Election Reform in the Wake of the 2000 Presidential Election

Senior Project

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For a voter in most any precinct in Knoxville, TN, casting a vote for President on November 7, 2000 was quite simple. A voter would enter the polling place, show her identification, sign her name, and then step into a voting booth. Inside the booth, she would press a few buttons, look over her choices, just to make sure, and then press the all-important "VOTE" button. A very simple process, the largest inconvenience might have been waiting a few minutes in line. Little did that Knoxville voter know about the discord that would begin that night and continue for more than a year.

For the next two months the media in America (and many places around the world) was consumed by the developing story of the 2000 election. Every newscast, every radio talk show, and every newspaper had an update or a comment on the election controversy, and the American public was transfixed. Until December 12th, when the US Supreme Court decision was handed down, no one really knew who would be the forty-third President of the United States.

As America looks back at the lengthy progression toward finally naming our forty-third President, it is clear that something needed to be fixed. Many have blamed election officials, especially in the state of Florida. Others have criticized the media for premature

announcements. Still others have blamed the candidates themselves for making the process last so long. No matter who is to blame, all agree that the system needs to be fixed so that this problem will not reoccur.

America has looked to the government to fix our election system, and there has been no lack of effort in attempting to resolve the situation by any branch. It does not happen often, but our entire government, and the American public, seems to agree on this: our country is greatly in need of election reform.

ELECTION 2000

Progression and Outcome

The 2000 Presidential election began as any other. Campaigns ran for over a year between the primaries and the general election. Election polls prior to election day were almost even, there was no easy prediction to be made, but no one would have guessed how close it would be.

The polls closed on the evening of November 7th. News organizations were covering the election results very closely as they began to come in. Shortly after 7 p.m. several news organizations predicted that Al Gore would win

the state of Florida and its twenty-five electoral votes. This prediction was based on voter exit polls, turnout of voters at certain election precincts, and historical voting patterns (Bickerstaff 434). As the evening went on, however, George W. Bush commanded a substantial lead in the actual vote tally. News organizations began to reverse their call and predict Bush as the winner in Florida. By about 2 a.m., it appeared that Bush had indeed won Florida and the Presidency with a lead of around 50,000 votes. At about 2:30 a.m. Gore called Bush to communicate his intention to concede the race (435).

Then, as members of both parties and the public watched in amazement, Bush's lead in Florida shrank to fewer than 6,000 votes. Gore called Bush again to say that things had changed and he was no longer planning on conceding. By the next morning, Bush's lead in Florida had shrunk to 1,784, and it was now clear to all that winning the state of Florida was essential to winning the election for both candidates. Both parties sent hordes of lawyers to Florida to prepare for what became a massive legal and political battle over the certification of the winner of Florida's electoral votes (Bickerstaff 435).

With 6 million votes cast, and a margin of less than 2 thousand, a statewide recount was automatically triggered.

This recount was conducted by election officials using mostly the same counting equipment and procedures as they had on election night. When the recounts from Florida's sixty-seven counties came in, by one unofficial count, Bush's lead had dropped to 327 votes (Bickerstaff 435).

Over the next several weeks, different types of disputed ballots would be identified (which will be discussed later), but most of the controversy centered around ballots that the counting equipment recorded as having no vote for any Presidential candidate (undervote), or more than one vote for a Presidential candidate (overvote)(Bickerstaff 436).

Gore attorneys properly petitioned for manual recounts of undervotes in four Florida counties: Miami-Dade, Broward, Palm Beach, and Volusia. It soon became clear that it would not be possible to complete manual recounts by the statutory deadline of November 14th. At that time the Florida Secretary of State was to certify a winner of the election (Bickerstaff 437). The counties sought to file returns that would include the manual recounts after the deadline, but Secretary of State Katherine Harris rejected the appeal. She announced that she would certify the outcome of the election based on those returns she

received on or before November 14th and the returns of overseas absentee ballots (438).

