



LOSER TAKE ALL



**ELECTION FRAUD AND THE
SUBVERSION OF DEMOCRACY,
2000-2008**

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**BUSH V GORE
AND THE SUPREME COURT
AS ELECTION TERMINATOR**



PAUL LEHTO

"[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens [. . .] not [to] wait till usurped power ha[s] strengthened itself [. . .] in precedents."—James Madison¹

"The great check imposed upon Executive power was a popular mode of election; and the true object of jealousy, which ought to attract the attention of the people of every State, is any circumstance tending to diminish or destroy that check."—Senator Uriah Tracy²

The unmistakable theme of patriots throughout history, as evidenced by the two quotes above, is that "jealousy" is the first duty of all citizens. Put another way, the first duty of citizens is not to be fooled, much less "fooled again," as Mark Crispin Miller aptly titled his previous book on elections. Not only is this duty repeated throughout the writings of the American Revolution, it is also repeated in many state constitutions where, amidst all the expected provisions limiting the powers of government in the name of freedom, there sticks out what can only be considered stark warnings to future citizens, warnings that have identical

themes and similar wordings, which can be closely paraphrased as: "Frequent recurrence to fundamental principles and rights is necessary to the preservation of liberty and free government." In other words, if we don't regularly invoke the "tools of democracy" (our fundamental rights and principles), the founders of our states and our nation predicted that freedom, liberty and democracy would perish.³

Indeed, even the famous African-American abolitionist Frederick Douglass, so very conscious of the compromise made at the founding of our country, provided a ringing defense of the most powerful and concentrated source of these rights and principles: the Declaration of Independence:

"I have said that the Declaration of Independence is the ring-bolt to the chain of your nation's destiny; so, indeed, I regard it. The principles contained in that instrument are saving principles. Stand by those principles, be true to them on all occasions, in all places, against all foes, and at whatever cost."

The inalienable right upon which elections as well as the Declaration of Independence is based is the right to "alter or abolish" the government, which includes the ability to change the representatives who hold their power by delegation at will. Thus, there's no excuse for not having proper elections in which our ability to "kick the bums out" is absolutely not subject to question. This is most important when we need to remove a criminal regime from power. Because the secret vote counting that undeniably occurs with computerized voting of all types leaves us utterly insecure in our right and ability to remove a criminal (cheating) regime if and when We the People desire to, as of today, we can no longer say that we are a free people.

Since the very reason our government was instituted was to guarantee us free elections, our politicians today ought to be

falling over themselves trying to return power and control over elections to the people—that is, if they truly practiced democracy, which means "people-rule." Government "of the people, by the people and for the people" is not just rhetoric, but reality when things are done right. Years ago, I had a minor supporting role as an attorney in a death penalty case, representing the defendant. Twelve people randomly selected from the populace literally decided life and death, ultimately sparing the defendant's life. That's rule by the people in the judicial branch—the jury system. Elections, by contrast, are rule by the people in the executive and legislative branches.

When thinking of election law, we must consider not only statutes, but case law, fundamental rights and principles, inalienable rights, and canons of statutory construction before we can know what the law will be held to mean where it truly counts: in court. Consequently, an intelligent reading of the Help America Vote Act (HAVA), which Congress passed in 2002, is not a completely accurate guide to what our election law is without heavy consideration of the constitutional equal protection holding of *Bush v. Gore*, the case that halted the recount in 2000 and handed the election to George W. Bush. It should be unnecessary to say that we are all on the most complete form of notice conceivable that the U.S. Supreme Court can, will, and has intervened to terminate a presidential election and decide the election itself. This fact alone exposes the mistaken conventional wisdom that *Bush v. Gore* is "not a precedent" to be a delusional self-deception to the extent such conventional "wisdom" leads us to believe that *Bush v. Gore* won't strike again, albeit in a slightly different form.

