

Cambridge University Press

978-1-107-04863-8 - Election Administration in the United States: The State of Reform

After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

Excerpt

[More information](#)

PART I

BUSH V. GORE IN PERSPECTIVE

Cambridge University Press

978-1-107-04863-8 - Election Administration in the United States: The State of Reform
After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

Excerpt

[More information](#)

Cambridge University Press

978-1-107-04863-8 - Election Administration in the United States: The State of Reform
After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

Excerpt

[More information](#)

I

Disputed Elections Post *Bush v. Gore*

Mark Braden and Robert Tucker

INTRODUCTION

The two most vital qualities of any voting system are simple to identify: (1) the winner wins – that is, the candidate with the most lawful votes is elected; and (2) the loser and his or her “reasonable” supporters believe they have lost. All other considerations are secondary.

This chapter provides a broad overview of U.S. practices for the resolution of disputed elections and inventories types of election disputes. Then it examines in some detail four election disputes that took place after the *Bush v. Gore* decision. Three of the disputes are studied because they arguably are the most widely followed and extensively contested election results since 2000: Washington gubernatorial (2004), Minnesota Senate (2008), and Florida Thirteenth Congressional District (2006). The final dispute, an Ohio Common Pleas Court Juvenile Judge contest, is examined because, as of early 2011, it was the only significant decision using *Bush v. Gore* as precedential authority in an election contest or recount.

TYPES OF ELECTION DISPUTES AND MODES OF RESOLUTION

The standard American pattern for determining election results, although not universal, is election night tabulation at each individual polling or precinct location followed by a canvassing of ballots and tabulated results at a central location (usually a county board of election) with an official certification of the results. This is followed by a period during which a recount may be conducted and/or a contest filed. In some jurisdictions, the recount and/or contest must be filed prior to certification of the results.

There is no common law basis for either an election recount or a contest, so the rights of candidates or their supporters are principally set forth in state statutes¹ or regulations. The details vary greatly among the states, but they are

Cambridge University Press

978-1-107-04863-8 - Election Administration in the United States: The State of Reform After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

Excerpt

[More information](#)

similar in general framework. The terms *recount* and *contest* often are used interchangeably, but they are more properly understood as two generally distinguishable processes.

Typically, a contested election is a formal challenge to the outcome of an election – a charge that the declared winner is, for any number of possible reasons, not the true winner. A recount is a retabulation of the vote, simply another count. A recount is usually employed when the challenger alleges mistakes/improprieties in the tabulation of the votes. Recounts are most often not a formal part of a judicial contest procedure, but a separate administrative process.

Recounts have a standard specific resolution, namely a new tabulation of votes with a “new” official result. Election contests can have three possible alternative outcomes: (1) the election result and certification are confirmed (the most common); (2) the election certification is changed and the contesting candidate is certified the winner; or (3) the election is voided with no candidate receiving a certification and a new election is required to fill the vacancy.

Although state election statutes generally provide for an administrative recount procedure, judicial involvement is occasionally set forth in statute, and if not set forth in statute is often sought by the party unhappy with the proposed administration. The most prevalent recount system is mandatory or automatic recounts at the expense of the state or local governments if the difference in votes between candidates is less than a certain percentage figure. The alternative model is a recount done at a candidate’s request (a number of states have a hybrid model with provisions for both automatic and candidate-requested recounts).

Because most recounts must be conducted prior to the issuance of any certificates of nomination or election, strict statutory timelines govern the initiation of the recount process. In the states where an election official starts the process, the statutes usually require the official to order the recount as soon as it is clear that the race was close enough and no later than the day set aside for the official canvass of the vote. In practice, election officials generally order a recount as soon as they know one is warranted in order to minimize a delay in the official certification of the election. In states where candidates or voters initiate the process, the law spells out deadlines for filing the recount request or petition. The specified period for filing is relatively short, with no state permitting a recount request to be filed beyond ten days from the date of the canvass.

In seeking to make sense of election administration of recounts and contests both before and after the Supreme Court decision in *Bush v. Gore*, there are a baker’s dozen of key points to understand.

First, a very tiny percentage of the individuals who count the ballots on election night are professional election officials. Most hold other jobs. Many are retirees or students. They work at a polling place maybe twice a year, from before 6:00 A.M. to often after 9:00 P.M., for modest pay. Even the observers of the tabulation process are usually party or candidates’ volunteers, not professionals.

Cambridge University Press

978-1-107-04863-8 - Election Administration in the United States: The State of Reform
After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

Excerpt

[More information](#)

Second, in comparison to other Western democracies, the United States has many more elected officials and ballot issues. In America, counting the ballots on an average election day is a much more difficult and lengthy process because the ballot is longer and more complex. There are simply many more ballot places (items to count). The vast expansion of mail and absentee voting has expanded and will continue to expand the number of the ballots that are the most problematic to count.