The Florida Democratic Party and Al Gore filed actions seeking to compel the Secretary of State to accept the amended returns. The cases were certified by the District Court of Appeal to the Florida Supreme Court. On November 17th, the Florida Supreme Court enjoined the Secretary of State from certifying the election results until further order of the court. On November 21st, the Florida Supreme Court ruled that there should not be any "hyper-technical reliance upon statutory provisions" and ordered the Secretary of State to accept the amended returns received by 5 p.m. that Sunday the 26th. Bush appealed this decision, and by a unanimous vote, the United States Supreme Court vacated the Florida Supreme Court's decision and remanded the case to the Florida Supreme Court to clarify details that would determine if the case presented a federal question within the jurisdiction of the US Supreme Court (Bickerstaff 438).

During all this, Bush's lead had increased to 930 counted votes once the absentee overseas ballots were included. On November 26th, only Broward and Volusia counties had finished manual recounts, and that evening George W. Bush was certified the winner of the Florida

election by 537 out of approximately 6 million votes. Now, Gore was only left with the option of contesting the election itself to challenge the certified result. He filed an election contest in Leon County Circuit Court and after trial on December 3rd and 4th, his claims were denied by Circuit Judge Sauls (Bickerstaff 438-439).

Gore's attorneys quickly appealed Judge Sauls' ruling, and on December 8th, the Florida Supreme Court reversed Sauls' decision. The court ordered that the recounted return from Palm Beach County and the partially recounted return form Miami-Dade County be included in the totals. This reduced Bush's lead to 193 votes. The court also ordered that the 9,000 Miami-Dade undervote ballots (which had not yet been reviewed) be recounted by hand and any legal votes be added to the total statewide certifications (Bickerstaff 439).

Soon thereafter the United States Supreme Court stayed the order of the Florida Supreme Court. On December 12th, in a 7-2 decision, the US Supreme Court reversed the decision of the Florida Supreme Court. However, the court was much more divided than the 7-2 ruling suggests. Seven members of the court agreed that there was a violation of the Equal Protection clause of the Fourteenth Amendment. Yet, only five justices agreed that the correct remedy was

to stop the process and hand the election to Bush. The other four justices believed a recount should have been finished, either the one ordered by the Florida Supreme Court, or one more Constitutionally crafted. Nonetheless, the decision effectively brought an end to the legal battle. With this ruling, George W. Bush received the twenty-five electoral votes from Florida, and thus became the winner of the 2000 Presidential election (Bickerstaff 439).

Problems with the Election

No election is perfect. In almost every election in the United States, there is some flaw in the voting system. However, very rarely are these flaws as exaggerated or as widely publicized as those in Florida during the 2000 election.

Looking back, there were eight types of problematic votes, or potential votes, that existed on November 8th. Numerous state or federal lawsuits were filed challenging these different categories of potential votes or alleged voting irregularities, but few were ever addressed, and even fewer had any impact on the outcome of the election. The eight types of problematic votes are as follows:

1. An estimated 110,000 ballots on which no vote was counted because the electronic counting equipment recorded votes on the ballot for more than one presidential candidate (overvotes);
2. An estimated 43,000 to 70,000 ballots on which no vote for any presidential candidate was counted because the electronic counting equipment recorded no vote (undervotes);
3. Absentee votes in at least two counties (Seminole and Martin) where local election officials allowed Republican Party officials to correct absentee ballot applications after the applications had been received in the election official's office;
4. Differences between the initial count and a second tabulation in Nassau County that produced 218 fewer votes, with a net gain of 51 votes for Bush;
5. Overseas absentee ballots that were counted even though the envelopes containing the ballots failed to have the date postmarked as required by state law;
6. Differences in the condition and type of voting equipment used by Florida counties that are alleged to have caused significant disparities in the percentage of overvotes and undervotes among

counties, with the highest percentage of uncounted ballots (primarily overvotes) occurring in areas of the state with large African-American or Caribbean-American neighborhoods;

7. Ballots uncast because of the alleged intimidation of voters, primarily in African-American or Caribbean-American neighborhoods;
8. Registered voters who remained ineligible on election day because they had not corrected an erroneous finding by state election officials that they had out-of-state felony convictions.

