

## International principles for resolving election disputes

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### Abstract

This article presents the principles of voting recounts and election contests worldwide. It concludes that similar rules apply in virtually every country for determining the winner of a democratic election and are successful only if they are trusted by the public. This article is designed to provide guidance about when and how to use these tools for both those who trail in the initial tally of votes and those who lead.

**Keywords:** International principles, election disputes

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### 1. Introduction

The outcome of virtually all general and primary elections is decided when the votes are initially tallied. The difference in the number of votes between the winning candidate and the losing candidate or candidates is usually too great for the outcome of the election to be changed by any post-election recount or election contest. Sometimes, however, these post-election remedies become critical in protecting human rights by determining who actually won an election.<sup>[1]</sup>

Legal counsel and election advisors need to take precautions before the election and to watch for anomalies in the election results. Both winners and losers need to be able to knowledgeably assess the likelihood of any successful challenge to the election results and to understand all of the ins and outs of a post-election challenge if it happens. Sometimes this is merely a matter of knowing the applicable law. Other times it may involve quickly assembling evidence, or identifying witnesses, that could be important in any later proceeding.

Although the United States has over 100 years of case law about voting recounts and election contests, almost all democratic nations have some method of recounting votes and challenging the legality of certain votes when the outcome of the election is in doubt. There are recounts and occasionally election contests annually throughout the world. Others are requested, but denied. For example, in 2015, Myanmar conducted its first “fair” election. One of the biggest upsets occurred when former defense minister, U Wai Lwin, of the governing party lost to a poet, Tin Thit, who had spent seven years in jail as a political activist. Lwin lost by only 178 votes out of more than 55,000, but was denied a recount because recounts apparently were available under Myanmar law only if the candidates were actually tied. By contrast, a recount of 7,628 polling stations was necessary in Santa Fe Province, Argentina, to resolve the outcome of the 2015 race for governor.

For this article, I have cited primarily authorities in the United States, but I have also reviewed the post-election procedures of many other nations and have found that the post-election process is similar in most democracies. There are many similarities, but there is almost always something different, even unique, about every nation and state. Nothing in this

article should be a substitute for knowing the legislative and court-made law in a particular nation or state.

All democracies have bodies responsible for canvassing votes and, sometimes, for certifying the results in elections. Under the U.S. Constitution, control over elections is almost entirely in the hands of state and local authorities. States generally provide for a bifurcated system by which the outcome of an election is certified and by which this outcome may be challenged in an election contest before an “impartial arbiter” (usually a local court).

In most nations, however, a national or regional electoral agency (often ostensibly independent of government influence) is the most important entity. It serves as the arbiter in the system and is responsible for investigating alleged irregularities and ordering a whole or partial “recount” or investigation of votes if warranted before declaring the final election outcome. Nations vary on whether a ruling by this electoral agency is final or can be challenged in court.

A warning upfront - As significant as proper use of these post-election actions may become, the most important post-election duties of a candidate’s advisors are to put aside any prejudice generated by a hard-fought campaign, to objectively and correctly assess the utility of any post-election action, and to advise the candidate frankly whether any post-election efforts are likely to change the outcome. These duties are not nearly as easy as they may appear. Very often the losing candidate is caught-up in the emotion of an unfavorable outcome and is unwilling to immediately accept the result. He or she thinks that the opponent stole the election, or the election officials miscounted the votes, or election irregularities affected the outcome. Supporters (or campaign personnel) urge the candidate “to keep fighting”. A contrary opinion may be unpopular, but it is the duty of the advisor to look realistically and knowledgeably at the results and advise the candidate accordingly. A failure to do so can prove costly.

At other times, a losing candidate may be tempted to immediately concede an election even when there are indications that the initial counting of votes has been affected by errors or wrongdoing which, if corrected, may change the outcome of the election. At such times, it is the duty of the candidate’s advisor to know if post-election action might change the outcome and to advise the client accordingly. In

2000, candidate Al Gore initially conceded the outcome in Florida, and therefore the presidency of the United States, to George W. Bush. Advisors later convinced him to withdraw this concession and to aggressively pursue recount and election contest options that, if properly handled, would probably have made Gore the victor.

