

Florida 2000: Bush Wins Again!

Everything you've heard about the latest media recount is wrong.

BY EINER ELHAUGE

Here's the conventional interpretation of the most recent media recount of the Bush-Gore election: Bush would have won even if the U.S. Supreme Court had not stopped the statewide recount of undervotes ordered by the Florida Supreme Court. But Gore would have won a statewide recount (that he did not request) of undervotes and overvotes. This seems to confirm that the U.S. Supreme Court was wrong to intervene, since the system would have produced a Bush victory anyway, and it further seems to confirm that Gore "really" won. This interpretation is wrong, both in its factual premises and in its conclusions.

First, the media recount does not show Bush would have won if Florida's manual recount of undervotes had continued. What it shows (as was apparent at the time) is that Bush would have won such a recount conducted under standards applied uniformly within each county by counters who were screened for their political bias.

But that was decidedly *not* the process underway in Florida on December 12. Then recounting was being conducted by unscreened temporary workers supervised by partisan election officials. Nor had each county picked one standard in advance, and stuck to it. Palm Beach and Broward began by using the only preexisting written standard, namely, that there had to be some perforation of the ballot. But then, after early results showed this did not pick up many votes for Gore, they switched to a dimple standard. Later still, these counties decided to switch to a policy of exercising discretion over *which* dimples they counted. By the end, as Gore's counsel memorably conceded, the standard being applied varied from table to table.

Does it matter? The media recount confirms that it

does. The media consortium—the *New York Times*, the *Washington Post*, the *Los Angeles Times*, the *Wall Street Journal*, the Associated Press, CNN, and four Florida newspapers—contracted with the National Opinion Research Center to examine all the uncounted ballots in the state. Yet even when a single standard was specified, the counters hired by NORC frequently disagreed in their ballot interpretation.

Although some accounts stress that the counters agreed on 96 percent of punchcard ballots, that 4 percent error rate greatly exceeded the election margin of .001 percent. This is rather like trying to recheck a microscope's measurement of an electron's width using the human eye and a yardstick. Moreover, the 96 percent figure is artificially inflated by agreements on ballots where there was no marking to dispute. On ballots where at least one counter saw a potential vote for Bush or Gore, the counters disagreed a third of the time.

Political affiliation mattered. Though the NORC counters were supposed to be impartial, Republican counters were 4 percent more likely than Democratic counters to deny a mark was for Gore. Even more striking, Democrats were 25 percent more likely to deny a mark was for Bush. This bias may well be utterly unconscious, but it remains a problem for any manual recount process.

Indeed, if this is the sort of accuracy one gets from an unhurried professional effort when counters are screened for bias and bound to the *same* standard, imagine the sort of inaccuracy that would have been produced by a rushed partisan set of counters each free to choose whatever standard he wanted. The U.S. Supreme Court was amply justified in putting a stop to it.

Critics of the High Court have argued that Florida's manual recount—while inaccurate, arbitrary, and haphazard—was not unconstitutional. Ronald Dworkin, for example, argues that the equal protection clause is violated only when state law creates "distinctions that put some citizens, in advance, at a disadvantage against others." But what made this process alarming was precisely that it did not set forth any objective standards "in advance."

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Such standardless discretion in the hands of partisan county officials is worrisome because it allows them to engage in *sub rosa* discrimination against the opposing party about how (and indeed whether) to conduct manual recounts. Since without standards such discrimination is hard to prove, the best way to vindicate the constitutional right of equal treatment is to prevent partisan officials from exercising such standardless discretion at all. For precisely this reason, well-established Supreme Court precedent makes such standardless discretion unlawful if used to hand out parade permits or locate newspaper boxes. Why should the protection be any less when discretion is being exercised over the far more fundamental question of which votes to count?

Nor is it true, as the critics claim, that if one really accepted the Court's logic, any election where some counties use more accurate counting machinery than others would also have to violate equal protection. Just as no constitutional difficulty is raised when different counties in advance set forth different hours for parade permits, so too no worry about *sub rosa* discrimination is raised when different counties in advance adopt different counting machinery. No county has incentives to reduce its own political clout, so any decision it makes reflects a tradeoff between the fiscal costs and political benefits of buying new machinery that reduces undervotes. Different counties may make different tradeoffs, but as long as they do so in advance, that does not reflect one party trying to manipulate the electoral rules to discriminate against the other party.