(Bickerstaff 436-437)

To give a more concrete example to some of the types above, let us look at the 10,644 Miami-Dade County ballots that election officials excluded from the count because they were not readable by the counting machines. An unofficial recount found that 3,061 ballots bore some kind of marking that could be interpreted as a vote for either Bush or Gore (netting Gore a total of 49 votes) [type 2 above]; 4,892 ballots bore no markings for President [also type 2]; 527 ballots bore markings for more than one presidential candidate [type 1]; and 1,912 ballots bore clean punches in vacant ballot positions [also included in

type 2], with 1,667 of these just below the numbers corresponding to one of the two major candidates (Coenen 873).

Another major concern with the election in Florida was due to the layout of the ballot in Palm Beach County. The ballot used in Palm Beach County was a "butterfly ballot." This type of ballot had candidate names on both pages and punch-holes down the center. The layout of names on the ballot made it easy to correctly mark a vote for Bush; to do this, voters only had to match the first name with the first punch-hole. However, to mark a vote for Gore, one would have to match the second name on the left-hand side of the ballot with the third punch hole in the center of the ballot. If a voter mistakenly punched the second hole on the ballot, they cast a vote for Pat Buchanan whose name was listed on the right-hand side of the ballot, slightly higher than Al Gore's name and slightly lower than George Bush's name (Brady 59-60).

Also, the Palm Beach County ballots instructed voters to "vote for group". According to some Gore voters, this led them to punch two names for president (making their ballot an overvote) since there were holes next to both Gore and Leiberman's names (Brady 60).

Palm Beach County's election results suggested that a large number of people may have made these mistakes. Pat Buchanan received almost 20% of his total statewide support in Palm Beach County, which only contains 7% of the voters in Florida. Using these numbers, it can be determined that over 2,000 Gore supporters may have mistakenly voted for Buchanan. Furthermore, the number of overvotes was over 19,000. This number is very high compared to those of other counties. These two facts lead to a great probability that numerous Gore votes were lost due to the ballot form. With the election result in Florida ending in a difference of less than 1,000 votes, the butterfly ballot might have proved to be the difference in the outcome of the Florida election (Brady 60).

Reactions to the 2000 Election

There have been many responses to the 2000 election and all its problems. Some responses do not directly address problems specific to this election. For instance, reformers have debated the merits of electing the President by popular vote since the beginnings of our country. The occasional occurrence of a candidate winning the presidency without a plurality of the popular vote inescapably

resurrects this issue. The 2000 election proved to be no exception, but it is unlikely to produce any such reform (Coenen 872).

Less radical proposals for altering the electoral college system have also come up. One example is replacing the winner-take-all system currently employed by forty-eight states with a proportional system tied to either the statewide popular vote or the popular vote of individual electoral districts (Coenen 872). Other, more germane reactions have come up on both the state and federal level. Some of these will now be discussed.

Reaction in Florida

Florida's Governor, Jeb Bush, recently signed a state election reform law that makes many improvements to the Florida election system. The first and most exciting change is the total elimination of punch-card voting. Instead, most Florida voters will now use optical-scanning technology to vote. This technology is similar to what is used on the SAT and other standardized tests. This system requires voters to fill in a bubble or an arrow on a sheet of paper to indicate their vote. In the 2000 election, this type of optical scanning technology outpaced all other systems by leaving the fewest invalid and uncounted

ballots. An additional benefit to the optical scanning technology is that voters can test the validity of their ballot before they turn it in. To do this, the voter simply runs his or her ballot through a scanner, and the machine will tell the voter if a counting machine will be able to read the ballot or not (Schwartz).