I will draw on the 2000 post-election conflict in the U.S. presidential election, *George W. Bush v. Al Gore*, to provide examples of how recount and election contests generally work and to illustrate some of the pitfalls that may plague any such post-election search for a remedy. <sup>[2]</sup> This post-election battle drew attention worldwide and continues to be the best known of such post-election fights. It has much to teach us.

The events in Florida in 2000 are somewhat limited in value today by the changes that have occurred in the United States, ironically, in response to what was seen as flaws in the election process in Florida. The most significant changes were enactment of the Help America Vote Act (HAVA), creation of the United States Election Assistance Commission (EAC), the EAC's adoption of testing and certification of voting equipment, the adoption of specific requirements for voting equipment used in federal elections, and the quick disappearance nationwide of the problematic "punch-card" voting equipment <sup>[3]</sup> that became notorious in the Florida recount. The manner in which some persons cast their vote has been changed (whether advanced or not is debatable) by technology in some states and nations. It is necessary to consider these changes, including this new technology, on the recount and election contest processes worldwide.

Despite these changes, the basic principles of recounts and election contests remain essentially the same as in 2000 for the United States and most other nations:

- International election principles contemplate the availability of a mechanism by which the ostensible outcome of elections can be validated. These remedies exist only if provided by law. They are not available at common law.
- Actual recounts are most common in first-past-the-post and majoritarian election systems. They are less common under proportional representation systems, but still exist as a potential remedy both in primaries to determine an open party list and in a general election to determine a party or individual's right to seats in a legislative body.
- The preferred means of recounting votes (and the means most likely to produce a change in the initial vote count) is a manual recount. The objective is to establish the voter's intent.
- In the U.S. recounts usually occur before the certification of the election results by the canvassing authority. The results are incorporated into the final vote tally. Once the body responsible for canvassing the election certifies that vote tally, the election is officially over.
- In some nations, however, a request for a "recount" is made to the electoral authority and encompasses both the physical retallying of votes to eliminate mistakes and a review of alleged irregularities. In this circumstance the election is not final until the electoral authority resolves any complaints and rules as to the election outcome.
- Any election contest in the United States comes only after certification of the election results. The action names the certified winning candidate as the defendant on the basis

that he or she has no right to the office because invalid votes were counted or valid votes were left uncounted. <sup>[4]</sup>

- The specifics of law regarding a recount or election contest include the timeline for filing pleadings and being heard, who has standing to request the remedy, who has jurisdiction over a particular type of election dispute at a particular place in time, and what grounds must be shown for the requested remedy. These requirements vary by jurisdiction and must be met, or the remedy is defeated. There is little time after an election in which to learn the law. An advisor who fails to know these differences before the election itself may be doomed in the rapid-fire atmosphere of a post-election dispute.
- The objective of an election contest is to determine the will of the people in the election, not to determine the final vote count or to investigate alleged wrongdoing. Despite the public pleas "to count every vote" in Florida in 2000, the real issue was simply whether Gore or Bush had won the election and Florida's 25 electoral votes according to a timely counting of legal votes determined according to the rules previously laid down by law and the courts. The goal is to apply standards uniformly; not to manipulate the counting of votes to win the election. <sup>[5]</sup>
- In the U.S. an election contest proceeding is *de novo* before an impartial arbiter. The arbiter (e.g. a court) is not required, however, to repeat an otherwise proper partial count or recount that is uncontested. Even when review is technically *de novo*, the reviewing authority will validate the election results if possible. <sup>[6]</sup> Any attorney representing a losing candidate in a contest of the election results must be prepared for a difficult and costly fight to overturn these results.
- In some nations, if any challenge is allowed to the ruling of the electoral agency, it usually comes as an appeal from the agency's decision to a special court (Mexico) or the nation's highest court. Only a few states in the U.S. provide such an appeal relying instead on the election contest process through the normal state courts.
- The emphasis throughout these post-election processes is on expeditiously determining the election outcome. Recounts or election contests must not be the basis for protracted proceedings that interfere with the purpose of the election (e.g. to determine a political party's candidate in an upcoming election), or potentially destabilize the governance of the jurisdiction by leaving an elected office unfilled, or by leaving a cloud of illegitimacy over the office-holder. <sup>[7]</sup> Sometimes the search for truth becomes a victim of this need for expediency.

