Florida’s Vote Wasn’t ‘Irregular’

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. It must be shown both that the ballot clearly constituted a substantial violation of election law, and that this irregularity deprived some 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 in the order 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 sort candidates in one column, and there is no rule that requires them to be marked on the right.

My esteemed Harvard Law colleague, Philip Heymann, said on CNN’s Washington Post on Friday that the standard is whether there was “clear simplicity.” But he must admit that there is “little dispute” that the ballot “flatly violated the law.” He based this on Florida statutes 101.569 and 101.37, which he quoted as true. The Florida statutes say that ballot formats are “used” if the ballot information shall be in the order of arrangement prescribed for paper ballots.

I have two responses. First, this language only requires that candidates be listed in the order of their name, 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 Elijah, for the language excised in the above passage is one that is “as far as possible”.

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. On the short ballot of the electronic 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, each with punch holes on the right of each, then some voters who wanted to vote for a candidate in the second column 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 were 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 claim that some proportion of the 3,468 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, locate 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 106,000 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 contests about
which hole to punch, nothing on if should
have confused voters into thinking they
could vote for two candidates, and this is
what happened on the 2,100 ballots that
Democrat's complaints were tossed out. This
is a common occurrence permitted by Flor-
ida statute 101.311: "If the election marks
were names than there are persons to be
elected to an office, the vote of her ballot
shall not be counted for the office."

This rule, similar to others in other
states, exists to preserve certainty and
the sanctity of secret ballots. Who a voter in-
tended 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 a voter's intent
cannot be determined is to invalidate a portion
of that ballot, not the election. If a ma-
jority 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 "irregu-
lar," 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 elec-
tion. But the courts try as much as possi-
ble to resolve any claims of ballot ambigu-
ity before an election. Even if a court
might well decide that the Democrats
waved their rights by failing to complain
about the ballot form beforehand, or that
voters waived their rights by not calling
for clarification at the polling place.

But even if the election were voided.
Florida officials (not judges) would decide
what any set of ballots could conduct, and
there would be no reason for them to con-
doncne limited to Palm Beach County?

This would give Democrats extra-
ently unfair advantage, since this is a
heavily Democratic County. Knowing that
they held the power to choose the next
president, one can predict that a court
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 information advantage com-
pared to voters at odds with a normal con-
duct elections.

It has been argued that the Constitution
only requires a vote of the majority of
electors in each of the states. But the Consti-
tution requires Florida to appoint electors. So Fl-
ida cannot legally refuse to hold a new
election if this one is voided. Florida elec-
tors will thus be at the Electoral College. It
is just a question whether the ones who
finally get there will be Mr. Gore or for
Mr. Bush.

The early press buzz is that the Bush
litigation is shaky because Florida law pro-
vides for manual recounts. But this mis-
construes the Bush litigation, which does
not claim Florida law is violated but rather
that the 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
elect, and the process. But it is well-
founded.

The 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 ma-
chines cannot. But there is absolutely no
reason to think the problem of partially
punched chads 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, Flor-
ida law has exasperated the problem by
providing no objective standards about
whether or how to conduct a recount. In-
deed, the standards already have been
switched in midstream—from a "sunlight
" test (whether you could see through the
card) to a partial perforation test.

The constitutional judgment calls still must be made, which
must be conscious or unconsciously bi-
ased. This problem has been worsened by
the extraordinary campaign the Demo-
crats have run to pilory the Democratic
officials who devised the ballot. Troyer
Lee, the Democrat in charge of the Palm
Beach County recount, has been de-
scribed by her friends as "deeply shaken." One need not imagine any conscious
wrecking to worry that officials who are
in deep hot water in their pro-Gore coun-
ties might subconsciously be influenced
by the fact that the complaints about their
ballot would go away if the manual re-
count 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
two weeks. To do properly for every county
may take months. The Constitutional re-
quirement that every state "shall" appoint
electors would thus constrain any attempt
at the same state-wide manual recount that
would at a minimum be necessary to
preserve the equal right to vote.

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