Another provision in the Florida election reform law deals with provisional ballots. Provisional ballots are given to people who arrive at a polling place and discover that they do not appear on the voter registry. With provisional voting, these people are allowed to vote, while election officials will later verify the validity of the vote. Without provisional ballots, many eligible voters are turned away because of a mistake in the voter registry (Schwartz).

A third change included in the reform law is an allotment of $5.9 million to both voter education and training of poll workers. Before this law, there were very low expenditures in both these areas (Schwartz).

Also, this law extended the period for certification of election results. It has been changed from seven to eleven days. This would allow more time to conduct recounts if necessary. Furthermore, the new law requires hand recounts in all close elections. On the other hand,

state officials can still delay recounts as they did in the 2000 election to attempt to prevent recounts from being completed (Schwartz).

FEC Reaction

The Federal Election Commission (FEC) is charged, by Congress, with administering and enforcing the Federal Election Campaign Act (FECA). The FEC is an independent regulatory agency whose main duties deal with the disclosure and regulation of campaign finances, but they also deal with some election administration (FEC Homepage).

In response to the 2000 election, the FEC is in the process of revising its "Voluntary Standards for Computerized Voting Systems" (the Standards). This set of documents, designed to guide the development of computerized voting systems, provides functional and technical requirements for a number of different voting systems. It also provides testing specifications and processes for these requirements. The Standards, which revise those published in 1990, are voluntary. However, thirty-eight states have chosen to adopt them either in whole or in part, and currently use them to design systems and obtain equipment. The Standards also address the

following: ways to meet the needs of disabled voters; specific software standards for ballot counting, vote processing, etc.; performance requirements to provide direct feedback to the voter indicating an invalid vote (this is part of the new Florida law discussed earlier); and performance requirements for the content and labeling of data provided to the media and other organizations prior to certification (FEC Record 1-2).

The Commission released this draft of the Standards for public comment on December 13, 2001. An earlier draft had been released in July of 2001, and the FEC has since made substantive revisions (FEC Record 1-2).

Legislative Reaction

In the wake of the 2000 election, many Americans have turned to Congress to fix the problems that became apparent in Florida and that undoubtedly exist in other parts of the country. True to form, Congress has given an extensive response to this outcry.

In the first forty-five days of the 107th Congress, six bills were introduced in the Senate or House of Representatives dealing with standardizing voting procedures across the country. These proposals have

centered on two key procedural reforms: 1) Minimum national standards for voting devices or machines, and 2) A uniform national ballot (Coenen 874).

One bill, introduced by Senator Reid of Nevada, and entitled the National Election Standards Act of 2001, would instruct the FEC to establish uniform national standards for federal election procedures, including the type of ballots used and the use of counting machines. Other bills, introduced into both houses of Congress by members of both major parties, would form a new national commission to study these issues. Each bill takes a slightly different approach, but most focus on having the commission investigate and recommend changes to voting procedures and technology. All of these bills raise the implication of Congress imposing national election-technology standards and uniform ballots for federal elections (Coenen 874-5). This in turn raises the question of Congress's constitutional power to do so, which will be addressed in the next few paragraphs.

This is not the first time in history that there has been uproar about the federal election system. In the 1876 election between Rutherford B. Hayes and Samuel J. Tilden, there were four states that sent more than one slate of electors to Congress, one slate for Hayes and one slate for

Tilden. The reform legislation that followed focused on intracongressional counting of electoral votes and encouraged timely electoral vote reporting by the states. It did not, like the proposed reforms of today, place any concrete duties on states or alter any "on-the-ground" election processes (Coenen 876). The proposed reforms of today however, are more far-reaching and thus require more constitutional scrutiny.

Constitutional authority for these proposed reforms could come from many different sources; some possible sources are better than others. Some years ago, one might have seriously considered the Commerce Clause of Article 1, Section 8 to justify national election reform. It is possible to argue that these ballots, and other pieces of election equipment in question, help determine who is President, and the President plays a key role in shaping national economic policy, which greatly affects interstate commerce. However, modern Supreme Court decisions lead us away from this line of justification. For instance, in *Printz v. United States*, the Court held that Congress may not, under the commerce power, force state officials to administer federal programs. To require state officials to use federally mandated ballots would violate this decision.

