomes: (1) confirmation of the election result and certification (the most common); (2) the election certification can be changed and the contesting candidate can be certified the winner; or (3) the election can be voided with no candidate receiving a certification and a new election required to fill the vacancy.

There are two alternative views as to what a contestant must prove to overcome the presumption of valid official election results. Some jurisdictions require the contestant to show that they received the most legal votes - the "but for" analysis: I received the most lawful votes cast for the office, but for the intervening misfeasance, malfeasance, act of God, or a combination thereof.[9] The other view requires that the contestant show only that it is impossible to determine which candidate received or would have received the most lawful votes for the office.[10]

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[9] Moreau v. Tonry, 339 S.2d 3 (la. 1976); Lloyd v. Kechley , 82 S.W. 2d. 739 (1985 Ark). *Berg v. Veit*, 162 N.W. 522 (Minn. 1917); Washington 2004 Gov.

[10] *Wyman v. Durkin* (US Senate, 1974). *See Griffin v. Burns*, 570 F.2d 1065, 1080 (1st cir. 1978) (setting aside results and ordering new election where "the closeness of the election was such that, given the retroactive invalidation of a potentially controlling number of the votes cast, a new primary was warranted."); *Marks v. Stinson*, 19 F.3d 873, 887 (3rd Cir. 1994) (remanding and authorizing remedy of setting aside election where illegal absentee ballots amounted to "substantial wrongdoing… the effects of which are not capable of quantification but which render the apparent result an unreliable indicium of the will of the electorate"); *Webb v. Bowden*, 124 Ark. 244 (Ark. 1916) (holding that illegal votes must be presumed to account for the margin of victory where the number of votes exceeded the number of registered voters); *Mead v. Sheffield*, 278 Ga. 268, 273 (2004) (setting aside election because 481 illegal absentee ballots exceeded respondent's statewide lead over petitioner, which 'cast in doubt" the outcome of the election); *Howell v. Fears*, 275 Ga. 627, 628 (Ga. 2002) (setting aside election where there were enough irregular ballots to place the result in doubt, finding it "improper and erroneous for courts to engage in presumptions of any kind in that exclusive area of privacy [i.e., voting]"; *Briscoe v. Between Consol. School District*, 156 S.E. 654, 656 (Ga. 1931) (election should be voided assuming that challenged voters "had all voted against the result reached"); *Akizki v. Fong*, 51 Haw. 354 (1969)

Contest actions focus predominantly on two issues: (1) uncounted ballots; or (2) illegally casted/counted ballots.

Uncounted ballots can be simply lost or overlooked ballots common to all large elections. The argument of whether these ballots should be counted when found usually revolve around security or chain of custody questions. The most often misplaced ballots are absentee ballots, although election day systems using paper ballots (scan or traditional) also lose ballots regularly.

In every election, absentee and provisional ballots are rejected for specific reasons. The validity of absentee ballots depends upon a number of legal requirements such as a signature, oath, witness(s), notary, timely arrival or postmark. With so many steps, many mistakes can br so will be made by voters and election officials. Decisions on absentee and provisional ballots are the center of many election disputes because uncounted absentee and provisional ballots

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(invalidating election because election officials commingled 19 invalid absentee ballots with valid ballots); *Adkins v. Huckabay* (La. 2000) (trial court correctly vacated and set aside general election decided by three votes, where five absentee ballots failed to substantially comply with election laws); *McCavitt v. Registrars of Voters*, 385 Mass. 833, 849 (1982) ("[W]henever the irregularity or illegality of the election is such that the result of the election would be placed in doubt, then the election must be set aside and the judge must order a new election."); *Ippolito v. James M. Power*, 22 N.Y. 2d 594, 598-99 (1968) (new election required where election machine counted 68 more votes than qualified people who signed voter registration cards, even without evidence of fraud, because irregularities were sufficiently large in number to establish probability that the outcome would be changed by a shift in, or invalidation of, the questioned votes); *Hitt v. Tressler,* 4 Ohio St. 3d 174 (1983) (affirming trial court's setting aside of election where voting machine malfunction failed to register votes within margin of victory); *Helm v. State Election Bd.*, 589 P.2d 224 (Okla. 1979) (election results are reasonably uncertain and thus must be set aside where number of voided ballots exceeds the margin of victory); *Emery v. Robertson County Election Comm.*, 586 S.W.2d 103(Tenn. 1979) (election is void where evidence reveals that number of illegal ballots cast equals or exceeds difference between two candidates receiving most votes); *Hardeman v. Thomas*, 208 Cal. App. 3d 153 (Cal. App. 1989) (ordering new election where 17 contested votes exceeded 16 vote margin of victory).

Green v. Reyes, 836 S.W.2d 203 (Tex. App. 1992) (upholding trial court's voiding of election where126 votes were unable to be attributed to either candidate; trial court exercised its authority under the election code and ordered the election void because the margin of victory was less than the number of unascertained illegal votes); *compare Noble v. Ada Count Elections Bd.*, Idaho 495 (2000) (evidence of 10 illegal ballots, where margin of victory was 51 votes, was insufficient to show that illegal votes changed the result of the election); *cf. Cramer v. City of Anderson*, 124 S.E. 2d 788 (S.C. 1962) (73 illegal votes cast in special annexation election should *all* be withdrawn from the winning side, which in effect reduced affirmative vote to below the level necessary for approval of annexation).

In *Gooch v. Hendrix*, 5 cal.4th 266, 851 P.2d 1321 (1993), an election was overturned because there were more illegal absentee ballots than the margin of victory, even though it could not be determined for whom the illegal ballots were cast.

are usually from specific precincts and often an unopened ballot can be linked to a specific individual. These ballots can be placed into various categories from which contestants can conclude with varying degrees of certitude their electoral impact if counted.

Illegally casted ballots present difficult questions in election contests. Of course, the first issue is the identification of the illegal ballots. Principally, these are ballots cast by individuals not eligible[11] to vote in a particular race or a group(s) of ballots defective under state law for a variety of reasons.[12]

Identifying illegal ballots cast is only the initial evidentiality step. The next step is how to determine the impact of the illegal ballots on the election. Most elections have some improperly cast ballots, but are they sufficient in number to be material? Are their number sufficient to change the result or bring it into question.

In some jurisdictions, it will be sufficient simply to show that there are more illegal ballots counted than the margin between the candidates for an election to be voided. However, other jurisdictions require some form of evidentiary presentation on how the illegal votes were cast. This can be in the form of direct testimony, which has some obvious problems in the context of secret balloting,[13] or alternatives such as proportional reductions.[14]

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[11] Not registered, non-citizens, non-residents, multi-ballot and the dead.

[12] Common reasons include printing errors or ballots for the wrong jurisdiction.

[13] *McCavitt v. Registrations of Voters of Brockto*, 434 N.E.2d (Mass.App. 1982).; *Lambert v. Levens*, 702 P.2d 320 (Kan. 1985).

[14] Alaska: *Finkelstein v. Stout*, 774 P.2d 786 (1989); *Hammond v. Hickel*, 588 P.2d 256 (1978); Arizona: *Huggins v. Superior Court*, 163 Ariz. 348 (1990); *Clay v. Gilbert*, 160 Ariz. 335 (1989); *Grounds v. Lawe*, 67 Ariz. 176 (1948); Illinois: *In re. Durkin*, 299 Ill. App. 3 192 (1998); *O'Neal v. Shaw*, 248 Ill. App. 3d 632 (1993); *People ex rel. Ciaccio v. Martin*, 220 Ill. App. 3d 89 (1991); *Gribble v. Willeford*, 190 Ill. App. 3d 610 (1989); *Jordan v. Officer*, 170 Ill. App. 3d 776 (1988); California - *Singletary v. Kelley*, 242 Cal. App. 2d 611 (1966); *Russell v. McDowell*, 83 Cal. 70 (1890); Kansas: *Parker v. Hughe;* 64 Kan. 216 (1902); Tennessee: *Moore v. Sharp*, 98 Tenn. 491 (1896); Michigan: *Gracey v. Grosse Pointe Farms Clerk;* 182 Mich. App. 193 (1989); *Attorney General ex rel. Miller v. Miller*, 266 Mich. 127 (1934); *Ellis ex rel. Reynolds v. May*, 99 Mich. 538 (1894); Montana: *Gervais v. Rolfe;* 57 Mont. 209 (1920); *Heyfron v. Mahoney*, 9 Mont. 497 (1890); Wisconsin: *Ollmann v. Kowalewski*, 238 Wis. 574 (1941); North Dakota: *Drinkwater v. Nelson*, 48 N.D. 871 (1922)

