Bush vs. Florida

By Einer Elkjaer

CAMBRIDGE, Mass. The lawsuit by George W. Bush challenging Flori-
da's manual recount has had a rough recep-
tion. A federal appel-
late court declined on
Friday to issue an impound while the ma-
ter is in state court. And most legal scholars panned Mr. Bush's fed-
eral lawsuit, arguing that federal
courts have a role in state-
run elections, especially when the chal-
lenge is to a rule that seems neutral
and has a long history of use.

Hold on. Doesn't anyone remember
John Anderson?

Mr. Anderson ran for president in 1980. Having lost the Republican nomi-
nation, he ran as an independent can-
didate, but he had a little problem. Some states, like Ohio, had early filing
deadlines that made it difficult for an independent to launch a late presiden-
tial campaign.

So Mr. Anderson went to federal
court to invalidate Ohio's filing dead-
line. And he won, even though he was
challenging the conduct of a state-run election. He won even though filing
deadlines, like manual recounts, seem neutral and had long been an accepted
practice. He won because the federal
courts accepted the argument that filing
deadlines tend to discriminate against late-coming, independent candidates without reasonably ad-
vancing important state interests.

Indeed, Mr. Anderson's case made it all the way to the United States Supreme Court, which established that state election law must be reason-
able and nondiscriminatory — even in a state-run election for state offices.

How does Mr. Bush's lawsuit stack
up against this standard? One must first understand that the Bush lawsuit is not against manual recounts, but
against an election system run by partisanship officials who lack any
objective standard for whether or how to conduct manual recounts, and who
have allegedly exercised their power in a discriminatory fashion.

Isn't that the sort of thing a little warri-
Some in an electoral system that gives partisanship officials unfettered
power to decide whether to conduct manual recounts? The obvious con-
cern is that county officials will grant man-
ual recounts only when asked by candidates they like. Moreover, in Florida, a state appellate court ruled in 1992 that such county decisions are not reviewable in state court at all. In that matter, Broward County declined to
do a manual recount in a local council race even though the gap between
candidates in a computer recount was only five votes.

It's also worth noting that the hand-
counting during manual recounts tends to alter punch-card ballots and that there are no clear objective standards for interpreting chads. Republicans hav-
ever already offered multiple affida-
tis claiming discriminatory handling and interpretation of the ballots. Given
these problems, a federal court might well conclude that a machine
that makes errors equally for both candidates is preferable to a hand
count that might be biased toward one candidate.

Whether the Bush litigation will suc-
cceed is, of coarse, another matter. But
this is a case of a sort of claim that the federal courts ran and should treat
very seriously. Presidential elections "implicate a uniquely important national interest," wrote Justice John Paul Steven in Anderson v. Celebrezze. "For the President, the Vice President of
the United States are the only elected officials who represent all the voters in the Nation. ... The state has a less important interest in regulating Presi-
dential elections than statewide or li-
county elections, because the outcome of the former will be largely determined by voters beyond the state's bound-
aries."

So, if the Florida Supreme Court
rules that manual recounts must be
elected to the presidential vote, no
one should be surprised if the U.S.
Supreme Court steps in.