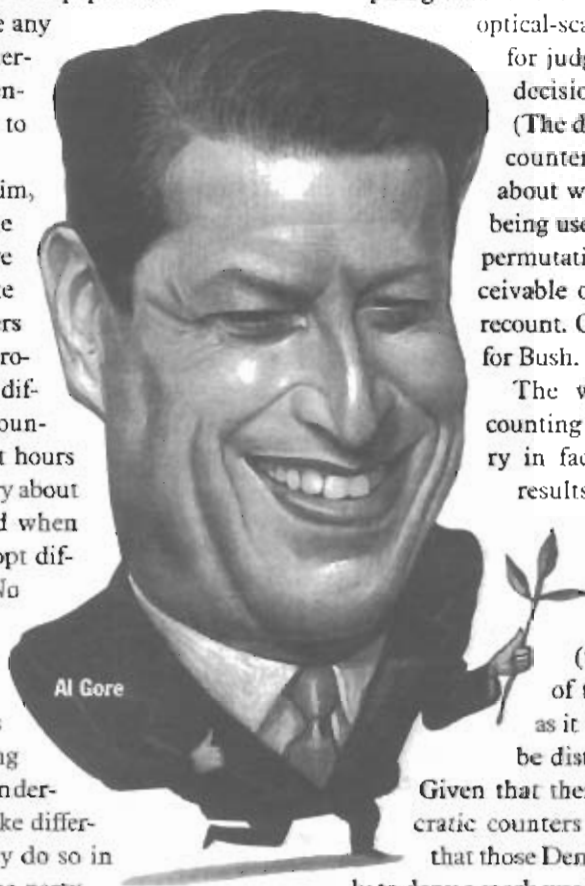
It was thus entirely reasonable for the U.S. Supreme Court to terminate the manual recounts and restore the result produced by a method that did not raise these equal protection problems: the machine recount. This approach had the considerable advantage of conforming to the actual Florida statute before the Florida court rewrote it to provide that manual recounts are available in any close election. As the counsel for the Florida attorney general (who was also Gore's state chairman) conceded, before this litigation Florida had never allowed a manual recount to be conducted simply because a losing party asserted that humans can interpret ballots better than machines. The

statute instead restricted manual recounts to cases of county-specific machine malfunction.

Second, the media recount did *not* show that Gore would have won if all the ballots rejected in the machine tally had been manually recounted under any uniform standard. With months and months to do their work, the NORC counters had the luxury of trying out different sets of standards on a statewide basis—compiling data from two different standards for judging optical-scan ballots, six different standards for judging punchcard ballots, and two decision rules for counting the latter. (The decision rules came into play when counters disagreed among themselves about whether a ballot met the standard being used.) Depending on which of these permutations you select, there are 24 conceivable outcomes of a statewide manual recount. Of these, 12 went for Gore and 12 for Bush.

The widespread media reports that counting overvotes produced a Gore victory in fact referred to only six of these results—those where the loser of the two optical scanner standards (judged by a single counter) was combined with the loosest of the punchcard decision rules (the one not requiring a consensus of the counters). This set of results, as it happens, is the one most likely to be distorted by counters' political bias. Given that there were 20 percent more Democratic counters than Republican counters, and that those Democrats were 25 percent more likely to deny a mark was for Bush, such bias cannot be discounted. One of those Democratic counters had even written articles calling the Bush victory a "coup d'état."

Finally, the media recount did not actually include all the ballots. The recount did include both undervotes and overvotes. But despite the researchers' best efforts, it missed 1,345 of them, enough for the lead statistician to conclude that margins smaller than a few hundred votes were "too close to call." All the pro-Gore results fell in that category, as did many of the pro-Bush results. More important, the recount only dealt with the 3 percent of ballots initially interpreted to reflect a vote for either no candidate or multiple candidates. If one believes in the superiority of manual recounts, there is no reason not to extend that proposition to the 97 percent of ballots initially interpreted



to reflect a vote for a particular candidate. Reinterpretation may have changed some of those to a vote for another candidate or, more likely, an invalid vote for multiple candidates.

The underlying lesson is well known to postelection tacticians: In any close election, you can change the result through manual recounts if you keep playing with the standards and the selection of ballots you recount. In Florida, an initial complaint about butterfly ballots (which went nowhere because they were legal) metastasized into a claim that manual recounts in selective counties were necessary because punchcard ballots undercounted votes. When (even with changed deadlines and standards) those manual recounts did not turn up enough Gore votes, the Florida Supreme Court ordered a statewide recount of undervotes alone. Had that not worked, and had Gore partisans prevailed in their insistence that no deadline should be imposed, there might well have been a recount of overvotes too, even though these were mainly caused by the ostensibly superior optical-scan ballots. Or some other selection of ballots would have been tried, until finally a better result was obtained.

Contrary to the Monday morning quarterbacks, the Gore legal team did in fact know what it was doing—the

legal equivalent of using trial and error to pick a combination lock. It simply was shut down by the U.S. Supreme Court before it found the precise combination of standards (or lack thereof) and sets of ballots to change the outcome.

In the end, the media recount explodes the unexamined factual premise that drove the Florida Supreme Court: that manual recounts are more accurate than machine recounts. No one doubts that machines have their own inaccuracies, but there is no reason to think these are greater than human error. More important, machine error is randomly distributed, not skewed by partisanship. Machine counting was introduced in this country not just for speed and cost, but to reduce the fraud and other human error that used to attend ballot counting.

The U.S. Supreme Court correctly established that states cannot leave human counters free to invent and use varying standards for counting ballots in the midst of an election dispute. Recounts must conform to objective standards established beforehand by lawmakers behind a "veil of ignorance" about which candidate the method would benefit. Despite what Al Gore said repeatedly, the dispute was never about whether to "count every vote." It was about *how* to count them. And, as we now know, how not to count them. ♦

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