Therefore we must turn elsewhere for legal authority (Coenen 879-80).

Another possible source of authority could be the Fourteenth Amendment and its Section 5 enforcement clause. Through *Bush v. Gore*, the US Supreme Court has already established that the lack of consistency in Florida's hand-recount standards was a violation of the Fourteenth Amendment's equal protection clause. Thus, according to Section 5, Congress may "enforce, by appropriate legislation," the provisions of the Amendment. However, due to the proportionality limitation established in *City of Boerne v. Flores*, Congress could not require sweeping changes. For instance, Congress most likely could not require that every voting precinct in the country use optical scanners or the exact same ballot (Coenen 881-6).

There also exists an implied congressional power to regulate federal elections. This power is founded in court cases starting with *Ex parte Yarbrough*. In *Yarbrough*, the Court spoke broadly of the federal government's "power to protect the elections on which its existence depends from violence and corruption," as well as its duty to ensure that federal office holders are in fact "the free and uncorrupted choice of those who have the right to take part in that choice." (*Yarbrough*) Drawing on Yarbrough, the

Court, in *Burroughs v. United States*, invoked the federal government's inherent "power of self protection" in passing legislation to protect its own elections (Burroughs). It went on to say that since Congress has the power to protect the election of the President, it could develop means to attain that end as long as those means are really calculated to that end. Drawing from these cases, we can see where the Court may uphold legislation to further regulate federal elections (Coenen 887-9).

Successful Legislation

With so many pieces of legislation introduced into both the House and Senate, it was evident that few of the bills would make it very far in the legislative process. With all of the bills being similar in nature, obviously, only one bill will make it to the desk of the President. Two pieces of legislation have survived from the many that were introduced. One originated in the House and the other in the Senate. The substance of these bills and the reactions to them will now be addressed.

House of Representatives Bill 3295

On December 12, 2001, exactly one year after a controversial Supreme Court ruling decided the 2000 presidential election; the House easily passed a bill to reform the nation's election system. The bill was titled the "Help America Vote Act of 2001", and would affect all federal elections including presidential and congressional elections. The 363 to 63 passage vote showed strong bipartisan support for this piece of legislation. Representative Robert Ney, a Republican from Ohio, and Representative Steny Hoyer, a Democrat from Maryland, primarily sponsored the bill. These two men are the chair and ranking Democrat, respectively, on the House Administration Committee (Walsh, House Approves…).

H.R. 3295 would provide a total of $2.65 billion over three years to upgrade voting equipment, improve the accuracy of voter registration lists, recruit and train poll workers, and enhance accessibility to polling places for people with disabilities. The funding would include a one-time payment of $400 million to states and counties to replace punch-card voting systems, which were used by more than one-third of U.S. voters in the 2000 election (Walsh, House Approves…).

The bill would also require states to adopt "minimum standards" for voting, but would allow the states and localities considerable leeway in deciding how to meet the standards (Walsh, Election Officials…). The bill would also require the creation of statewide voter registration lists linked to local precincts, a uniform definition of what constitutes a vote, and a system for provisional voting. States would be required to meet the minimum standards even if they did not accept federal funds to upgrade their voting systems (Walsh, House Approves…).

Senate Bill 565

Hours after the passage of H.R. 3295, Senators announced details for a similar bill to come before the Senate. This bill, entitled the "Equal Protection of Voting Rights Act of 2001", passed the Senate on April 11, 2002 by a vote of 99 to 1. Senator Christopher Dodd, a Democrat from Connecticut, and Senator Mitch McConnell of Kentucky, were the primary sponsors of the bill. Senator Dodd is the Chairman of the Senate Rules and Administration Committee, and Senator McConnell its ranking Republican. Also making major contributions to the bill were Senators Christopher Bond, a Republican from Missouri, and Charles

Schumer, a Democrat from New York (Walsh, Election Reform…).