Fundamentally, the incentives are not set up correctly for election law to "work" because if the incumbents, who by definition make up election law, really foul things up, the election will be unconstitutional and/or void, as we saw in *Bush v. Gore*. Here again, we have ample notice this can and will happen, and the fact

that lower courts don't have the political courage of the Supreme Court of the United States misses the mark entirely, because lower court judges are often elected through secret vote counting procedures and would fear to overturn them, but the unelected Supreme Court of the United States and the higher federal appellate courts suffer no similar limitations. It should be apparent, then, that an entirely new incumbent-protection strategy emerges for federal courts especially: agree that election activists make a great deal of good points, declare the election (or perhaps just the recount or "audit") invalid, void or unconstitutional, and thereby deprive We the People of the only method to remove an incumbent regime: a valid election. Given the time-honored strategy of running out the clock, especially in regards to an presidential election (as seen in 2000), it should not come as a surprise that I would assert that election law itself is often a rigged game every bit as or more insidious than corrupted vote counts themselves, especially since election law can parade as justice.

Moreover, successful election cheaters (by winning elections) get to set or influence future election law. Thus, in order to truly appreciate the legal pickle we are in with regards to our elections, we should imagine what things would be like if bank robbers somehow became bank officials or got to set future bank vault security policy, just like successful election stealers get to become election officials and/or influence or set election security policy. In this context, when election officials or their supporters complain about us not "trusting" them, one should point out that our country is not based on trust, but rather on checks and balances as distinct forms of *distrustful* oversight and supervision. Willie Sutton famously explained that he robbed banks because "that's where the money is." Similarly, people cheat in elections because that's where the power is.

OVER-RIDING IMPORTANCE OF ELECTION LAW

By "constitutionalizing" elections as equal protection issues, *Bush v. Gore* greatly expanded the territory in which the Supreme Court has an un-appealable final decree on what our elections mean, simply because the Supreme Court always has the un-appealable final decree on what the U.S. Constitution means. *Bush v. Gore* also expanded the Supreme Court's role in presidential elections by emphasizing the "unique federal concerns" of the presidency, supposedly justifying the Court in ignoring both jurisdictional and procedural doctrines that should have normally barred Supreme Court review or caused it to defer to the Florida Supreme Court, as pointed out in the dissents. The conventional wisdom that this case is "not a precedent" is the opposite of reassuring: If a case is not precedent, then that literally means that even if exactly the same facts came up again, the Court would be free to decide entirely differently.

One likely issue to justify Court intervention and an option to decide either way would be the California initiative that would purport to split the state's electoral votes along the lines of the victor in each congressional district, rather than "winner take all" as in the rest of the country. As a recent *Hastings Constitutional Law Quarterly* article concluded, whether the term "Legislature" in the Constitution (referring to the method of selecting presidential electors for the Electoral College) can be read to include deciding the method of selection of electors **by initiative** is something that reasonable minds can disagree on, and a "*Supreme Court decision either way is both plausible and defensible.*"⁴ However, this very plausibility and defensibility means that if the initiative were to pass, the U.S. Supreme Court has an *option* to decide the 2008 presidential election either way, and be more (seemingly) justified in doing so than they were in their *Bush v. Gore* election intervention of 2000. This option works out just the same if the Federal Circuit courts decide the issue to the liking of the U.S. Supreme Court. In that event, the Supreme Court can decline to

grant *certiorari*, and then most likely various newspapers around the country will salute the Court's noble "abstention" from politics when in fact the Court simply liked the result already obtained in the lower courts and thus left it undisturbed.

ELECTION TERMINATION EXPANDS FURTHER: TO THE ORIGINAL VOTE COUNT

As if not to be outdone by the Supreme Court, in a June 6, 2006 special election in California's 50th Congressional District, the House of Representatives actually terminated an election not during the recount, but during the very *first* count. In the infamous "CA-50" race, which was conducted to replace Randy "Duke" Cunningham, had who resigned in November 2005 after pleading guilty to bribery, wire fraud, mail fraud, and tax evasion charges, the Democrat, Francine Busby, led in many pre-election polls. However, on election night, using non-transparent optical scan counting systems, the Republican, Brian Bilbray, was reported to hold a narrow lead. A week later, on June 13, with over 65,000 ballots still uncounted and no result yet certified, the House, without objection, swore in Brian Bilbray as a Congressman.⁵