### **Pre-election Precautions**

Winning any post-election battle must necessarily start before the votes are first tallied. The surest way of winning any post-election dispute (aside from avoiding it altogether by winning the initial vote count by a comfortable margin) is to take appropriate precautions before the election. Votes must not be wasted. Several egregious mistakes by Democrats before the 2000 election in Florida had unexpected consequences and provide examples of how pre-election mistakes or oversights cannot be undone after the election.

**Beware of Overzealous Campaign Tactics That Can Backfire.** Sometimes a campaign tactic intended to help a party or candidate can have an unintended effect. This occurred in Florida. In an effort to improve the likelihood that persons voting for Gore would also vote for Democratic candidates lower on the ballot, Democratic voters in some counties were urged to “Vote on Every Page” of the ballot. Unfortunately, the candidates for president took up two or more ballot pages in some counties. A person who voted for Gore, but also voted on the second page of the ballot had his or her vote nullified as an “overvote” (See below). This problem was exacerbated in Duval County where voters were also urged to vote for “Gore and Brown” in an effort to reelect black congresswoman Corrine Brown. Unfortunately, there was also a presidential candidate for the Libertarian Party named Harry Browne. Any vote for Gore was nullified if the ballot also contained a vote for Browne. Certainly most voters understood these admonitions and cast legal votes. On the other hand, apparently a few voters did not, or realized their mistake only after casting an invalid vote and had no time or legitimate alternative for correcting it. It is estimated that these two miscues caused a loss of 15,000+ net votes for Gore in Duval County alone – far more than enough to offset Bush’s ultimate winning margin of 537 votes statewide. None of these votes could be recovered after the election.

**Beware of Ballot Format and Content.** Virtually all nations and states afford a candidate the opportunity to review and approve the ballot before an election. Take advantage of this opportunity. Do not make the review *de facto* and limit your review of the ballot to only whether the candidate’s name appears properly (e.g. correct order, correct spelling, etc.). The infamous “Butterfly Ballot” episode in Palm Beach County, Florida could have been avoided with a more careful and thoughtful review by election officials or candidate representatives of the ballot format. The county’s punch-card ballot lay-out was confusing – i.e. some voters intending to vote for Gore or Bush mistakenly punched the wrong hole and thereby voted for another candidate. Many tried to correct their mistake, but ended up with a ballot that contained more than one vote for president. Both Bush and Gore were affected, but by far the largest number of votes disallowed as overvotes in Palm Beach were those that had a vote for Gore (15,000) and someone else as compared to those that had a vote for Bush (3,500) and someone else. Neither a recount nor an election contest furnished a means for salvaging any of these votes.

**Test Vote Tabulating Software and Voting Machine Algorithms and Capabilities.** In most countries worldwide, votes are still cast using paper ballots. These ballots are then counted by hand. This counting process may be slow and has the potential risk of human error (e.g. misplaced ballot boxes, vote recording errors, etc.)

In some nations, however, the hand-counting of votes has been replaced by a faster computerized process. Electronic or computerized equipment is used either to count votes on paper ballots (e.g. optical scanning of paper ballots) or to allow voters to actually cast and to record a vote (e.g. Direct Recording [DRE] or e-voting equipment). Some of these systems are privately produced and marketed in a highly competitive environment. Some nations, however, have developed their own government systems allowing e-voting

through a public network. [8] Although generally successful, these systems continue to be subject to frequent allegations that they are susceptible to fraud and manipulation.