The Senate bill establishes three basic minimum requirements that would need to be met by the 2004 election. Those requirements are as follows, in the words of Senator Dodd:

"First, it requires that voting systems meet minimum standards on error rates, provide access for the disabled and language minorities, provide notification to voters of overvotes, and provide voters an opportunity to correct the ballot before it is tabulated." Second is a requirement of provisional voting. And finally, "to address fraud concerns, states must establish statewide, computerized voter registration lists and require verification of identity for first-time voters who register by mail. The [bill] also creates a new Election Administration Commission to ensure ongoing federal support for the administration of federal elections." (Dodd)

The Senate bill would provide up to $3.8 billion in federal funds, over five years, for meeting the new requirements, upgrading voting equipment and procedures, educating voters, and training poll workers (Dodd).

Differences in the Bills

These two bills have the same goals for election reform, but each takes a somewhat different approach toward those ends. The Senate bill sets minimum standards for the states to meet in certain aspects of election administration, whereas the House bill gives more leeway to the states by requiring the states to set their own minimum standards. The House bill includes a one-time payment of $400 million for replacing punch-card voting systems; the Senate bill has no such provision. However, the Senate bill provides $1.15 billion more in total funding. Another difference is that the voter identification requirement of the Senate bill is not echoed in the House bill (Walsh, Election Reform…).

Reactions to the Bills

Many political actors have expressed their praise or criticism for these bills. Some favor one over another, others oppose both, still others do not care which one is enacted, as long as something is done.

Certain interest groups have expressed their feelings on these bills. H.R. 3295 was opposed by several civil rights and disability rights organizations as well as the League of Women Voters, which described it as a

"significantly flawed bill" (Walsh, House Approves…). When ask about S. 565, the League stated that the Senate bill "can be the antidote to the flawed election reform bill recently passed by the House." Also, the American Association of People with Disabilities described the Senate bill as "a huge victory for the disability community." (Dodd) On the other hand, Civil Rights groups are skeptical of the identification requirement of the Senate bill; they fear that it could be used to deny minorities the right to vote (Walsh, Election Reform…).

States have also voiced opinions on the matter. A survey of election officials in 36 states and 208 local jurisdictions found that a strong majority would welcome federal grants to help pay for improvements in voting procedures and equipment. However, those same officials oppose the federal government setting standards for elections as a condition of providing more funding, with the opposition stronger among state elections officials than among their local counterparts (Walsh, Election Officials…).

President Bush has also voiced his opinion on each bill. Following the passage of H.R. 3295, he issued a statement saying the bill "goes a long way" toward the changes he advocates (Walsh, House Approves…). After the

Senate passed its bill, Bush praised the Senate action but indicated his support for the House approach to the issue. He said he hopes for the enactment of legislation that would "respect the primacy of state and local governments, and envision a limited but responsible role for the federal government." (Walsh, Election Reform…)

The Future of the Legislation

So, what happens now? There are two different proposals for election reform, and both houses of Congress must pass the exact same piece of legislation before it can go before the President. On May 1st, both Houses appointed members to the conference committee charged with working out the differences in the two bills. This committee will hopefully produce one bill that will go back to both houses of Congress for passage. Assuming both houses adopt the bill, it will then go to the President for his signature or veto. From there, depending on the final wording of the bill, a commission will be established and they will begin working toward the 2004 election.

Conclusion

No matter what form is taken, and what words are used, America will soon have an answer to its need for election reform. Although the process of realizing problems is a rough one, those who learn from the problems always come out better than they were before. America struggled with the Election of 2000, but it will emerge a stronger nation because of the challenge. The proposed legislation should, in the words of Senator Dodd, "ensure that every eligible American has the opportunity to both cast a vote and have that vote counted," (Dodd). Hopefully, the larger effect will be even greater than that. The efforts of so many will eventually restore the faith of Americans in their election system, the supreme icon of the democracy we treasure above all.

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