THE WASHINGTON GOVERNOR RACE - 2004

The basic facts of this dispute can be briefly set forth. Initial tabulations of the ballots cast in Washington's general election on November 2, 2004, showed Dino Rossi (R) to have received the most votes for the office of Governor. The margin between Dino Rossi and his opponent, Christine Gregoire (D) was merely 261 votes out of more than 2.8 million votes counted - less than one half of one percent of the total number of votes cast for the two candidates. The Washington Secretary of State, Sam Reed,[15] ordered a mandatory machine recount pursuant to Washington statute.[16] After the machine recount, Rossi led Gregoire by only 42 votes statewide. The ballots were then hand counted, resulting in a Gregoire margin of 129 votes

The initial counting process in Washington is much slower than in most states because of the extensive use of mail/absentee ballots. Washington provides that a mail ballot, which is postmarked by election day must be counted. This results in valid mail ballots arriving at county election offices two weeks after an election. Washington also provides for a more 'liberal' provisional voting procedure requiring that provisional ballots cast anywhere in the state by registered voters be counted in statewide races.[17] The combination of these factors resulted in an estimated 850,000 uncounted ballots following election night tabulations. But, even with such a large number of uncounted ballots, it was quickly clear to all observers that the election result would be extremely close and a recount very likely. By November 17, all county canvassing boards certified their general election returns. Rossi had "won" by 261 votes out of 2.8 million. Of course, these basic facts leave out the ten lawsuits and the continuous rollercoaster of changing vote totals.

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LITIGATION PRE-RECOUNT

The first lawsuit was filed in King County's District Court on November 12, 2004, before the initial canvass was even completed. The Democratic Party brought suit, seeking the names and addresses of those individuals whose provisional ballots were ruled invalid by county election officials. The County's failure to release this information was argued to be a violation of Washington State and federal constitutional equal protection rights and state public disclosure

[15] For the Secretary of State's perspective on the election dispute: See T. Heffernan, *An Election for the Ages*, WSU Press (2010).
[16] RCW 29A-64.021(a).
[17] This is in contrast with states that require all ballots be cast in the voter's correct precinct or county.

rules. Although it was far from clear that any county in the state had ever released this information, over the objections of the Republicans, a King County district court ordered that the county release the 929 names to the Democratic Party. Democratic Party workers sought to contact those on the list identifiable as Democratic voters, attempting to qualify their ballots before the completion of the canvass. This process produced few, if any, changes in provisional ballot counts.

RECOUNT I – MACHINE

The mandatory recount began on Saturday, November 20, 2004. The Washington electorate casts most of its votes on optical scan ballots. In theory, the mandatory machine recount consists of simply repeating the election night process of running the ballots through optical scanning machines for tabulation. This first recount, done by machine, followed a pattern familiar to anyone experienced with disputed elections. Ballots which were not counted in the initial count were discovered and simple tabulation errors discovered.

In Snohomish County, an election worker discovered 224 properly marked but uncounted ballots sitting in a tray in a secured room. The ballots had been prepared for counting, but mistakenly placed in a stack of empty trays. When additional trays were stacked on top, the ballots were buried out of sight. Despite the newly added votes, the county's recount of more than 350,000 ballots resulted in a net change of only one vote. The "lost" ballots in Snohomish County were evenly divided between the candidates.

Cowlitz County reported that 99 fewer ballots were counted in the machine recount than during the original count. "Lost ballots?" No, a careful review of the tabulation records showed that a stack of absentee ballots was inadvertently counted twice on election night. The county reported 29 fewer votes for Gregoire and 40 fewer votes for Rossi, a net gain to Gregoire of 11 votes. Minor changes were recorded in many precincts around the state, however, the recount outside of King County resulted in very little net change between the candidates.

By the end of the day on November 22, 2004, the machine recount was completed in 24 counties. Most of these results favored Rossi, adding some 25 votes to his original 261 vote lead. However, King County had yet to report. The significant net change in the election results following the machine recount was largely attributable to changes in the results in King County,

the largest and most heavily Democratic county in the state. According to the initial count in King County, Gregoire received 59% of the votes cast for either Gregoire or Rossi. In the machine recount, King County counted an additional 941 votes cast for the two candidates, of which 66.6% were for Gregoire. At each count, more King County ballots were counted and Gregoire's percentage of the vote total of the newly discovered King County votes increased.

FEDERAL COURT

Within hours of the machine recount beginning on Saturday, November 20, the Republicans had filed for a temporary restraining order in federal court. The Republicans argued that Rossi was being "irreparably harmed by the King County enhancement and duplication process."

Rossi counsel claimed that the counties had different standards for processing ballots initially rejected by the tabulating machines. "Applying counting standards in selected counties different from those in others violates the equal protection and due process protections of the U.S. and Washington constitutions and ultimately will deny Washington voters… their fundamental right to vote," the lawsuit stated. This was an express attempt to employ and rely on the analysis of *Bush v. Gore.*

In their pleadings, Republican Party lawyers argued that the plaintiffs were being "irreparably harmed by King County's unconstitutional recount procedure." Because original ballots are being enhanced on the basis of a subjective determination of voter "intent" each "enhancement" is final and cannot be reviewed or re-examined. Moreover, such ballots would be difficult, if not impossible, to locate as King County was simply mixing them back into the general ballot pool once the "enhancement" was complete. In other words, once enhanced, an egg cannot be unscrambled; and as each hour passes, more and more eggs are broken.

On election night workers could enhance or duplicate ballots under State law. The enhancement and duplication of ballots allowed for the ballots to then be counted by an optical scan machine. Washington is a voter-intent state. Thus, even if the voter failed to follow instructions by, for example, circling an oval instead of filing it in, which optical scan machines can not read, if the intent of the voter was clear, the ballot is to be counted. The enhancement and duplication of ballots allowed for the ballots to be machine counted. According to the

Republicans, the recount should only include ballots as tallied in the original count, not new enhancements or additional duplicates.

U.S. District Court Judge Marsha Pechman, during a Sunday conference call hearing, denied the Republican Party's request for a temporary restraining order to stop the enhancement process. The judge did not reject the *Bush v.* Gore analysis, but found that there was no irreparable harm because the duplicated ballots were not being destroyed and could be reviewed later, so there was no need to disrupt the state's process.

RECOUNT II - HAND COUNT

With the posting of the King County totals on November 24, the machine recount was complete and had Rossi ahead by 42 votes. The Gregoire campaign and her supporters faced a difficult decision - request a selective recount of only certain districts or seek a full statewide hand count. A statewide hand count required the posting of a $730,000 bond for costs and the bond was subject to forfeiture if the result did not change. On December 3, 2004, with a substantial advance from John Kerry's unspent presidential campaign funds, the Democrats sought a statewide hand recount.

Immediately, the parties disputed how the hand recount should be conducted. At his stage the Secretary of State generally agreed with the Republicans, so the Democrats headed back to state court.

WASHINGTON STATE SUPREME COURT

The two Washington Supreme Court decisions involve the most common recount issue of whether to expand the number of ballots counted. In particular the dispute was about King County's absentee ballots. The electoral impact of counting additional King County ballots was easily recognized by all because King County is by a large margin the most Democratic area of the state. More ballots counted in King County meant more votes for Gregoire.

ROUND I

The Democrats requested a review of all absentee and provisional ballot rejections. In the first case won by Rossi, Gregoire argued that, in the recount the canvassing boards were to "consider anew all ballots previously left uncounted." Gregoire also argued that King County rejected a higher percentage of absentee ballots for signature mismatches,[18] than other counties. They argued that various counties used disparate tests and procedures to determine whether to count or reject absentee ballots. This, they argued, "suggested or implicated equal protection concerns under the privileges and immunities clause of the Washington State Constitution."[19]

This argument was rejected by the State Supreme Court on a seemingly straight forward Washington statutory analysis.[20] A "ballot" is a physical or electronic record of the choices of an individual voter, or the physical document on which the voter's choices are to be recorded.[21] "'Recount' means the process of *retabulating* ballots and producing amended election returns…"[22] The procedure for recounts is set forth in statute,[23] and starts with the county canvassing board opening "the sealed containers containing the ballots to be recounted."[24] Thus, under Washington's statutory scheme, ballots are to be "retabulated" only if they have been previously counted or tallied, subject to the provisions of the statutes[25]. Effectively, the State Supreme Court had moved any issues relating to whether additional absentee ballots which had been previously rejected should be counted to a later contest procedure.