Third, while technological advances hold a hope that, in the future, the difficulties of remotely cast ballots and verifying the eligibility of those casting ballots will be significantly eased, at the current time these “tech” fixes are only theoretical and not practicable. Internet ballot casting and verification processes are still future possibilities, not current programs. Also, faxed and phone voice transmittals of ballots are viable alternatives for the casting of a ballot but, at present, not for the casting of a secret ballot.

Fourth, because of the large number of elected offices and ballot measures in the United States, every election year sees a number of recounts, but only a very small *percentage* of election results in the nation are recounted.

Fifth, very few recounts result in reported judicial opinions because most recounts are administrative in nature, very fact driven, with strict statutory time limits.

Sixth, only a small percentage of recounts leads to contested elections. The candidates who are the apparent losers usually are too physically, emotionally, financially, and politically exhausted to pursue a contest. The “political sore loser” label is not easily shed. The contestant always has the burden of proof and the regularity of election results is a strong presumption to overcome, with judges commonly expressing their desire that the voters, not themselves (judges) decide any election. These factors combine to make actual election contest actions rare in comparison to recounts.

Seventh, very few of these recounts (or contests following recounts) receive national attention because most involve only local candidates or ballot issues. During the 2010 election cycle, for example, despite the fact that the 2010 congressional races were among the most widely and seriously contested races in recent American political history, there were fewer than ten House recounts and only a single U.S. Senate recount.² Moreover, despite the existence of recounted congressional elections in 2012, no election contest actions were filed in the U.S. House or Senate. There were also no recounts in gubernatorial contests that year.³ It is important to appreciate that most of what we think we know about recounts comes from a handful of highly publicized high-stakes recounts, and that these cases are highly atypical. This applies especially to *Bush v. Gore*, where both federal and state issues were implicated and courts construed both federal and state statutes.

Eighth, not only are the implications of a case like *Bush v. Gore* limited for future recounts because of the peculiar nature of the context and litigation history in that case (and the Supreme Court’s insistence on its uniqueness regarding

its potential use as a precedent), but even without these limitations, it would necessarily be limited in its impact because the conditions for recounts to take place are, by and large, set by state or local statute, and contests that are not close enough to trigger a recount according to those statutes (i.e., the vast preponderance of all contests) will remain not close enough to trigger a recount.

Ninth, in 2000, and especially afterward, virtually all the journalistic attention was devoted to *Bush v. Gore*, but that case was but one of many involving the presidential race in Florida, and arguably not even the most important. Although what is remembered from Florida are disputes about counting procedures (how to interpret dangling and other types of chads as signals of voter intent, whether there was any legal remedy for the effects of the voter confusion caused by the so-called butterfly ballot in Palm Beach), other cases litigated during that controversy dealt with issues like the admissibility of some ordinary mail ballots and many military ballots because of problems like the legibility/absence of signatures, and whether there was reliable recorded information about date of receipt or clear postmarks showing when a ballot was sent. Also there was controversy about registration purges that took place prior to the election allegedly disproportionately deleting minorities from registration rolls, and about Florida's rules for (felon and) ex-felon disenfranchisement that operated to reduce the percentage of African Americans and Hispanics in the electorate.

Tenth, although there are an unlimited number of ways for voting and vote tabulations to be miscarriages, they can be placed into three general categories: (1) malfeasance; (2) mistakes/misfeasance; and (3) acts of God.

It is beyond the scope of this chapter to discuss these three categories in detail; however, a brief outline may be useful.

Malfeasance

- A. Candidate/Agents *Tunno v. Veysey*, H. Rep. Wo. 92–626, 92d Cong. (1970)
 Also see: *Moreau v. Tonry*, 433 F. Supp. 620 (E.D. La 1977)
- B. Election Officials *Stevenson v. Thompson*, In re Contest for Governor, 444 N.E.2d 170 (Ill. 1983)
 Roe v. State of Ala. Evans (11th Cir. 1997)/*Alabama/Chief Justice*
 Anderson v. United States, 417 U.S. 211 (1974)
- C. Third Parties/Voters *United States v. Franklin*, 181 F.2d 182 (7th Cir. 1951)
 United States v. Girdner, 754 F.2d 877 (10th Cir. 1985)
 United States v. Clapps, 732 F.2d 1148 (3rd Cir. 1984)
 Dornan/ Sanchez, U.S. House (1998)

Cambridge University Press

978-1-107-04863-8 - Election Administration in the United States: The State of Reform
After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

Excerpt

[More information](#)

