

Florida's Vote Wasn't 'Irregular'

By EINER ELHAUGE

A federal judge is scheduled to hear arguments today on a Republican lawsuit charging that manual recounts in four heavily Democratic Florida counties violate the U.S. Constitution. Gore spokesmen counter that the recount is merited because of "irregularities" in those areas, especially in Palm Beach County.

The validity of the Democrats' claims thus turns on the details of Florida's election law. Examining those statutes reveals that many of the claimed "irregularities" are clearly frivolous, for they involve complaints that Florida election officials followed, rather than violated, the rules. The rest of the "irregularities" are disposed of under well-established legal precedents.

One complaint is that election officials only gave voters five minutes to vote and refused to allow them to bring others into the polling booth to assist them. Florida statute 101.51 specifies precisely that time limit, and bars others from entering the polling booth unless the voter signs an oath that he is blind, disabled, or unable to read or write. Both rules exist for good reason. The time limit tries to move voters through quickly, so that others get a chance to vote. And secret ballots would mean little if voters could be pressured to allow others to come into the voting booth to "help" them.

Right or wrong, these were the rules for the election, and one cannot complain that fidelity to the rules constituted irregularity.

Nor can it be irregular to follow Florida statutes that require election officials to turn away voters who do not have identification or who try to vote in the wrong precinct.

The same goes for what the Associated Press called a "horror story," refusing to allow voters who had received absentee ballots to vote in person until they signed affidavits swearing they had not used their absentee ballots. This horror amounted following the letter of Florida statute 101.69. Following these rules helps to curb double voting and other election law fraud. *Failing* to follow such rules would have been an irregularity.

Political Strategy

Since none of these claims have any legal significance, one might take comfort in the fact that the courts will dismiss them. But the Gore forces are pursuing not just a legal strategy but a political one. And the constant and irresponsible repetition of these supposed irregularities, without any reference to the actual legal rules, has abetted a destructive political campaign that has already resulted in selective hand recounting of ballots in counties leaning to Mr. Gore.

To his credit, Mr. Gore himself has not (yet, at least) echoed these frivolous charges. Instead, his campaign has focused its attention on the complaint that the ballot in Palm Beach County confused voters. One must acknowledge that it is regrettable that voters ever cast an erroneous vote because they were confused. But for this claim to justify invalidating the election, it is not enough to show that some voters were in fact confused. Rather, it must be shown both that the ballot clearly constituted a substantial violation of election law, and that this irregularity deprived voters of any reasonable opportunity to figure out how to vote.

Critics claim the ballot format violated Florida law in two ways. First, the law requires that the candidates be listed in a certain order. This claim can be disposed of easily, as the candidates were listed in the proper order. The list was structured in columns, like this article, and Patrick J. Buchanan happened to be the first name in the second column.

Second, opponents charge that Florida law requires that you always vote for candidates to the right of their name. This is indeed the rule for paper ballots, which can be long enough to accommodate a big list of candidates in one column. But electronic or machine ballots are often too short to put candidates in one column, and there is no rule that requires them to be marked on the right.

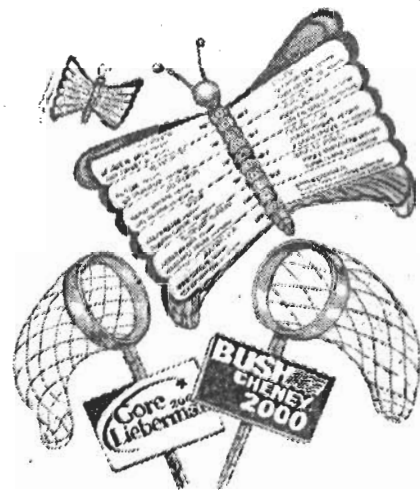
My esteemed Harvard Law colleague, Phil Heymann, acknowledged in the Washington Post on Friday that the standard is whether there was "clear illegality." But he went on to argue that there is "little dispute" that the ballot "flatly violated the law." He based this on Florida statutes 101.5609 and 101.27, which he quotes as stating that where electronic or machine ballots are used "The ballot information shall . . . be in the order of arrangement provided for paper ballots."

I have two responses. First, this language only governs the order of the candidates, not where the votes are marked,

and thus was not violated by a ballot that put the candidates in the correct order but in two columns. Second, beware of ellipses, for the language excised in the above quote was "as far as practicable." Florida election officials are explicitly allowed by the statute to alter the order of arrangement to meet practical concerns.

And here there was a practical concern. Given the shortness dictated by the machines, to put the candidates in one column would have made the ballots harder to read and thus, potentially, confused many more voters. If the ballot is in two columns, with punch holes on the right of each, then some voters who wanted to vote for a candidate in the second column

The 'butterfly' ballots complied with the law. Their use does not justify a selective manual recount in pro-Gore areas.



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might mistakenly punch the hole right before that candidate. So, as election officials often do, the punch holes were put in the middle of the two columns, with big arrows from each candidate indicating the appropriate hole to punch.