ROUND II

Eight days later, the parties were back before the Washington Supreme Court on, what from a distance would appear to be the same issue, that is whether to recount additional uncounted

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[18] RCW 29A.40.110(3) requires that the signature on an absentee ballot return envelope be "the same" as the signature in the voter registration files, as determined by the canvassing board or its designated representative, whereas WAC 434-253-047 requires a signature for a provisional ballot that "matches a voter registration record."
[19] Wash. Const. Art I § 19.
[20] McDonald et al. v. Reed et al., 153 Wash.2d 201, 103 P.3d 722 (2004).
[21] RCW 29A.04.008(1)(c),(d).
[22] RCW 29A.64.139.
[23] RCW 29A.64.041.
[24] *See* RCW 29A.60.110.
[25] RCW 29A.60.210.

King County absentee ballots. At issue were ballots not counted originally and not counted in the first machine recount. The Court's second opinion had the exact opposite effect to its first and lead to an additional 573 King County absentee ballots being counted in the hand recount.

During the hand recount, the King County canvassing Board discovered that 573 absentee ballots which had been specifically rejected and therefore not counted in either the initial count or machine recount had been miscoded by county workers as having "no signature on file" when in fact there were signatures on file.[26] The King County Board decided to count these ballot or as described by the Board "recanvassed" them. Rossi's counsel sought and received a temporary restraining order from a State District Court prohibiting the "reconvassing" by King County, based on the Washington Supreme Court's decision of the prior week. Rossi argued that this was a matter properly considered in a contest action, not a recount. Effectively, the same argument made in the first Supreme Court case only a week before.

The Washington Supreme Court reversed.[27] Again, according to the court, the decision was based simply on Washington statutory scheme. The Court said that the Washington recount statute does not permit the recanvassing of ballots rejected and counted, but when a board reconvasses it may correct errors. In prior cases, these errors had been only arithmetic or omission. Valid ballots that were misplaced and found were counted, but ballot specifically rejected for whatever reason were not "recounted" or "recanvassed."

Although it is logically difficult to reconcile this court's action with its prior decision, the Court was faced with an unpalatable course if it were to remain constant. Without counting these 573 King County absentee ballots, Rossi would be certified the winner of the gubernatorial election. Every party to the litigation and serious observer understood that, based on partisan voting patterns, counting these ballots would result in the certification of Gregoire as Governor. These absentee ballots were wrongly rejected by King County. The Supreme Court ordered them "recanvassed" so they would be counted in the second recount.

Notably, no reference to *Bush v.* Gore can be found in the briefs of either party or in the Supreme Court's opinions.

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[26] The "no signature" rejected absentee ballots included a ballot cast by the King County Council Chairman, Larry Phillips, the nominal supervisor of the King County Elections Board.

[27] Case cite.

CONTEST

On January 7, 2005, Rossi filed suit in Chelan County Superior Court, contesting the election of Christine Gregoire as Governor. The suit asked that the court set aside the election and order a new election. The suit alleged that the number of illegal cast ballots and the number of valid ballots improperly rejected rendered the true result of the election uncertain and likely unknowable. Rossi made no request, however, to block the swearing in of Gregoire as Governor. Efforts to block the acceptance of the returns in the legislature failed on party lines and thus, on January 11, 2005, the state legislature confirmed Gregoire's election as Governor.

Gregoire filed a series of motions contesting subject matter jurisdiction and venue which were rejected in early February, but Chelan County Superior Court Judge John Bridges did task Rossi's counsel with delivering to the opposing party "a written list of the number of illegal votes and by whom." The court stated that no testimony would be received as to any illegal votes, except as to those specified on the list.

Also, Judge Bridges critically defined the Republicans' ultimate burden of proof. The judge stated "no election may be set aside on account of illegal votes unless it appears that an amount of illegal votes has been given to the person whose right is being contested, that, if taken from that person, would reduce the number of the person's legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes that may be shown to have been given to the other person."[28]

Republicans would have to show that Rossi received more valid votes for the Office of Governor than Gregoire.

After extensive discovery and a two-week trial, the state district court concluded that at least 1,678 illegal votes were cast in the 2004 general election. This included ballots cast by felons[29] established by Rossi (754), felons established by Gregoire (647), deceased voters (19) , double

[28] This seemed to conflict with *Foulke v. Hayes*, 85Wn.2d. 629 (1975), where the election was set aside with only a number of illegal ballots exceeding the margin between the candidates, but no evidence as to how cast.

[29] Individuals who have been convicted of felony offenses may have their voting rights reestablished if all sentence requirements were satisfied.

voters (6), illegal provisional ballots in King County (96), illegal provisional ballots in Pierce County (79), and additional votes in Pierce County for which a registered voter could not be found (77).

The trial also confirmed, as was evident by this time to everyone in Washington State, that King County's election processes were seriously flawed. King County could not identify how many ballots were mailed to eligible voters, how many voted ballots were returned, or how many absentee ballots were received and not counted because they were determined improper. Although many felons were permitted to vote and more than a thousand votes were cast by persons whom King County had failed to ensure were qualified and registered voters, and whose identities could not now be determined, no intentional fraud was proved by Rossi in regard to any King County election official.

Judge Bridges concluded "that no matter the number of illegal votes, whether they total 1,678, as determined by this Court, or 2,820, as argued by petitioners in their closing, this election may not be set aside merely because the number of illegal or invalid votes exceed the margin of victory, because the election contest statute requires the contestant to show that the illegal votes or misconduct changed the election's result."

For every illegal vote alleged by Rossi, the court required credible evidence to prove that these illegal voters actually cast a vote for governor and for which candidate. Not surprisingly, Rossi's lawyers concluded that attempting to compel hundreds of felons to admit they had committed another crime (voting), and also who they cast their secret ballot for, was an impossible task to undertake through standard depositions or direct testimony.

In an effort to bridge the gap between simple identification of categories of illegal voters, and actual proof that specific voters cast ballots for Governor Gregoire in the 2004 election, Rossi introduced the testimony of two political science professors[30] who argued that statistical analysis should be used to show that Rossi received a majority of the lawful votes.[31] Gregoire presented conflicting expert testimony. Even the expert witness employed by Gregoire admitted, however, that it was impossible to know whether Gregoire actually got the most legal votes.[32]

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[30] Jonathan Katz, California Institute of Technology; Anthony Gill, University of Washington.

[31] For Gregoire counsels' criticism of the expert testimony, see: *No Guessing Allowed*, Albany Law Review, Vol. 69 p.561-67 (2006)

[32] Cross-examination of University of Washington Professor Christopher Adolph.

The Court was unwilling to credit any form of evidence other than direct voter testimony on how any individual cast a ballot.

Rossi did not appeal to the State Supreme Court. Neither the attorneys for Rossi nor the attorneys for Gregoire cited *Bush v. Gore* in any of the pleading or argument in the District Court contest action. Not surprisingly, the Court did not find any need to reference the case in its opinion.

MINNESOTA SENATE, 2008

The November 4, 2008, Minnesota general election had Norm Coleman ("Coleman") and Al Franken ("Franken") as the principal candidates for U.S. Senate. On November 18, the statewide canvassing report showed that Coleman received 1,211,565 votes and Franken 1,211,359 votes for the Senate. The margin separating the two candidates was 206 votes; far less than one-half of one percent so triggering under Minnesota law an automatic hand recount of the ballots.

RECOUNT

The Minnesota State Canvassing Board ("Board")[33] directed the Secretary of State to oversee the manual recount.[34] The Secretary drafted proposed administrative recount procedures and provided them to both campaigns for their review. The Board approved the administrative recount procedures as proposed with neither candidate objecting initially to the terms.