Disputed Elections Post Bush v. Gore

7

Misfeasance/Mistakes

A. Mistake Officials

- 1) Math/counting. *Thorsness v. Daschle*, 285 N.W. 2d 590 (S.D. 1979)
- 2) Missed or uncounted ballots (absentee/emergency/provisional/regular)
- 3) Wrong districts – VA Rep., Dist. 14, 1984
- 4) Ballot printing errors: *Hendon v. N. Carolina St. Bd. of Election*, 710 F.2d 177 (1984); *Kohler v. Tugwell*, 292 F.Supp. 978 (E.D. La 1968); Aff'd 393, U.S. 531 (1969). In Re Election Atty. Gen. of Ohio 569 N.E. 2d.447 (Ohio 1991)
- 5) Machine failure/voting machine setup. *Buonenno v. DiStefano*, 430 A.2d 765 (1981)
- 6) Absentee ballots *Akizaki v. Fong*, 51 Haw. 354 (1969)
- 7) Registration errors. In Re General Election – (531 A. 2d. 836 Penn. 1985)
- 8) Noneligible voters (felons, aliens)

B. Mistake Voter

- 1) Absentee ballots
- 2) Identifying marks
- 3) Illegible/unclear
- 4) Over-vote

Acts of God

- A. Floods
- B. Fires
- C. Earthquakes

Eleventh, there are two alternative views as to what a contestant must prove to overcome the presumption of valid official election results. Some jurisdictions require the contestant to show that he or she received the most legal votes – the “but for” analysis: I received the most lawful votes cast for the office, but for the intervening misfeasance, malfeasance, act of God, or a combination thereof.⁴ The other view requires that the contestant show only that it is impossible to determine which candidate received or would have received the most lawful votes for the office.⁵

Contest actions focus predominantly on two issues: (1) uncounted ballots; (2) illegally cast/counted ballots.

Uncounted ballots can be simply lost or overlooked ballots common to all large elections. The argument of whether these ballots should be counted when found usually revolves around security or chain-of-custody questions. The most often misplaced ballots are absentee ballots, although election day systems using paper ballots (scan or traditional) also lose ballots regularly.

Cambridge University Press

978-1-107-04863-8 - Election Administration in the United States: The State of Reform After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

Excerpt

[More information](#)

In every election, absentee and provisional ballots are rejected for specific reasons. The validity of absentee ballots depends on a number of legal requirements such as a signature, oath, witness(es), notary, timely arrival, or postmark. With so many steps, voters and election officials can and will make many mistakes. Decisions on absentee and provisional ballots are at the center of many election disputes because uncounted absentee and provisional ballots are usually from specific precincts, and often an unopened ballot can be linked to a specific individual. These ballots can be placed into various categories from which contestants can conclude with varying degrees of certitude their electoral impact if counted.

Twelfth, illegally cast ballots present especially difficult questions in election contests. Of course, the first issue is the identification of the illegal ballots. Principally, these are ballots cast by individuals not eligible to vote in a particular race⁶ or a group(s) of ballots defective under state law for a variety of reasons.⁷

Identifying illegal ballots cast is only the initial evidentiary step. The next step is how to determine the impact of the illegal ballots on the election. Most elections have improperly cast ballots, but are they sufficient in number to be material? Is their number sufficient to change the result or bring it into question?

In some jurisdictions, it will be sufficient simply to show that there are more illegal ballots counted than the margin between the candidates for an election to be voided. However, other jurisdictions require some form of evidentiary presentation on how the illegal votes were cast. This can be in the form of direct testimony, which has obvious problems in the context of secret balloting,⁸ or alternatives such as proportional reductions.⁹

Finally, no electoral process is sufficiently exact in design or execution to determine outcomes widely held to be legitimate without recount and contest processes. For example, when the ballot is a piece of paper given to a voter to be marked in secret, the voter's intent can be difficult to determine. As anyone experienced with large recounts can attest, the artistic originality or ingenuity of some voters defy reasonable intent analysis. While a number of methods designed to replace paper ballots have advantages in making recounts easier, each has its own problems.

The optical scan system is now the most widely used balloting system in the United States. All optical scan systems have inherent problems¹⁰ because each ballot is still a piece of paper. Each ballot can be folded, bent, mutilated, gotten wet, or lost. Individual optical scan ballots are pieces of paper that are always lost and/or found in recounts. The misplaced/lost/found ballots are then subjected to security issues. Are these ballots properly cast? Have they been or could they have been tampered with? It is difficult to lose large mechanical lever voting machines; even smaller DRE systems generally are not misplaced. Opposition to electronic voting devices is growing, however, due to a perception held by at least some voters and activists that DRE systems are not secure,

Cambridge University Press

978-1-107-04863-8 - Election Administration in the United States: The State of Reform
After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

Excerpt

[More information](#)*Disputed Elections Post Bush v. Gore*

9

and historically there has been concern about proofing mechanical lever voting machines against tampering.

