

MEMORANDUM

TO: HJR 8 Subcommittee on Voting Systems

FROM: David S. Niss, Staff Attorney

RE: Meaning and Implementation of Bush v. Gore

DATE: September 4, 2001

I INTRODUCTION

On December 12, 2000, the United States Supreme Court handed down an opinion in the case of George W. Bush v. Albert Gore, Jr., ___US___ (No. 00-949). The majority opinion was agreed upon by a 5-4 vote. This memorandum examines the language and meaning of that opinion because the opinion may guide the recommendations of the Subcommittee.

II DISCUSSION

A. Facts of the Case and the General Subject of the Opinion

The Florida Supreme Court had held that votes for Vice President Al Gore resulting from a recount in several Florida counties using punch card ballots were to be counted as "legal votes" and also ordered that the punch card ballot votes in other counties be subjected to a manual recount in order to determine the "intent of the voter". In its opinion reviewing the opinion of the Florida Supreme Court, the U.S. Supreme Court held the Florida Court's order to be unconstitutional and reversed the order of that court requiring the counting of certain punch card votes and requiring additional recounts. The U.S. Supreme Court held that the Florida Supreme Court's requirement that the "intent of the voter" be determined could not be uniformly applied. The Supreme Court pointed out that previous recounts of punch card ballots had involved many cases of dimpled and hanging chads that were not evaluated by a uniform standard during the recount process. Because there was no uniform standard for determining the "intent of the voter" in those counties using punch card ballots, the recount process would be subject to the same flaws as had already occurred in some counties using punch card ballots -- some county recount teams had previously used more lenient standards than other recount teams to determine a voter's intent, some county teams changed the standard while in the process of the recount, and some county recount teams changed the standard more than once during the recount process.

The subject of the U.S. Supreme Court's opinion, then, is the constitutionality of the Florida Supreme Court's previous opinion and order, not the constitutionality of Florida statutes. The U.S. Supreme Court concluded that a state may decide whether state voters are to choose the presidential electors required by the U.S. Constitution, but that once the legislature has decided that the presidential electors were to be chosen by popular vote, the equal protection clause of the 14th amendment to the U.S. Constitution requires the application of the "one person, one vote" principle and, since under that principle an elector's vote in one county was to count as much as an elector's vote in another county, the standards for what constitutes a "legal vote" have to be a uniform standard. The U.S. Supreme Court held that the Florida Supreme Court failed to provide for any uniform standard to determine the intent of the voter.

B. Language and Meaning of the Opinion

In addition to noting many specific instances of the unequal application of the "intent of the voter" standard to the punch card ballots, the U.S. Supreme Court stated:

The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

* * * *

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For the purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirements of nonarbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter". . . . This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

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The want of those rules here has led to unequal evaluation of ballots in various respects As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another. [Here, the Court describes some of the uneven treatment].

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The State Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified totals. [Here, again, the Court describes other uneven treatment of punch card ballots.]

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The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to these present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal protection and fundamental fairness are satisfied.

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Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise.

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Seven Justices of the Court agree there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy The only disagreement is as to the remedy.

The difficulty with the foregoing language of the opinion is that it leaves questions without definitive answers. Chief among these questions are whether the opinion (1) applies to elections other than federal presidential elections; (2) applies only to statewide elections; (3) applies only to statewide recounts ordered by a court; (4) applies to elections in which ballots are cast other than by punch card ballot; (5) is relevant to state statutes as well as to court orders; (6) requires legislatures to adopt uniform standards for what constitutes a legal vote; and (7) requires the adoption by state legislatures of uniform voting technology between counties, between technologies, or both.

Additionally, the opinion never clearly states what constitute the “rudimentary requirements of equal treatment and fundamental fairness” in the context of the opinion.

I would also note that the National Conference of State Legislatures (NCSL) has analyzed the Bush opinion and tried to derive from that opinion its own statements of principles and criteria to guide electoral reform. Those statements and criteria need to be evaluated in light of the language of the opinion.

III CONCLUSION

Several reviewers, writing for NCSL and others, agree that it is difficult to know how much importance to attach to the U.S. Supreme Court’s opinion in Bush v. Gore. Perhaps what can be said of the meaning of the opinion is the following:

1. The test for what constitutes a “legal vote” cannot be more rigorously applied in one county than it is in another.
2. To the extent that that a lack of specificity encourages unequal application between counties of the standard of a “legal vote”, the standard needs to be made specific.
3. The opinion does not provide clear guidance to state legislatures on whether they must adopt uniform standards for what constitutes a “legal vote”, what those standards must be, or whether legislatures must establish the use of only one form of voting technology. Subsequent opinions from the federal or state courts may address those issues more clearly. For this reason, the HJR 8 Subcommittee of the State Administration and Veterans' Affairs Interim Committee should consider the U.S. Supreme Court’s opinion in Bush v. Gore to be only one of a number of factors used to determine whether changes need to be made in voting methods and statutes and what those changes should be. It would be a mistake to treat the opinion as the source of ironclad requirements for election reform enacted by a state legislature.