The mandatory recount began November 19, 2008, with nearly 3 million ballots to review and hand-count. Although a lengthy process, the actual hand count of the individual optical scan ballots was not especially contentious. The ballots were hand counted in each county. The candidates' observer representatives could object or challenge the counting of any ballot which would effectively defer the decision on how to count the ballot to the state canvassing board. The state board members laboriously reviewed the individual challenged ballots. The originality of some voters at times stumped the panel, but the Board was usually unanimously determining the intent or lack thereof on the challenged ballots. The single locus and the totally transparency of the process rendered any equal protection or fundamental fairness argument moot in regard to challenged ballots.

Shortly after the recount began, however, it became clear that a significant number of absentee ballots had been improperly rejected by county election officials during the original count. This

[33] Minn. Stat. § 204C.31, subd. 2. Two Justices of the Minnesota Supreme Court, two judges of District Courts chaired by the Secretary of State

[34] Minn. Stat. § 204c.35, subd. 1(b)(1).

became the principal focus of the election dispute[35]. Franken's campaign asked for these ballots to be counted by each county and added to the recounted results. The Coleman's campaign argued that the canvassing board did not have the authority to deal with rejected absentee ballots in a recount. Some counties began sorting rejected absentee ballots to find out how many were incorrectly rejected, while other counties believed they lack the authority to review in any manner prior rejected ballots during a recount. The Board voted to recommend that the counties sort through their rejected absentee ballots, setting aside those they concluded were incorrectly rejected, and to resubmit their vote totals with the incorrectly rejected ballots counted. The Coleman campaign petitioned the Minnesota Supreme Court to halt such counting as inappropriate until an election contest or alternatively until "a standard procedure" could be determined for the process.

SUPREME COURT I

The Minnesota Supreme Court did conclude that county canvassing boards lack statutory authority to review improperly rejected absentee ballots.[36] However, the Court ordered the candidates, the Secretary of State, and all county auditors and canvassing board to establish a process as expeditiously as practicable for the purpose of identifying all absentee ballot envelopes that the local election officials and the candidates agree were rejected in error. The Court also ordered local election officials to identify for the candidates' review those previously rejected absentee ballot envelopes that were not rejected on any of the four specific reasons found in Minnesota law.[37] Any absentee ballot envelopes that the local election officials and the two candidates agreed were rejected in error were to be opened and the ballot counted. This statewide "standard procedure" was at least in part a response to *Bush v. Gore* equal protection concerns expressed by Coleman to the Court.

During the process, county officials had identified more than 1300 apparently wrongly rejected absentee ballots. The Franken campaign wanted to count all of those ballots, while the Coleman campaign agreed to a subset, but also wanted to reconsider more than 700 other absentee ballots which they argued were of the type accepted in some counties but not in other counties.

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[35] Another material issue involved the disappearance of a single envelope of ballots from a polling place in Minneapolis after the election night count but before the recount. The Board accepted the election night count for the missing 133 ballots in the recount total. This decision was affirmed in the contest action.

[36] *Coleman v. Ritchie* 758 N.W. 2d. 306 (Minn. 2008).

[37] Minn. Stat. § 203B.12 (2006), or in Minn. Stat. § 203B.24 (2006) for overseas absentee ballots.

SUPREME COURT II

After Coleman's request to review these additional absentee ballots was rejected by the Secretary of State, Coleman filed for an emergency order with the Minnesota Supreme Court, seeking an order requiring that local election officials convey all absentee ballots identified by any party as having been wrongfully rejected to the Secretary of State's office for an uniform review by the parties. The Supreme Court denied this motion ruling this issue could be addressed in an election contest.[38]

On December 30 and 31, representatives of both campaigns met with county officials sorting through uncounted absentee ballots. After some ballots were rejected by each campaign, 953 ballots were sent to the Secretary of State. The parties agreed these "wrongly" rejected absentee ballots should be opened and counted. On January 3, 2009, 933 previously uncounted absentee ballots were counted with 481 votes for Franken and 305 for Coleman, effectively changing the prior result.

The Board's final report complied from the hand recount showed that Franken received 1,212,431 votes and Coleman received 1,212,206 votes. On January 5, 2009, the Board certified the results of the election declaring that Franken received 225 more votes than Coleman.

CONTEST

On January 6, 2009, Coleman filed a Notice of Contest[39] in Ramsey County district court contesting the certificate of election results issued by the Board and seeking an order declaring that Coleman was entitled to the certificate of election as United States Senator. This action stayed the issuing of a Minnesota certificate of election to Franken. It was clear by this time that the U.S. Senate would not be able to seat any candidate unless they had a Minnesota certification of election in hand to present to the Senate.

[38] *Coleman v. Ritchie*, 759 N.W. 2d 47, 49 (Minnesota, 2009)
[39] Minn. Stat. § 209.021.

The contest was held pursuant to Minnesota law[40] before a special three-judge district court panel. The trial commenced on January 26, 2009, and ended on April 13 with the dismissal of Coleman's contest and a ruling that Franken had won the election by 312 votes.

With the change in vote total between the initial canvass and the recount, the candidates' position on whether additional absentee ballots should be counted changed. In the election contest, Franken argued to exclude any additional absentee ballots, and for the strictest interpretation of the Minnesota absentee balloting law. Coleman's position essentially was the mirrored image. By election day, approximately 300,000 Minnesotans had voted by absentee ballot. Under Minnesota law[41] as in all states, certain requirements must be met before an absentee ballot can be counted. During the initial count more than 12,000 absentee ballots were rejected. Coleman identified 4797, of these rejected absentee ballots which he argued should now be open and counted by the trial court.

Coleman believed he could present evidence that showed local election officials did not uniformly apply the Minnesota absentee balloting laws and that there was no consistency among the counties and municipalities in how ballots were rejected and how ballots were accepted: For example, Minneapolis accepted many ballots that would have been rejected in Carver County. And Ramsey County accepted ballots that would have been rejected in Wright County. Coleman argued that local election officials made deliberate decisions to apply the statutory requirements as they understood them but resulting in a compliance standard that was not uniform.

Coleman's argument was that the constitutional guarantees of equal protection and due process require the uniform application of the statutory standard to all absentee ballots. Equal protection and due process mandate that similarly situated voters be treated the same: whether a ballot is accepted cannot be determined by where the voter lives.

Coleman argued that local county officials applied Minnesota statutory requirements differently and inconsistently – not just by isolated, "garden variety" errors to be expected in every election but different counties and municipalities made their own decisions on the meaning of the statute and, as a result, reviewed similar absentee ballots differently, accepting ballots that were not in

[40] Minn. Stat. § 209.045.
[41] Stat. § 203B.12, subd. 2 (and § 203B.24 for overseas ballots),

strict compliance with the statute but had sufficient indicia of trustworthiness. As a result, some ballots were counted in some counties while other identical ballots were not in other counties.

From the Coleman's perspective, the trial court exacerbated the disparity. Coleman attempted to show that most counties accepted absentee ballot under a substantial compliance standard. He argued that those who had their ballots rejected in these jurisdictions applying a more exacting standard and then not enfranchised by the trial court using its strict compliance standard were treated unfairly. Two classes of similarly situated voters with different acceptance rules.

If the state fails to apply "specific standards" during a statewide recount that will ensure "equal application" to all votes, the lack of uniform standards is a constitutional violation, citing to *Bush*, 531 U.S. at 106, *Erlandson* at 732 ("treating similarly situated voters differently with no rational explanation…violates equal protection guarantees").[42] Here, although there was a single statutory standard for accepting absentee ballots, that standard was applied differently and inconsistently in the different counties and cities on election night, and by the trial court with its decision to strictly enforce the requirements.

The differences in application were not merely the exercise of discretion about how best to ensure compliance with the statute. Rather, the problems resulted decisions by some local officials not to apply specific elements the trial court later found to be required in its decision on whether to count ballots.

The trial court found that the disparities in application of the statutory standards were the product of local jurisdictions' use of different methods to ensure compliance with the same statutory standards; that jurisdictions adopted policies they deemed necessary to ensure that absentee voting procedures would be available to their residents, in accordance with statutory requirements, given the resources available to them; and that differences in available resources, personnel, procedures, and technology necessarily affected the procedures used by local election officials in reviewing absentee ballots.