According to a case filed in state court when two voters that attorney Ken Karan and I represented contested the election by asking for a recount, Bilbray claimed that the premature swearing-in caused "exclusive jurisdiction" to transfer to the House of Representatives, depriving the California courts of any jurisdiction to investigate, recount or otherwise do anything about the election. According to Bilbray's lawyers, the "Qualifications Clause" of Article I, Section 5 of the Constitution meant that only Congress could review the qualifications of its own members, including that of election, after a swearing-in, even if it happened before the vote counts were completed.

The direct implication of Bilbray's legal arguments of "no jurisdiction" in California was that every action in the state after

June 13, 2006 was void, and that there was nothing the people of the 50th District could do, other than to ask the House of Representatives to reconsider their decision. Thus, the election had been legally terminated of significance or effect before all the votes had been counted.

HOW HAVA AND BUSH V. GORE ELIMINATED THE VOTER INTENT STANDARD

In 2002, Congress funded the virtual elimination of "neutral and transparent" balloting procedures via the Help America Vote Act. HAVA mandated for "uniform and nondiscriminatory vote counting" procedures that reflected the *Bush v. Gore* case holdings. Although HAVA purported to grandfather-in paper ballot systems—a point that helped obtain key votes for its passage in Congress—this alleged preservation of paper ballots, as we see in a 6th Circuit case, *Stewart v. Blackwell*, is an illusion at best. In that case, all voting systems that didn't give "notice" of undervotes to the voter (paper ballots cannot talk, and thus cannot give "notice") were held unconstitutional, while touch screen DREs and precinct-notice "optical scans" were upheld.⁶

The "voter intent standard" declares that if the voter's intent is apparent, the vote should count despite whatever technicalities may arise. This is a reflection of the special sovereign status that the act of voting holds. As the Massachusetts Supreme Court said back in 1996, "The voters are the owners of our government, and our rule that we seek to discern the voter's intention and to give it effect reflects the proper relation between government and those to whom it is responsible."⁷ As Gore's brief before the U.S. Supreme Court in *Bush v. Gore* noted, the "voter intent" standard was the universal standard *prior to* the adoption of voting machines in the United States. In contrast, the final ruling in *Bush v. Gore* called voter intent merely "a starting point" and imposed the requirement of detailed uniform "objective" rules. The whole idea,

however, is not to allow technicalities to disfranchise the voter if intent can be determined. The law nowadays, by requiring as HAVA does “uniform nondiscriminatory” rules for vote counting, makes this “sovereignty-of-the-voter” standard obsolete. In its place, voters must now *comply* with rules, instead of being *listened* to, as was true in the voter intent standard that has been used during most of this country’s history. Moving from government listening to voters to voter compliance is a *tectonic shift* in the relationship between voters and their government. We the People are in charge when we are voting (unlike the rest of the year, when we are subjects who have to obey the laws), and this is the critical difference that makes election secrecy unjustifiable, and distinguishes it from whatever justifiable secrecy might exist in other cases, such as in national security.

DEFENDING DEMOCRACY TODAY

Thinking of *Bush v. Gore*, “Loser Take All” might fairly be considered to mean democracy as well. But we do have nonviolent recourse, which, over the centuries, has shown itself to work pretty well. The inalienable rights of the Declaration of Independence have proved successful for abolitionists, suffragists, and for the modern Civil Rights movement, specifically because they were incapable, by definition, of destruction by any “mortal power” or government, as Hamilton put it. That these rights are “self-evident” means we don’t have to prove anything to anybody. Thus, we can take a cue from Thomas Jefferson and play the ultimate power card with regards to voting: inalienable rights. Though the situation seems complicated, it’s amenable to asking simple but powerfully clarifying questions like “Whose Country is this?” and “What’s the government’s primary job?” As the owners of this country, our employees/public servants cannot legitimately hide the vote counts from us. As Justice Brandeis said of transparency: “Sunshine is the best disinfectant.”