We now turn to four recent recounts and subsequent contests that illustrate many of these points.

FOUR RECENT RECOUNTS

The Washington Gubernatorial Race – 2004

The 2004 Washington gubernatorial race followed the standard textbook path for a disputed election: count, machine recount, and hand re-recount – all administrative but with various court disputes before and during each “count” concerning how or what to count. The certification of the election was followed by the filing of an election contest in Washington Superior Court. The 2008 Franken/Coleman Senate dispute also played out in a number of different court proceedings. It was classic recount litigation. The recount was principally a dispute about uncounted absentee ballots, with the candidate that was behind at each stage seeking to have additional ballots counted.

The basic facts of this dispute can be briefly set forth. Initial tabulations of the ballots cast in Washington’s general election on November 2, 2004, showed Dino Rossi (R) receiving the most votes for the office of governor. The margin between Dino Rossi and his opponent, Christine Gregoire (D), was merely 261 votes out of more than 2.8 million votes counted – less than one half of one percent of the total number of votes cast for the two candidates. Washington Secretary of State Sam Reed¹¹ ordered a mandatory machine recount pursuant to Washington statute.¹² After the machine recount, Rossi led Gregoire by only 42 votes statewide. The ballots were then hand counted, resulting in a Gregoire margin of 129 votes. Of course, these basic facts leave out the ten lawsuits and the continuous roller coaster of changing vote totals.

The initial counting process in Washington is much slower than in most states because of the extensive use of mail/absentee ballots. Washington provides that a mail ballot postmarked by election day must be counted. This results in some valid mail ballots arriving at county election offices two weeks after election day. Washington also provides for a more “liberal” provisional voting procedure requiring that provisional ballots cast anywhere in the state by registered voters be counted in statewide races.¹³ The combination of these factors resulted in an estimated 850,000 uncounted ballots remaining following election night tabulations. But, even with such a large number of uncounted ballots, it was quickly clear to all observers that the election result would be extremely close and a recount very likely.

By November 17, all county canvassing boards certified their general election returns. Rossi had “won” by 261 votes out of 2.8 million.

Cambridge University Press

978-1-107-04863-8 - Election Administration in the United States: The State of Reform After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

Excerpt

[More information](#)*Litigation Pre-recount*

The first lawsuit was filed in King County Superior Court on November 12, 2004, before the initial canvass was even completed. The Democratic Party brought suit, seeking the names and addresses of those individuals whose provisional ballots were ruled invalid by county election officials. The county's failure to release this information was argued to be a violation of Washington State and federal constitutional equal protection rights and state public disclosure rules. Although it was far from clear that any county in the state had ever released this information, over the objections of the Republicans, the King County Superior Court ordered that the county release the 929 names to the Democratic Party. Democratic Party workers sought to contact those on the list identifiable as Democratic voters, attempting to qualify their ballots before the completion of the canvass. This process produced few, if any, changes in provisional ballot counts.

Recount I – Machine

The mandatory recount began on Saturday, November 20, 2004. The Washington electorate casts most of its votes on optical scan ballots. In theory, the mandatory machine recount consists of simply repeating the election night process of running the ballots through optical scanning machines for tabulation. This first recount, done by machine, followed a pattern familiar to anyone experienced with disputed elections. Ballots that were not counted in the initial count were discovered and simple tabulation errors found.

In Snohomish County, an election worker discovered 224 properly marked but uncounted ballots sitting in a tray in a secured room. The ballots had been prepared for counting, but mistakenly placed in a stack of empty trays. When additional trays were stacked on top, the ballots were buried out of sight. Despite the newly added votes, the county's recount of more than 350,000 ballots resulted in a net change of only one vote. The "lost" ballots in Snohomish County were evenly divided between the candidates.

Cowlitz County reported that ninety-nine fewer ballots were counted in the machine recount than during the original count. Lost ballots? No, a careful review of the tabulation records showed that a stack of absentee ballots was inadvertently counted twice on election night. The county reported twenty-nine fewer votes for Gregoire and forty fewer votes for Rossi, a net gain to Gregoire of eleven votes. Minor changes were recorded in many precincts around the state; however, the recount outside of King County resulted in very little net change.

By the end of the day on November 22, 2004, the machine recount was completed in twenty-four counties. Most of these results favored Rossi, adding some twenty-five votes to his original 261-vote lead. However, King County had yet to report. The significant net change in the election results following the machine recount was largely attributable to changes in the results in King County, the largest and most heavily Democratic county in the state.