The voting equipment testing and certification process of the EAS in the U. S. is intended to assure that electronic voting and counting equipment in that country meets standards of reliability. The EAS standards are voluntary, but certain federal funding for a state is tied to whether that state follows these guidelines. Section 301(a) of HAVA and EAC regulations set the following standards for voting systems used in the United States. The systems must:

- permit a voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;
- provide a voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and
- notify a voter of overvotes (votes for more than the maximum number of selections allowed in a contest) and provide the voter a chance to correct these errors.

Forty-seven states in the U.S. follow these federal guidelines or have adopted similar guidelines by state law. The regulations also now provide that a voting system must also produce a permanent paper record suitable for use in a manual recount. The final decision about which voting equipment to acquire and to use in the United States is usually left to the local government paying for the equipment. As a result, the actual type of equipment used in the U.S. may vary among jurisdictions even in the same election (e.g. a multi-county or statewide election), while in most countries the manner of casting votes is uniform nationwide.

Electronic or computerized tallying of votes through the optical scan of paper ballots is used by a majority (56%) of jurisdictions in the United States and many other jurisdictions worldwide. A person records his or her vote by appropriately marking the empty rectangle, circle, oval or incomplete arrow (based on the brand of equipment) next to a candidate’s name on a paper ballot. These ballots are then scanned and recorded by the electronic equipment at the precinct or later at a central location. This equipment is widely accepted, largely because, if necessary, the result can be verified through a manual recount of the actual paper ballots.

DRE or e-voting equipment allows a person to actually cast his or her vote on electronic equipment. Each vote is recorded directly in a computer’s memory. Some nations see a move to a DRE or other computerized system as less problematic than continuing to count ballots by hand. It is now used in parts of at least 31 states in the United States and 10 nations worldwide. The first versions of such equipment provided no means for testing the accuracy of the electronic system’s numbers by comparing these numbers against any “paper trail”. The EAS guidelines now require a paper record in the U.S. Many persons, however, doubt the meaningfulness of recounting votes in a DRE system because the “paper” is simply a reprint of the DRE machine’s record of the vote.

DRE or e-voting is intended to give reliable vote counts immediately and to make recounts, especially manual recounts, unnecessary. Many jurisdictions have begun using such equipment, but others have hesitated or even changed back to

their prior method of casting votes in response to public concerns about the accuracy and security of relying solely on electronic means for casting and recording their vote. This debate over the reliability of casting votes on electronic equipment is still unsettled. A candidate's advisor cannot change the manner by which votes are cast in an election, but must take all necessary and available steps to assure that the official outcome is the real one.

A candidate's advisor should confirm that the electronic equipment meets applicable standards. Even though the brand and model of the equipment are certified by EAS in the United States or a similar federal agency in other countries, the specific devices being used may malfunction, be inadvertently mis-programmed, or (at least theoretically) be intentionally sabotaged. Testing the accuracy of the equipment by election officials before an election is generally required by law. A candidate's counsel should confirm that this testing occurs, that the results of the test tabulations are accurate, that the equipment has no possible connection to any outside source, and that the equipment remains secure from the time of testing through the actual election. Malfunctions have occurred. Stories about plots to steal elections through tampering with electric voting equipment abound, but they are unverified.<sup>[9]</sup> Nevertheless, such intentional or inadvertent mis-programming remains theoretically possible.<sup>[10]</sup> No candidate or advisor should ignore these possibilities.

**Monitor Election Day voting as it happens.** Virtually every state and nation allows candidates or political parties to have representatives ("poll watchers") at the polling stations when voting takes place. A candidate should take advantage of this opportunity. Such representatives should be instructed beforehand on what to observe and with the expectation that they could become witnesses in any post-election litigation. In reality, most serious candidates have a slew of volunteers willing to watch over polling stations and to report (usually orally or by text message) on activity at the stations. It is necessary to sort through these reports and to filter out the extraneous "noise", especially rumors of conspiracies by opposing candidates.<sup>[11]</sup> Too much time focused on the imagined misdeeds of the opposition can mean too little time focused on the vagaries of your candidate's own campaign. Monitoring Election Day events can also give you a needed head start on assessing whether there are any anomalies that suggest wrongdoing or errors that could affect the election outcome.

