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 is what happened at the time: that Bush would have won such a recount conducted under standards applied uniformly within each county by election workers who were apprised of their political bias.

But that is decidedly not the process under way in Florida on December 12. Then recounting was being conducted by unscreened temporary workers supervised by partisan election officials. No bipartisan county picked one standard to adopt in, and stick to it. Palm Beach and Broward began by using the only prevailing written standard, namely, that there had to be some perforation of the ballot. But then, after early results showed that did not pick up enough votes for Gore, they switched to a simpler standard. Later still, these counties decided to switch to a policy of rescinding discretion over which dimples they counted. By the end, so Gore's counsel incredulously conceded, the standard being applied varied from house to house.

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 recount ballots in the state. Yet even when a single standard was specified, the counties 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 exceeds the actual margin of 0.01 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 counts were supposed to be impartial, Republican counties were 8 percent more likely than Democratic counties 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 entirely unconscious, but it remains a problem for any manual recount process.

Indeed, if this is the rate of accuracy one gets from an unreviewed professional effort, when counters are screened for bias and bound to the same standards, imagine the rate 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 simply justified in putting a stop to it.

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

November 20, 2001

The Weekly Standard
Such state-based discretion in the hands of partisan county officials is worrisome because it allows them to engage in adverse discrimination against the opposing party about how (and indeed whether) to conduct manual recounts. Since without standards such discretion is hard to prove, the best way to vindicate the constitutional right of equal treatment is to prevent partisan officials from exercising such state-based discretion as an officer. For precisely this reason, well-established Supreme Court precedent makes such state-based discretion unlawful if used to hand out results with a partisan tilt.

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 purdah 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 at issue reflects a tradeoff between the fiscal costs and political benefits of buying new machinery that reduces undercount. 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 voters revoted it to provide that manual recounts are available in only 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 NOREC counters had the luxury of trying out different sets of standards on a statewide basis—computing data from each of the standard's 600 optical-scan ballots, six standard's different standards for judging punchcard ballots, and two decision rules for counting the latter.

The decision rules came into play when counties 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 honest of the punchcard decision rules (the one not requiring a consensus of the county). The net effect of this is, as happens, is the most likely to be distorted by counties' political bias.

Given that there were 20 percent more Democratic counties than Republican counties, 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 counties had even written articles calling the Bush victory a "coupe d'etat."

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 marginals smaller than a few hundred votes were "too close to call." All the Gore-Bush results fell in that category, as many of the pre-Bush results. More importantly, the recount only dealt with the 9 percent of ballots initially interpreted to reflect a vote for either neither candidate or multiple candidates. Some believes in the superiority of manual recounts, there is no reason not to extend that proposition to the 97 percent of ballots initially interpreted.
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THE NATIONAL INTEREST 9950 Irish Hill Road NW, Suite 100, Washington, DC 20015
Published by the Council on Foreign Relations, 2001

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November 26, 2001

THE WASHINGTON TIMES/33