[42] The Minnesota Constitution "embodies principles of equal protection synonymous to the equal protection clause of the Fourteenth Amendment of the United States Constitution." *Stante v. Russell*, 477 N.W.2d 886, 889 N.3 (Minn. 1991). Indeed, the state constitution may require even more "stringent" review and a more robust guarantee of equal protection. *Id*. At 889.

Much of the Coleman's evidence attempting to show the disputes between counties was excluded by the trial court. The court concluded that the disparities were not clearly demonstrated enough to warrant a change in the outcome of the election.

Coleman attempted to show in the contest that there were widespread disparities in how officials applied the standard and, as a result, if the court's strict compliance standard were uniformly applied, thousands of absentee votes should not be included from the tally of legally cast votes.

The trial court took a very narrow approach in reviewing absentee ballots. It required strict compliance with all Minnesota statutory provisions and placed the burden of proof for the compliance on Coleman for any rejected ballot it proposed for counting. Although the trial court rejected Coleman's equal protection claim and also eschewed jurisdiction to even consider those constitutional claims. It effectively casted any equal protection issues to the U.S. Senate or Minnesota Supreme Court.[43] The trial court did order that an additional 351 absentee ballots be opened and counted.

SUPREME COURT III

Coleman's principal contentions on appeal were that (1) similar absentees ballots were treated differently depending on which county in which they were cast and this disparate treatment violated voter rights under the equal protection clause; (2) the trial court followed more strictly Minnesota statutory requirements for acceptance of absentee ballots in contrast to the practices of the county election authorities during the elections so wrongly failed to count many rejected absentee ballots.

The Minnesota Supreme Court concluded that (a) in order to prevail on his equal protection claim of disparate application of a facially neutral statute, Coleman was required to prove either that local jurisdictions' differences in application or the trial court's application of the requirements for absentee voting was the product of intentional discrimination; or (b) a showing that the statutory standards were applied differently with the intent to discriminate in favor of one individual or class over another is required. Despite the fact that Coleman's arguments were

[43] *Wichelmann v. City of Grencoe*, 273 N.W. 638 (Minn. 1937), and *Bell v. Gannaway*, 227 N.W.2d 797 (Minn. 1975).

based on *Bush v. Gore,* the Minnesota Supreme Court's equal protection analysis was based on two cases – *Snowden v. Hughes*, 321 U.S. 1, 8 (1944), an Illinois dispute and *Dragenosky v. Minn. Bd of Psychology*, 367 N.W.2d, 521 (Minn. 1985), not *Bush v. Gore.* The Minnesota Supreme Court required intentional discrimination against Coleman. This seems to be at variance with the U.S. Supreme Court admonition in *Bush v. Gore* that states have an "obligation to avoid arbitrary and disparate treatment of the members of its electorate.[44]

Both the trial court and the Minnesota Supreme Court concluded that *Bush* was distinguishable in several important respects. In *Bush*, the Supreme Court specifically noted that it was not addressing the question of "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. The Supreme Court's view was that *Bush v.* Gore equal protection analysis applied only to the actual counting process, not to the acceptance or rejection of unopened ballots.[45]

But the essence of the equal protection problem addressed in *Bush* was that there were no established standards under Florida statutes or provided by the state supreme court for determining voter intent; as a result, in the recount process, each county (indeed, each recount location within a county) was left to set its own standards for discerning voter intent.[46] However, the Supreme Court's view was that Minnesota had clear statutory standards for acceptance or rejection of absentee ballots, about which all election officials received common training.

The Minnesota Supreme Court said that Florida election officials decisions that the U.S. Supreme Court was concerned in *Bush* was voter intent – that is, for whom the ballot was cast – as reflected on ballots already cast in the election. In *Bush*, officials conducting the recount were reviewing the face of the ballot itself, creating opportunities for manipulation of the decision for political purposes. At issue in Minnesota was whether to accept or reject absentee ballot

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[44] Per curiam *Bush v. Gore*, p.6

[45] *Coleman v. Franken,* 767 N.W.2d 453 (2009).

[46] The Court in *Bush* identified three additional problems in the recount procedures that contributed to its conclusion that the circumstance sin Florida failed to provide "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." 531 U.S. at 109. Those problems were: (1) the state court had ordered some recounts to be included that considered both undervotes and overvotes, but the new recounts were to include only undervotes; (2) there was no assurance that all recounts included in the final totals would be complete; and (3) people with no experience in interpreting ballots were recounting the votes, and observers were not allowed to make objection. *Id*. At 107-09. Coleman has not argued that any of these problems were present in this election.

return enveloped before they were opened, meaning that the actual votes on the ballot contained in the return envelope were not known to the election officials applying the standards. Based on these factors, the Minnesota Supreme Court concluded that *Bush v. Gore* is not applicable and did not support Coleman's equal protection claims.

The Minnesota Supreme Court unanimously upheld the lower court's decision. Coleman conceded the election and Franken was sworn into the U.S. Senate on July 7, 2009.

SARASOTA, FLORIDA, 2006

The November 7, 2006, election in the 13th Congressional District of Florida between Vern Buchanan (R) and Christine Jennings (D) was very close with a mere 368 vote margin separating the candidates after the initial count.[47] Florida law provides for automatic recount in very close elections so the Florida Election Canvassing Commission ordered a recount. On November 20, 2007, the Commission certified Buchanan as the victor by 369 votes.[48]

The election night and certified recount reports of election results did have an anomalous number in Sarasota County Almost 15% of Sarasota voters appeared not to have cast a vote in this congressional race.[49] This number of voters not casting a vote in the race was nearly ten times the number normally experienced in a prominent race near the top of the ballot. The Jennings campaign immediately charged that the county's voting system (iVotronic touch screen DRE) must have malfunctioned. The Buchanan campaign's initial response was that the drop off was because of the bitter nature of the primary and general election campaigns souring the electorates to both candidates. Neither candidate's explanation was correct

In response to the widespread speculation and concern about the significant percentage of undervotes, on November 9, 2006, the Florida Secretary of State directed the Florida Division of Elections, Bureau of Voting Systems Certification to conduct an audit of Sarasota's voting system and election procedures to determine whether the voting system was responsible for the unusually high number of non-votes in the Congressional race. The audit team conducted two parallel tests on the Election System and Software (ES&S) iVotronic touch screen voting system. These tests were designed to simulate mini-elections on five voting systems to test election day vote totals cast on the machines and assess whether the undervote count observed during the District-13 race could be replicated. The Florida Secretary of State also requested that the Florida State University's Security Analysis in Information Technology (SAIT) Laboratory conduct a software review and security analysis of the ES&S iVotronic firmware. The final audit report released by the Florida Department of State found no evidence to suggest

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47 *Jennings,* 118, 737*; Buchanan* 119, 105.
48 *Jennings*, 118, 940; *Buchanan* 119, 309.
49 Of 123, 901 ballots cast in Sarasota County,18,000 did not have a vote in the 13th District race.

or conclude that the official certified election results did not reflect the actual votes cast.[50] The machines worked as designed in their tests. The test confirmed what Sarasota and Florida election officials recognized : the reason for the undervote was simple – a flawed ballot design layout. Thirteen months and 4434 pages of report later, the U.S. House of Representatives came to the same conclusion.

For anyone unfamiliar with the system, the direct recording electronic voting systems (DRE) used by Sarasota County is a machine closely resembling a common ATM machine. In elections with long multi-races ballots, voters must go through multi-screen pages to cast their vote in all races.

In 2006, the touch screen's first ballot image page presented the voter with only the first of the federal races, the U.S. Senate because of the large number of senate candidates. The second touch screen image page showed at its very top the other federal race, the 13th District Congressional. This was followed directly below by a bright red, highly visible header for the slate of statewide races. In the first seconds after reviewing the second page image, it was clear to those uninterested in the result that the screen layout was the reason for the undervote. The voters of 13th district are the oldest electorate of any congressional district in the nation. Any individual with impaired vision or anyone just using bifocals would have significant difficulties seeing the race on the top of the touch screen.

Similarly designed ballot screens used in other Florida DRE counties resulted in unusually high undervotes in races at the top of screen and followed by a larger type faced colored header. Losing candidates are not disinterested in the election results.

