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### **Bush vs. Gore: Evermore: Plaintiffs Use High Court Voting Case in Other Lawsuits**

by William C. Smith

Divining the effects of any court case is about as easy as predicting the next big pop music craze. But when the U.S. Supreme Court essentially decided the presidential election in *Bush v. Gore*, 121 S. Ct. 525 (2000), the High Court seemed to be expecting a one-hit wonder.

The ruling dealt only with "the special instance of a statewide recount under the authority of a single state judicial officer," the per curiam decision said. "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."

#### Equal Protection Issues

Yet, if the Court meant to limit the precedential effect of its Dec. 12 decision, disgruntled voters and their lawyers haven't taken the hint. The case that caused Al Gore to quit his presidential election bid is fueling at least five lawsuits.

All focus on the equal protection analysis that the Court wielded to bar the recount of disputed presidential ballots in Florida. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another," the Court said.

And despite the majority's insistence on limiting the ruling to the Florida situation, the cases use *Bush v. Gore* as precedent. As Stanford law dean Kathleen Sullivan predicted shortly after the decision was handed down, *Bush v. Gore* would serve as "an invitation to lawyers across the country to bring an avalanche of lawsuits claiming that [counting] people's votes differently and with different rates of error in different counties violates the equal protection clause."

The Supreme Court "opened a path as wide as an 18-wheeler truck" for voters challenging county-by-county inequities in electoral systems, says Cincinnati attorney Stanley M. Chesley, co-counsel for several of those suits. "If you're looking for a good precedent, you can't do better than that."

Among the states in which lawsuits have been filed is Florida, ground zero for electoral disputes. In January, the National Association for the Advancement of Colored People, the American Civil

Liberties Union and a coalition of other civil rights groups sued state and county election officials, claiming that the state's African-American voters were disproportionately disenfranchised. They blamed faulty election machinery, errant voter registration processes, and illegal purging of qualified voters from election rolls.

The complaint, filed in federal District Court in Miami, alleges violations of the federal Voting Rights Act, and the 14th Amendment's equal protection and due process guarantees.

In announcing the suit in January, Theodore Shaw, counsel for the NAACP Legal Defense Fund, called it "ironic" that the Supreme Court's decision halting the Florida recount also relied on the 14th Amendment, which was adopted after the Civil War to protect recently freed slaves.

"We are going to court to ensure that the equal protection clause serves its original purpose . . . to protect African-American voters from disenfranchisement," he said.

"Unfortunately, the Supreme Court's decision halting the manual recount focused more on dimpled chads than disenfranchised voters," added ACLU legal director Steven R. Shapiro.

Another class action against Florida officials focuses on the "inherently defective" Votomatic punch card ballot system used in 15 counties across the state. The complaint, filed in Tallahassee circuit court, quotes the Bush Court's statement that Florida has a constitutional duty to "avoid arbitrary and disparate treatment of members of its electorate."

"The continued use of defective voting machines, with known and predictable failures in their ability to accurately and fully count ballots, while citizens of other counties are afforded preferential exercise of their franchise, constitutes just such 'arbitrary and disparate treatment,'" says the complaint filed by Chesley, along with Michael D. Hausfeld and Matthew F. Pawa of New York's Cohen, Milstein, Hausfeld & Toll.

"There is no rocket science here," the lawyers wrote in a March 9 motion for injunctive relief. They point out that the same Bush decision that warned against "valuing one person's vote over that of another" also recognized that Votomatic machines "produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter."

Pawa dismisses the suggestion that Bush is limited to inequities in judicially mandated statewide recounts. "In our system of justice, you can't have a one-case rule," he argues. "Why should one type of disparity be more significant than any other?"

### Blame It on the Machine

Atlanta attorney Kenneth Canfield wonders the same thing. He has teamed up with the ACLU in a lawsuit alleging that Georgia's election machinery is "fatally flawed, routinely disenfranchising thousands of voters." The suit, which has been removed to federal court, targets the high rate of machine and voter error in the punchcard systems used in several populous counties.

Canfield says he doesn't believe the U.S. Supreme Court meant to limit Bush to the peculiar

circumstances of the court-ordered recount in Florida. "I'd hate to think that the Court engaged in result-oriented jurisprudence," he says.

In Indiana, *Bush v. Gore* has prompted a lawsuit alleging that Indiana's use of punch-card ballots violates a state constitutional guarantee of "fair and equal" elections.

One of the named plaintiffs, former Terre Haute city council member Charles Toth, was involved in a 1996 election dispute involving punch-card ballot problems. Toth says he was prompted to seek legal action by his sons' disillusionment with last year's election debacle in Florida. "One is 20 and one is 22, and both claim they won't vote next time," Toth told a local reporter. "We try to convince people their vote counts. This election shows your vote doesn't count. Not always."

And in Illinois, plaintiffs counsel in the Florida Votomatic suit have also filed a class action against four companies that sell products or services related to the now infamous voting system. The complaint, filed in the circuit court of St. Clair County on behalf of 41 million voters in 28 states, alleges violations of state consumer protection and unfair competition laws.

The suit also raises equal protection and due process claims, asserting that the companies' role in elections--"the exclusive province of the state"--qualifies the defendants as state actors.

According to Chesley, this is a straightforward products liability case that happens to involve constitutional, rather than physical, injury.

While Chesley insists that *Bush* supports the Florida and Illinois lawsuits, others are not so sure about the case's precedential value.

"I don't think the [*Bush*] decision will be all that significant in opening a broad new vista of equal protection law," says Barry Richard, the Tallahassee lawyer who commanded the *Bush* campaign's legal efforts in Florida.

"I don't think there's any way you can limit it to Florida," says Richard, "but equal protection issues are always judged within the particular circumstances of the case."

The dispute over the presidential ballots in Florida involved a rare confluence of factors, he says: a statewide race, a razor-thin vote difference, and manual recounts under different or confused standards.

Temple University law professor Laura Little sees nothing unusual in the majority's effort to limit its holding to the peculiar facts of the Florida election debacle.

"The Court has repeatedly emphasized," Little notes, "that constitutional rulings should be narrowly tailored if they cannot be avoided."

Harvard law professor Heather K. Gerken sees *Bush* as a one-way ticket with little impact on the Court's equal protection jurisprudence. "It's possible that the lower courts will develop the precedent, but I have a hard time believing that the Supreme Court wants to go down this path

again," says Gerken, a former clerk to Justice David Souter. "Except when it involves race, the Court is just not interested in the nitty-gritty of elections."

However, Gerken also says the decision's limited impact is not at all apparent from the majority's sweeping language about valuing every vote.

The justices might find it difficult to back down from their lofty equal protection prose, she says. "If the next person who comes to them [with a vote-counting case] is a poor African-American from a county without the resources to count ballots well, one would hope they would apply this precedent evenly."

No matter how much the Court wants to limit the play list, the beat in this case seemingly will go on.

*William C. Smith is a lawyer and legal journalist in Narberth, Pa. His e-mail is [wc.smith@erols.com](mailto:wc.smith@erols.com).*