## 2. Recounts

Recounts are essentially an administrative process by which election officials identify and correct any mistakes in the process of finalizing the tally of votes in a race. Election night returns are notoriously incomplete and inaccurate. Election officials work to identify any errors and to correct them before any official numbers are verified and released. They ordinarily will do so without any formal petition for a recount. A candidate should observe (or arrange for the observation of) this counting process and help the election officials spot any problems. Nevertheless, despite the election officials' best effort, some errors may escape detection and persist. An official recount is a means for finding these errors.

**Election Officials.** Virtually all election officials meet their duties without any partisan or personal bias. Exceptions occur. In 2000 the chief election officer in Florida was Secretary of State Katherine Harris. She was also the co-chair in Florida for the George W. Bush campaign. Ms. Harris's attorney acknowledged to me that they did everything they thought legally possible to see that Bush prevailed in the subsequent recount and election contest. In some nations the opportunity for fraud by election officials is greater than in the United States especially when a candidate or political party controls administration of the election process. In many countries, international election monitors observe and audit elections and at least give their assessment of whether the elections were free and fair.<sup>[12]</sup>

**Automatic Recount.** Many jurisdictions have a law that automatically triggers a recount of votes if an initial tally of votes falls within a threshold.<sup>[13]</sup> This trigger for an automatic recount is usually expressed as a percentage of the total vote for the two candidates, is in a range of .05-1%, and can vary according to whether the election is local, statewide, or nationwide. Some jurisdictions also provide that an automatic recount occurs if the candidates are closer than a certain number of votes (e.g. 100). Usually an automatic recount is accomplished by simply rerunning the ballots through the same counting process as earlier as a test of the vote counting equipment. It seldom yields any material change in the election outcome. There are exceptions.<sup>[14]</sup>

**Requested Machine Recount.** In some jurisdictions a losing candidate may request a machine recount. As with an automatic recount, however, simply repeating the earlier counting process (e.g. running the ballots through the same counting equipment) is unlikely to produce any meaningful change. Nevertheless, since mistakes do happen, requesting a machine recount (when available) in a very close race is usually advisable.

**Manual Recount.** A Manual Recount is one in which each ballot is reviewed and counted by hand instead of counted by machine. It is the type of recount most often used worldwide. It is also the type of recount most likely to change the vote count and the outcome because it allows the counting of overvotes and undervotes that were not counted by the electronic equipment (see below) or that were initially determined by election officials to not contain a valid vote. In some nations, local election officials will readily recount votes if asked to do so. In others, the law prescribes a formal process of asking for a manual recount. In those circumstances, a formal manual recount often comes at the expense of the person (general public or candidate) requesting the recount, can be costly and should be undertaken only where a legal counsel's assessment of the election returns discloses anomalies that, if corrected in a manual recount, might change the election result. In at least one country (Myanmar) a recount is possible apparently only if the candidates are tied. In others, a recount is possible only if the difference in votes is within a prescribed threshold.

Although many nations still manually count votes after an election, very few jurisdictions (<4%) in the United States do so. Such manual counts are labor intensive, slow (often taking days), and have a high error rate as the counters often must simultaneously tally votes in many races. On the other hand, a

manual review of those ballots for a single race in a highly structured recount process does not have the same shortcomings and is the best means for arriving at the will of the people in a close election.

In many states and nations, the canvassing authority first conducts a partial manual recount to determine whether a manual recount of all precincts is justified. <sup>[15]</sup> In other jurisdictions anyone asking for a manual recount must show grounds for doing so. The local elections official in the U.S. oversees most recounts in partisan elections, but the secretary of a city, school district, etc. will usually oversee a recount for that political institution. In countries with a separate elections agency, the recount generally occurs under the auspices of that regional or national authority.