PROCEEDINGS INVOLVING FLORIDA'S COURTS

On November 20, 2006, Jennings filed a contested election suit in Florida's Circuit Court,[51] arguing that Florida's certified vote totals excluded thousands of legal votes that were cast in

[50] Florida Department of State, Division of Elections Audit Report of the elections Systems and software, Inc.'s iVotronic Voting System in the 2006 General Election for Sarasota County, Florida: 2007.

[51] Contestant filed the contested election suit in the Florida's Circuit Court of the Second Judicial Circuit under Florida Election Code 102.168.

Sarasota County due to malfunctioning electronic voting machines.[52] Jennings subsequently requested access to the ES&S hardware and software in possession of the state and county to test whether the iVotronic voting system in fact malfunctioned and caused the undervotes.[53] The state, county, and ES&S defendants jointly objected to Jennings' production request, arguing that these materials were trade secrets belonging to ES&S.[54] ES&S requested an evidentiary hearing to determine the necessity of Jennings' request for the hardware, software, and source code. Judge William Gary granted ES&S's request and held an evidentiary hearing on December 19 and 20, 2006. On December 29, 2006, Judge Gary issued a order denying Jennings access to the ES&S hardware and software.

On January 3, 2007, Jennings filed an emergency motion in Florida's First District Court of Appeal to expedite proceedings and appeal of the trial court's ruling. On January 24, 2007, the appellate court granted Contestant's motion to expedite. On June 18 , 2007, the First District of Appeal denied the Contestant's motion to compel discovery and access to proprietary information, including voting machine source code technology. No further action was taken by the courts or the parties over the following five months, and Jennings withdrew her challenge in the Florida courts on November 26, 2007.

HOUSE CONTEST

On December 20, 2006, Jennings filed a notice of contest with the U.S. House of Representatives under the Federal Contested Election Act.[55] The House procedures provide that contests are to be initially considered by the Committee on House Administration. The Committee Chairperson appointed a three-member task force to oversee matters relating to the District 13 election contest.

Jennings's Notice of Contest alleged the following grounds for contesting the election. First, she dismissed the reliability of Florida's recount audit, arguing that merely "recounting" electronic

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[52] *Jennings v. Election Canvassing Commission of the State of Florida*, Plaintiff's Motion to Compel Expedited Discovery, 20 November 2006.

[53] *ERR14*[9] *Jennings v. Election Canvassing Commission of the State of Florida*, Plaintiff's Motion to Compel Expedited Discovery, 20 November 2006.

[54] *ERR14*[10] *Jennings v. Election Canvassing Commission of the State of Florida*, State Defendants' Response to Plaintiff Jennings' Request for Production of Documents and for Inspection of Tangible Things, 5 December 2006.

[55] 2 U.S.C. §§ 381-369.

ballots (unlike paper ballots) is inevitably a meaningless exercise because the manual "recount" consists simply of printing out the ballot-image reports from the allegedly malfunctioning iVotronic systems and counting by hand the ballot images that recorded no choice for the congressional race in question.[56] As anticipated, neither the machine nor the manual recount altered or explained the number of congressional undervotes recorded on the iVotronic touch screen voting system in Sarasota County.

Jennings also argued that the undervote total for the congressional race in Sarasota County was abnormal in several respects. The undervote rate on Election Day was 13.9% of the ballots cast on electronic voting machines, and the undervote rate during the early-voting process was 17.6% of the ballots cast on electronic machines. By contrast, of the 22,613 votes cast in this race by paper absentee ballot in Sarasota County, there were just 566 undervotes recorded – an undervote rate of only 2.5%. In addition, the percentage of undervotes for the District-13 race in Sarasota County was disproportionately higher than other counties within District-13. The undervote rate for the race was 2.5% in Charlotte County, 2.1% in Desoto County, 5.8% in Hardee County, and 2.4% in Manatee County.

Finally, the percentage of undervotes recorded on electronic voting machines in Sarasota County for the congressional race was almost seven times the rate of undervotes for District-13 in the last midterm election (2.2%). Jennings argued that this statistical evidence alone indicated that the large number of undervotes in Sarasota must be attributable to a malfunction of the iVotronic touch screen voting system. In addition to this statistical evidence, Jennings also submitted as evidence in support of her contest affidavits memorializing the eyewitness accounts of Sarasota County voters attesting to their difficulties in attempting to cast a vote for her during early voting and Election Day on the iVotronic machines in Sarasota County.[57] She also cited contemporaneous official "Incident Report Forms" filed with the Sarasota County Supervisor of Elections documenting what she described as "widespread occurrences" of voters having difficulty getting the iVotronic machines to record votes in the District-13 race.

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[56] *Jennings v. Buchanan* Notice of Contest Regarding the Election For Representative In the One Hundred Tenth Congress From Florida's thirteenth Congressional District, 20 December 2006.

[57] *Jennings v. Buchanan*, Documentation of Voting Machine Malfunction Appendix to Contestant Jennings' Memorandum Responding to the Honorable Charles A. Gonzalez's April 3, 2007 Letter Regarding The Investigation of the election For Representative In the One Hundred Tenth Congress From Florida's Thirteenth Congressional District Volume I & II, 13 April 2007.

Jennings cited a statistical analysis conducted by Charles Stewart III, the chair of the Political Science Department at the Massachusetts Institute of Technology (MIT), to argue that failure of the iVotronic touch screen voting system adversely affected the outcome of the District-13 race.

Jennings's House contest was premised entirely on her allegation that thousands of legal votes cast in Sarasota were not counted due to pervasive malfunctioning of the iVotronic touch screen voting system.

On June 14, 2007, the Task Force unanimously authorized the U.S. Government Accountability Office ("GAO") to test whether the voting machines contributed to the undervote. During the period November 27-December 4, 2007, the GAO conducted testing on the iVotronic touch screen voting system used in Sarasota County.

The GAO met with officials from the Sarasota County Supervisor of Elections, the Florida Department of State and Division of Elections, and ES&S to obtain details about the voting systems and prior tests to document their testing procedures. The GAO also reviewed voting system documentation to develop GAO's testing procedures. To ensure that the certified firmware held in escrow by the Florida Division of Elections corresponded to the source code that was reviewed by a team from Florida State University and the GAO, on November 19, 2007, GAO visited the ES&S development facility in Rockford, Illinois, and witnessed the rebuild of the firmware from the escrowed source code.

To conduct its verification test, GAO extracted the firmware from a random sample of 115 iVotronic touch screen voting systems out of the 1,499 used in Sarasota County's 2006 general election and found that each machine's firmware matched the certified version of firmware held in escrow by the Florida Division of elections. Based on this statistical approach, the GAO was able to determine with a "99 percent confidence level" that at least 1,439 of the 1,499 machines[58] used the same firmware that was certified by the Florida Division of Elections. Consequently, the GAO reported to the Task Force that it had additional confidence in the results of previous source code reviews conducted by itself and Florida State University, which had indicated that the iVotronic touch screen voting system did not cause the recorded undervotes.

[58] Some machines had to be reprogrammed for use in other special elections.

For the ballot test, the GAO cast predefined test ballots on 10 iVotronic machines and confirmed that each ballot was displayed and recorded accurately. The test ballots represented 112 common ways a voter may have interacted with the iVotronic system to select a candidate in the District -13 race and cast a ballot. These tests were performed on nine machines configured as election-day machines and then repeated on one machine configured as an early voting machine.

The GAO finally conducted the calibration test by miscalibrating two iVotronic touch-screen voting machines and casting ballots on them to validate that the machines recorded the information that was displayed on the touch screens. The GAO reported to the Task Force that its tests, involving a total of 10 different miscalibrated patterns and capturing 39 ballots, indicated that the machine correctly displayed the selection in the District-13 race on the review screen and correctly recorded the ballot.

At a public hearing on February 8, 2008, the GAO reported that the results of its tests, like the Florida tests, did not identify any problems that would indicate the iVotronic touch screen voting system was responsible for the undervote. The contest was dismissed.

This DRE ballot format was especially difficult for the older voters of Sarasota. The contest reinforces the importance of thoughtful consideration of ballot design – be it a butterfly or touch screen.