Was this a perfect solution? Evidently not, for some voters are saying that they were, in fact, confused by this ballot. But there was no option that would have eliminated all potential confusion. This was a reasonable choice for election officials to make, and the Democratic official who made it violated no law.

Even if the ballot were irregular, it did not deprive voters of a reasonable opportunity to cast their vote. Democrats complain that some proportion of the 3,400 voters who voted for Pat Buchanan in Palm Beach County did so only because they were confused by the ballot. But the test is whether a conscientious voter of ordinary intelligence could have, with reasonable time and effort, located the candidate of his choice. That test is clearly satisfied here. Any voter who was confused could ask an official for clarification, or request a new ballot. Most important, it is undisputed that more than 400,000 other voters in that county managed to locate those arrows and make the right choice, which clearly shows the task was not impossible for the reasonable voter.

Even if the ballot was confusing about which hole to punch, nothing on it should have confused voters into thinking they could vote for two candidates, and this is what happened on the 19,000 ballots that Democrats complain were tossed out. This is a common occurrence governed by Florida statute 101.011: "If the elector marks more names than there are persons to be elected to an office. . . his or her ballot shall not be counted for the office."

This rule, similar to that in other states, exists to preserve certainty and the sanctity of secret ballots. Who a voter intended to vote for is determined solely by the objective evidence left on the ballot, and cannot be undermined by testimony that they intended to vote for someone else. The remedy when the voter's intent cannot be determined is to invalidate a portion of that ballot, not the election. If a majority of Floridians don't like this rule, the time to change it is in the future. A past presidential election is no time to make an unprecedented change in the law.

Indeed, even if the ballot was "irregular," Florida law does not authorize the courts to order a new election. It provides only two remedies that might apply here. First, it authorizes courts to void any votes where the voter's intent is not clear. This obviously would have no effect other than possibly reducing Mr. Buchanan's vote count and thus cannot help the Democrats.

The **second remedy** is to void the election. But the courts try as much as possible to resolve any claims of ballot ambiguity before voiding an election. A court might well decide that the Democrats waived their rights by failing to complain about the ballot form beforehand, or that voters waived their rights by failing to ask for clarification at the polling place.

But even if the election were voided, Florida officials (not judges) would decide what sort of new election to conduct, and there would be no reason for them to conduct one limited to Palm Beach County. This would give the Democrats an extremely unfair advantage, since this is a heavily Democratic county. Knowing that they held the power to choose the next president, one can predict that turnout would be affected, and that Nader voters would switch to Mr. Gore. To vote after you know how everyone else has voted is a massive informational advantage completely at odds with how we normally conduct elections.

It has been argued that the Constitution only requires a vote of the majority of electors meeting, not the whole potential electoral college, thus making a Gore win possible if there are no Florida electors. This is not correct. The Constitution requires Florida to appoint electors. So Florida cannot legally refuse to hold a new election if this one is voided. Florida electors will thus be at the Electoral College. It is just a question whether the ones who finally get there will be for Mr. Gore or for Mr. Bush.

The early press duzz is that the Bush litigation is shaky because Florida law provides for manual recounts. But this misconstrues the Bush litigation, which does not claim Florida law is violated but rather that, as currently being applied, Florida law on manual recounts violates the U.S. Constitution. The course of this litigation is much harder to predict since it does not turn on any clear rules but rather on the meaning of such general constitutional principles as equal protection, the right to vote, and due process. But it is well-founded.

One clear effect of a manual recount is to increase the number of votes counted where the "chad" was partially punched out. People can pick this up where machines cannot. But there is absolutely no reason to think the problem of partially punched chad is unique to the counties in which the manual recount is proceeding. Thus, selecting only heavily Democratic counties to conduct a manual recount will effectively dilute the votes of those living in other counties. Any manual recount should be done either in all counties or none to preserve the equal right to vote.

Subjective Judgments

Another effect of a manual recount is to substitute subjective human judgment for objective machine judgments. Here, Florida law has exacerbated the problem by providing no objective standards about whether or how to conduct a recount. Indeed, the standards already have been switched in midstream—from a "sunlight" test (whether you could see through the card) to a partial perforation test.

Even if the standard were consistent, judgment calls still must be made, which might be consciously or unconsciously biased. This problem has been worsened by the extraordinary campaign the Democrats have run to pillory the Democratic officials who devised the ballot. Theresa LePore, the Democrat in charge of the Palm Beach County recount, has been described by her friends as "deeply shaken." One need not imagine any conscious wrongdoing to worry that officials who are in deep hot water in their pro-Gore counties might subconsciously be influenced by the fact that the complaints about their ballot would go away if the manual recount favors Mr. Gore.

A final effect of the recount is to delay the resolution of this election. A manual recount in just a few counties will take days. To do it properly for every county may take months. The Constitutional requirement that every state "shall" appoint electors would thus constrain any attempt at the sort of statewide manual recount that would at a minimum be necessary to preserve the equal right to vote.

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