The recount process must be open and transparent. A manual recount process for paper ballots (including those that use optical scanners to count votes) is usually very straightforward. One election official manually reviews the ballot and announces the vote, while a second election official records each announced vote for the respective candidate. Sometimes a third election official is present to help the first two by making sure the process is fair and accurate. The candidates, or their representatives, also are present, can review the ballot, and can note their agreement or dissent from the decision of the election officials to count, or not to count a vote. A manual count of the paper records from a DRE or e-voting system is possible only if a paper trail exists for the votes. If one exists, the recount is conducted in much the same fashion, but, since the paper record is generated by the same equipment that recorded and counted the votes, there is not likely to be any difference in the recount tally or any issue of voter intent.

Sometimes the general public can observe. In Florida, the recounts in Palm Beach and Miami-Dade counties became circus-like affairs as protestors from both parties clamored for the canvassing authority to favor their candidate during the recount.

**Looking for Anomalies.** A candidate's counsel or advisor must look closely at the returns in an effort to spot any anomaly in those returns that might indicate a problem. Any political consultant worth his or her fee can usually immediately spot where a candidate is "underperforming" or "over performing". The candidate's advisor or counsel should not, however, rely solely on this consultant, but should independently look for anomalies such as:

- Whether the number of ballots given out in a precinct exceeds the number of registered voters in the precinct or is suspiciously high or low compared to other precincts. Be aware, however, that this apparent anomaly can be explained in many jurisdictions where Election Day registration is allowed or persons are allowed to vote in voting boxes other than the one in which they are registered (e.g. Iran).
- Whether there is any indication of voting by persons outside of the jurisdiction in question (e.g. outside of a representative district).
- Whether there is a significant difference between the numbers of votes cast in your candidate's race as compared to the numbers of votes cast in a voting box for other comparable races. Be aware, however, that a

common mistake is to equate the number of ballots with the number of votes.

- Whether the number of overvotes or undervotes in your candidate's race could affect the election outcome.
- Whether there is any difference in the tally of votes recorded at the precinct and the tally shown at the central counting location. There should be no difference.
- Whether evidence shows that an ineligible person voted or a person voted more than once.
- Whether any unusual activities or irregularities at the polling stations may have intimidated or affected voting.
- Whether there are any irregularities in the treatment of early votes (e.g. lack of security).
- Whether there is anything suspicious in the treatment, security or results of absentee voting. Absentee voting is notoriously a possible source of fraud that can affect the outcome of a local race. It is usually the only time when a ballot officially can leave the custody of election officials. Every valid absentee ballot must have at least the voter's name, address, and signature (sometimes requiring notarization). In some jurisdictions, a voter must show a reason why he or she cannot vote in person on the day of the election. Even strict compliance with these requirements, however, does not guarantee that the absentee vote is legitimate.

This is not an exclusive list of possible anomalies. The presence of one or more of these or other anomalies does not necessarily indicate that something is amiss, but is the basis for further investigation. An election can often be surprising, with voter turnout (or other indicators) unexpectedly varying for legitimate reasons.

**Rechecking Electronic Equipment.** Law usually requires that electronic counting equipment must be retested after an election. The candidates' counsel should assure that the testing occurs and that the test shows no discrepancies.

**Undervotes.** It is common for persons to not vote in all races that they find on a ballot. The reason may be as grand as a protest against all of the candidates in a particular race (i.e. effectively saying "none of the above") or as banal as not knowing anything about the candidates in a race. These are undervotes – i.e. where the ballot is determined by the counting equipment or election official to not contain a vote in a particular race or races. Votes elsewhere on the ballot are counted in the appropriate races.

In some circumstances, however, the person may actually intend to cast his or her vote in a race, but the electronic equipment does not count the vote or the voter's intention is overlooked in the initial tally of votes. The Manual Recount is the means for finding and counting these votes. It was the search for such undervotes that caught the public's attention in Florida when election officials were seen eyeing the "punch-card" ballots in an effort to find hanging or dimpled "chads" that showed a voter's intent to vote for a particular candidate in the presidential election.