THE HAMILTON COUNTY
OHIO JUVENILE COURT JUDGE RACE – 2010

The most significant expanded application of *Bush v. Gore* stems from a lawsuit relating to the counting of provisional ballots for a juvenile court judge seat in Hamilton County, Ohio.[59] In that case, the plaintiff, a candidate for Hamilton County Juvenile Court Judge, alleged that the Hamilton County Board of Elections ("Board").

> violated the Equal Protection Clause by "refusing, without reasonable basis, to investigate whether poll worker error caused some voters to vote at the right polling location but at the wrong table while others investigating similarly situated circumstances where poll worker error caused a voter to vote in the wrong precinct," and "by arbitrarily allowing some provisional voters the right to vote when the error in the ballot was caused by the poll worker, but denying other provisional voters the right to vote when the error in the ballot was caused by the poll worker."[60]

The facts of *Hunter* are convoluted. During Ohio elections, many polling locations contain multiple precincts. In such locations, voters must go to the correct "precinct" i.e. – table within the location. Hamilton County had several multiple precinct locations during the November, 2010 election. At nearly all of these locations, it employed an extra poll worker to act as a "precinct guide" to direct voters to the correct table.[61]

Primarily at issue in the litigation are 849 ballots that were cast by a voter at the right location but the wrong precinct (i.e – at the wrong table). The Board understood Ohio law to be that ballots cast in the wrong precinct were invalid and should not be counted unless, under a prior consent decree entered by the Ohio Secretary of State, there was poll worker error and the voter used the last four digits of his or her social security number as identification. Because the voters in the 849 ballots at issue did not use their social security number, they were not included in the consent decree terms so their ballots were disqualified.[62]

The Board, however, counted a group of 27 ballots that were cast at the Board's headquarters in downtown Cincinnati prior to the election day even though they were recorded in the wrong

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[59] *Hunter v. Hamilton County Bd. of Elections*, 6th Cir. Nos. 10-4481 and 11-3059/3060, 2011 U.S. App. LEXIS 1731 (6th Cir. Jan. 27, 2011).
[60] *Id*. at *15.
[61] *Id*. at *5-6.
[62] *Id*. at *10.

precinct.[63] The Board found that these ballots resulted from "clear poll worker error" because an elector voting at the Board's headquarters had no choice but to walk up to one person who gave them their ballot.[64]

It was the divergent rulings on these two categories of ballots that gave rise to the central theme of Hunter's case. Hunter alleged that the Board counted (1) 27 provisional ballots cast at the Board's headquarters but in the wrong precinct, (2) 685 provisional ballots with contradictory information regarding whether the voter provided identification, (3) 10 provisional ballots that the voter had not signed but the Board determined should be counted, and (4) several provisional ballots in which the ballots themselves were from the wrong precinct but the envelopes were from the correct precinct.[65] However, the Board failed to conduct a similar investigation in other instances, including the 849 ballots cast at the right location but wrong precinct, as to whether such ballots resulted from poll worker error.[66]

Hunter filed a complaint and a motion for a temporary restraining order and preliminary injunction with the United States District Court for the Southern District of Ohio for violations of both the Equal Protection and Due Process Clauses of the United States Constitution. The district court granted the preliminary injunction the following day and ordered the Board to "immediately begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots now in issue and to include in the recount for the Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error."[67]

After the district court's order requiring the Board to investigate the 849 ballots, the Ohio Secretary of State provided additional guidance identifying "objective criteria for determining poll worker error."[68] At a meeting on December 28, 2010, the Board rejected approximately 500 of the 849 disputed ballots, voted to unanimously count 7 ballots that were miscast on account of poll-worker-error, and to count 9 ballots that were determined to have been cast in the correct precinct but had been erroneously included with those of having been cast in the wrong precinct. The Board had a 2-2 tie on whether to count 269 ballots that were cast in the correct

[63] *Id*. at *10-11; R.C.
[64] *Hunter*, 2011 U.S, App. LEXIS 1731, at *10-11.
[65] *Id*. at *13-14.
[66] *Id*. at *14.
[67] *Id*. at *16.
[68] *Id*. at *18.

polling location, but in the wrong precinct. As required by Ohio law, the Ohio Secretary of State broke the tie by instructing the Board to count some of the 269 provisional ballots, but not others based upon certain boundary issues.[69]

While this lawsuit was pending, the Ohio Supreme Court issued a ruling requiring the Ohio Secretary of State to rescind her prior directives and requiring the Board to investigate the 849 ballots using the exact same procedures and scrutiny applied to any provisional ballots.[70] Such investigation was limited to examination of the poll books, help-line records, and provisional-ballot envelopes. *State ex rel. Painter v. Brunner*, 2011-Ohio-35, at ¶23. The Ohio Supreme Court held that no provisional ballot cast in the wrong precinct should be counted.[71]

Subsequent to the Ohio Supreme Court's ruling, the newly elected Ohio Secretary of State issued a new directive requiring the Board to (1) examine the provisional ballots at issue that are not subject to the prior consent decree consistent with the Ohio Supreme Court's recent decision by examining only the poll books, help-line records, and ballot envelopes, (2) examine those provisional ballots that are subject to the prior consent decree, and (3) count 9 provisional ballots that were cast in the correct precinct but erroneously included in the group of 849 in the wrong precinct.[72]

The district court, without hearing, granted an emergency motion to enforce the preliminary injunction stating:

> The Board is hereby (1) enjoined from complying with Secretary of State Directive 2011-04; (2) ordered to count the 149 ballots that were investigated and found to have been cast in the wrong precinct due to poll worker's error in determining whether the street address was located inside the precinct; (3) ordered to count the seven ballots that were investigated, found to have been cast in the wrong precinct due to poll worker error, and unanimously voted upon at the Board's December 28, 2010 meeting; (4) ordered to count the nine ballots that were investigated, found to have been cast in the correct precinct but were rejected due to staff error, and unanimously voted upon at the Board's December 28, 2010 meeting; and (5) ordered to investigate all ballots subject to the NEOCH Consent Decree for poll worker error and count those ballots as required by that Consent Decree.[73]

[69] *Id*. at *20.
[70] *Id*. at *21-23.
[71] *Id*. at 23.
[72] *Id*. at *27.
[73] *Id*. at *28-29.

The district court found that the Board would violate the Equal Protection Clause if it were to certify the election results as they were on November 16, 2010.[74] Both the winning candidate for the Hamilton County Juvenile Court Judge position and the Board filed an appeal of the district court's order.

The Sixth Circuit agreed that there was a "sufficiently strong likelihood of success on an equal-protection claim to weigh in favor of the district court's grant of a preliminary injunction" relying in part on *Bush v. Gore*.[75] Quoting *Bush v. Gore*, the Sixth Circuit stated: "'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.'"[76] Following the precedent in *Bush v, Gore*, the Sixth Circuit found that a lack of specific standards for reviewing provisional ballots could otherwise resulted in "unequal evaluation of ballots."[77]

The Sixth Circuit found that the 27 provisional ballots cast at the Board's headquarters and the 269 provisional ballots cast at the right polling location but the wrong precinct are substantially similar. Thus, treating such ballots in different manners raised equal-protection concerns:

> Despite the requirements of state law, Plaintiffs have provided evidence that, in the November election, the Board considered evidence of poll-worker error with respect to some ballots cast in the wrong precinct but not other similarly situated ballots when it evaluated which ballots to count. In doing so, the Board exercised discretion, without a uniform standard to apply, in determining whether to county provisional ballots miscast due to poll-worker error that otherwise would be invalid under state law.[78]

The Sixth Circuit concluded that "the Board's review has met the requirements of *Bush v. Gore*."[79] The newly elected Secretary of State argued that the district court failed to satisfy that requirements of *Bush v. Gore* because it ordered a standardless investigation which was not applied to the first 27 ballots and which was applied inconsistently with the others. The Sixth Circuit rejected that argument finding that the previous Secretary of State had issued a directive with objective criteria. Moreover, it found that the "intent of the voter' standard invalided in *Bush*

[74] *Id*. at *29.
[75] *Id.* at *46
[76] *Id*. at *39.
[77] *Id*. at *42.
[78] *Id*. at *52.
[79] *Id*. at *60.

v. Gore was implemented differently by different counties for the same presidential election, but in this case, the district court's order applied to only one jurisdiction and one race.[80]

It was also argued that the district court's equal-protection analysis created a broader equal protection problem because it ordered provisional ballots to be counted in Hamilton County and not the rest of Ohio.[81] The Sixth Circuit likewise rejected this argument finding that only Hamilton County voters are eligible to vote for the Hamilton County Juvenile Court Judge, and thus, the Board did not treat equally voters within its own county which was the only equal protection concern being addressed.[82] It did recognize that "[s]tatewide equal-protection implication could arise, however, to the extent hat the ballots at issue include candidates for district and statewide races that transcend county lines."[83]

In sum, the Sixth Circuit found

> the Board was required to review all provisional ballots. In doing so, it chose to consider evidence of poll-worker error for some ballots, but not others, thereby treating voters' ballots arbitrarily, in violation of the Equal Protection Clause. We therefore conclude that there is a strong likelihood of success on this equal-protection claim which weighs heavily in favor of the district court's grant of a preliminary injunction.[84]

The Sixth Circuit left it to the district court, however, to apply the uniformity requirement of *Bush v. Gore* to direct the Board on how to proceed with the ballots at issue. Thus, resolution of this issue and the impact of *Bush v. Gore* on this particular recount is far from concluded.