NOTES

1. James Madison, “Memorial and Remonstrance against Religious Assessments,” June 1785, http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html
2. “Debate on Amendment XII to U.S. Constitution,” December 1803, <http://presspubs.uchicago.edu/founders/documents/amendXIIs5.html>
3. See, e.g. Wash. Const. Art. I, § 32; see Also Arizona Const. Art II, sec. 1; Illinois Const., Art. I, § 23; Massachusetts ALM Constitution Pt. 1, Art. XVIII; New Hampshire RSA Const. Part 1, Art. 38; North Carolina N.C. Const. art. I, § 35; West Virginia W. Va. Const. Art. III, § 20
4. Hasen, Rick L., “When “Legislature” May Mean More Than “Legislature:” Initiated Electoral College Reform And The Ghost Of Bush v. Gore,” *Hastings Constitutional Law Quarterly*, April 2008.
5. Collins, Michael, “Congressional Election Nullified—Nobody Noticed,” Scoop Independent News, August 25, 2006, <http://www.scoop.co.nz/stories/HL0608/S00316.htm>
6. United States Court of Appeals for the 6th Circuit, Eric Stewart, et al v. J. Kenneth Blackwell, et al <http://www.ca6.uscourts.gov/opinions.pdf/06a0143p-06.pdf>
7. Ford Fessenden and Christopher Drew, “Counting the Vote: The Legal Precedent; For Texas and Other States, A Bump Is Sometimes a Vote,” *New York Times*, November 23, 2000.

1. Repeal the Help America Vote Act (HAVA)

This step will inevitably follow an in-depth investigation of how HAVA came to be.

2. Replace all electronic voting with hand-counted paper ballots (HCPB)

Although politicians and the press dismiss this idea as utopian, the people would support it just as overwhelmingly as national health care, strong environmental measures, withdrawal from Iraq, and other sane ideas.

3. Get rid of computerized voter rolls

It isn't just the e-voting machines that are obstructing our self-government. According to *USA Today*, thousands of Americans have had their names mysteriously purged from the electronic databases now used nationwide as records of our registration.

4. Keep all private vendors out of our elections

With their commercial interests, trade secrets and unaccountable proceedings, private companies should have no role in the essential process of republican self-government.

5. Make it illegal for the TV networks to declare who won before the vote-count is complete

Certainly the corporate press will scream about its First Amendment Rights, but they don't have the right to interfere with our elections. When they declare a winner before even know if the election was legitimate, they pre-define all audits, recounts and even first counts of the vote as the mere desperate measures of "sore losers."

6. Set up an exit polling system, publicly supported, to keep the vote-counts honest

Only in America are exit poll results not meant to help us gauge

the accuracy of the official count. Here are they are meant only to allow the media to make its calls.

7. Get rid of voter registration rules, by allowing every citizen to register, at any post office, on his/her 18th birthday

Either we believe in universal suffrage or we don't.

8. Ban all state requirements for state-issued ID's at the polls

As the Supreme Court smiles on such Jim Crow devices, we need a law, or Constitutional amendment, to forbid them.

9. Put all polling places under video surveillance, to spot voter fraud, monitor election personnel, and track the turnout

We're under surveillance everywhere else, so why not?

10. Have Election Day declared a federal holiday, requiring all employers to allow their workers time to vote

No citizens of the United States should ever lost the right to vote because they have to go to work.

11. Make it illegal for Secretaries of State to co-chair political campaigns (or otherwise assist or favor them)

Katherine Harris wore both those hats in Florida in 2000, and, four years later, so did Ken Blackwell in Ohio and Jan Brewer in Arizona. Such Republicans should not have been allowed to do it, nor should any Democrats.

12. Make election fraud a major felony, with life imprisonment—and disenfranchisement—for all repeat offenders

"Three strikes and you're out" would certainly befit so serious a crime against democracy.

CONTRIBUTORS

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