[80] *Id*. at *60-62.
[81] *Id* at *62.
[82] *Id*. at *63.
[83] *Id*. (citing *Bush*, 531 U.S. at 106-07).
[84] *Id*. at *66.

CONCLUSION

The two most vital qualities of any voting system are simple to identify: (1) the winner wins – that is, the candidate with the most lawful votes is elected; and (2) the loser and their rational supporters believe that they have lost. All other considerations are secondary. However, no electoral process is sufficiently exact in design or execution to meet these essential requirements without recount and contest processes.

Why? Because elections are conducted by humans. This is the simple and, of course, most accurate answer. However, a better understanding of our process limitations in the United States comes from examining who are the individuals that count the ballots on election night. A very tiny percentage are professional election officials. Most are individuals having other jobs. Many are retirees or students. They work at a polling place maybe twice a year, from before 6:00am to often after 9:00 p.m. for modest pay. Even the observers of the tabulation process are usually party or candidate's volunteers, not professionals.

Also, in comparison to other western democracies, the United States has many more elected officials and ballot issues. In America, counting the ballots on an average election day is a much more difficult and lengthy process because the ballot is longer and more complex. There are simply many more ballot places (items to count). The vast expansion of mail and absentee voting has and will continue to expand the number of the ballots that are the most problematic to count. Technological advances hold a hope that, in the future, the difficulties of remotely cast ballots and verifying the eligibility of those casting ballots will be significantly eased, but at the current time these "tech" fixes are only theoretical and not practicable. Internet ballot casting and verification processes are still future possibilities, not current programs. Also, faxed and phone voice transmittals of ballots are viable alternatives for the casting of a ballot but, at present, not for the casting of a secret ballot.

Even before the *Bush v. Gore* decision, federal courts did on occasion agree to consider disputed elections. Fundamental unfairness issues such as the changing of a counting process in a post election period have spurred federal court involvement.[85] However, pre[86] and post[87]

[85] *Roe v. State of Alabama Evans,* 49 F.3d 734 (11thCir. 1995).

Bush v. Gore the federal courts still seem to be a very limited vehicle for the resolution of recount/contest disputes.[88] In general, federal courts do not involve themselves in "garden variety" post election disputes.[89] If, however, "the election process itself reaches the point of patent and fundamental unfairness, a violation of the Due Process Clause may be indicated and relief under § 1983 therefore is in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots."[90] State recount process disputes in few state elections are so shocking as to implicate Due Process/Equal Protection, concerns under the Fourteenth Amendment, and thus, federal court intervention.

As predicted by many scholars, a scenario, for *Bush v. Gore*, to have a significant precedential impact is during a post-election issue related to provisional voting. Such situations have a unique similarity to the specific state-wide post-election recount addressed in *Bush v. Gore*. If anything, the Sixth Circuit's opinion in *Hunter* helps clarify that *Bush v. Gore*'s largest impact is in situations when all ballots have been cast, and a board of election, or some other administrative body, must determine which will be counted and which will not. If there are arbitrary decisions made on which ones to count, especially if such decisions are made after the ballots are already cast, there are serious equal protection concerns related to the disenfranchisement of voters.

While *Bush v. Gore* specifically addresses equal protection concerns during post-election statewide recounts, it is possible it could eventually have a farther reaching impact. Other cases have looked to the equal protection principles enunciated in *Bush v. Gore* for guidance in evaluating the equality of other election practices. For example, in *League of Women Voters v. Blackwell*, several Ohio voters brought claims challenging various inequities that occurred during the 2004 election presenting claims under *Bush v. Gore*.[91]

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[86] *Bennett v. Yoshing*, 140 F.3d 1218 (9th Cir. 1998); *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975); *Gold v. Feinberg*, 101 F.3d 796 (2nd Cir. 1996).

[87] *Spears v. Steward*, 283 F.3d 992 (9th Cir. 2002).

[88] This contrast with a significant increase in pre election litigation. Richard Hasen, The Democracy Canon, Stanford Law Review, Vol. 6 (2009).

[89] *Curry*, 802 F.2d at 1315 (quoting *Welch v. McKenzie*, 765 F.2d 1311, 1317, vacated on other grounds and remanded, 777 F.2d 191 (5th Cir. 1985))

[90] Id. (quoting *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B 1981). cert. denied. 459 U.S. 1012, 103 S.Ct. 368, 74L.Ed.2d 504 (1982)).

[91] 548 F.3d 463 (6th Cir. 2008).

Despite the application and potential expansion of the equal protection holding of *Bush v. Gore* in some lower federal and state courts, the United Supreme Court has not had an opportunity to review whether and how the precedent should be expanded and likely will not anytime in the near future. The Supreme Court denied certiorari in the matter of *Wexler v. Anderson*, a case from the Eleventh Circuit that rejected an Equal Protection challenge to the lack of a paper record in Florida counties that use touch screens.[92] The Court will likely wait for a conflict among lower courts, which, given the relatively low number of election contests and recounts that result in litigation, could take a significant amount of time.

The primary impact of *Bush v. Gore* on the resolution of disputed election is not jurisprudential, but legislative. The Help America Vote Act of 2002 (HAVA)[93] is most certainly a child of the disputed 2000 presidential election. HAVA led the states to replace their punch card and lever voting machines with DRE and optical scan systems. How a recount is conducted is principally driven by the type of voting system used on election day and by absentee voters.

The optical scan system is now the most widely used balloting system in the United States. All optical scan systems have inherent problems[94] because each ballot is a piece of paper. Each ballot can be folded, bent, mutilated, gotten wet or lost. It was difficult to lose large mechanical lever voting machines. Even smaller DRE generally are not misplaced, but the individual optical scan ballots are pieces of paper which are always lost and/or found in recounts. The misplaced/lost/found ballots are then subjected to security issues. Are these ballots properly cast? Have they been or could they have been tampered with?

Also, when the ballot is a piece of paper given to a voter to be marked in secret without the election worker standing, looking over the voter's shoulder, the voter' s intent can be difficult to determine. As anyone experienced with large recounts can attest, the artistic originality or ingenuity of some voters defy reasonable intent analysis.

The DRE systems represent certainly the easiest recount process. The machine does not change its mind, however, there is growing opposition to electronic voting devices. It is not sufficient for a voting system to be efficient, accurate and secure; it also must be perceived as

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92 *See Vanzant v. Brunner*, S.D. Ohio No. 1:10-cv-596.
93 Help America Vote Act (Pub. L. 107-252).
94 A position exposed by many a high school senior following the receipt of SAT results.

such.[95] Even with a visibly apparent and easily understood explanation, the Sarasota House contest lasted may months because of distrust of the DRE system, so there is a perception held by at least some participants that DRE systems are not secure.

The *Bush v. Gore* election dispute has saved election lawyers from dark and dank voting machine warehouses. The mind-numbing task of counting archaic computer punch cards is history. However, county courthouses and state courts still remain the principal venue for disputed election resolutions, not federal courtrooms.

[95] See H.R. 811, Voter Confidence and Increased Accessibility Act of 2007; U.S. House Hearing, Auditing the Vote, Subcommittee Elections, One Hundred Tenth Congress, First Session, March 20, 2007.