This problem of the undervote is not unique to punch-card voting. Most electronic counting equipment (e.g. optical scan of a paper ballot) records only those votes marked with the requisite instrument and in the requisite manner (like a scoring machine on a college entrance exam). Otherwise the equipment

records a non-vote. Thus, if a voter does not use the requisite pencil or places something other than the requisite mark alongside the desired candidate's name (e.g. checks the oval rather than filling it in) the vote may not be identified and recorded by the electronic counting equipment. In nations where the ballots are initially counted by hand, election officials may overlook a voter's intent.

**Overvotes.** An overvote occurs when a ballot contains two or more votes in the same race. In such a circumstance, voting equipment discards all votes in the race and records a non-vote for the ballot. This result seems reasonable because it is difficult at first blush to think of a legitimate reason why anyone would vote for two different candidates in the same race and expect his or her vote to be counted. The issue, however, is the occasional failure of vote counting equipment or manual vote counters to correctly discern a voter's intent. In Florida, some voters were so emphatic in their support for Gore that they both marked their ballot for Gore and put his name in the space for write-ins or made other incidental markings on the ballot to show their support for Gore. These voters probably did not realize that the electronic vote counter would read these markings as constituting an invalid vote even though, on manual review, the intent of the voter was clear. Gore's lawyers mistakenly opposed any recount of overvotes throughout the post-election proceedings. Later review of the ballots found that these overvotes statewide would have produced the greatest net gain for Gore.<sup>[16]</sup>

**The Intent of the Voter.** The intent of the voter controls whether his or her vote is counted. Therefore, merely because a vote is not recorded by the electronic voting equipment or in an initial manual counting of votes does not mean that some undervotes or overvotes should not be counted if the voter's intent is clearly evident on a manual review of the ballot. In the Supreme Court opinion in *Bush v. Gore*<sup>[17]</sup>, however, Justice Rehnquist (joined by JJ Scalia and Thomas) indicated that these votes should be left uncounted because it was the voter's fault (i.e. failure to follow instructions) that his or her vote could not be read by the electronic counting equipment.<sup>[18]</sup> The suggestion was that if the vote was not detected by the electronic counting equipment, it should not be classified as a legal vote. I am unaware of any state or nation that follows this principle, but many struggle with how to objectively discern voter intent. The demonstrable intent of the voter is still the recognized standard in most states and nations.

**Jurisdiction-wide Recounts.** The cardinal rule for any recount is that it should be as broad as possible. The Gore lawyers in Florida violated this rule by seeking a recount of votes only in four of the state's 67 counties. This decision was a critical mistake because:

- It left the Democrats vulnerable to the Republican claim that Gore was trying to "cherry-pick" the election results in order to steal the election;
- It left the post-election process an equal protection nightmare, ended up dividing an otherwise friendly Florida Supreme Court, and legitimized the U.S. Supreme Court's intervention to stop the process; and
- It caused Gore to lose the election.

Gore's attorneys respond that there was no mechanism for a statewide recount. I do not agree.<sup>[19]</sup> Bush's attorneys avoided calling for a recount in the remainder of the state.<sup>[20]</sup>

**Preparing for an Election Contest.** A recount serves as a means of discovering or exploring any potential basis for an election contest.<sup>[21]</sup> At the most basic level, it serves to identify any specific ballots on which a vote is to be contested as a legal vote that was not counted or an illegal vote that was counted, and whether these contested ballots made a difference in the outcome of the election. On a broader basis it may show irregularities that can be challenged. A candidate's counsel should keep a record of each step or decision in the recount process and notify the recount administrator and canvassing board of any perceived errors.

### **Election contests**

A recount and an election contest are distinct remedies in the United States. In some other countries this distinction is unclear. In such countries, what the media describes as a "recount" of votes is a petition asking the nation's electoral agency both to retally the votes and to determine a challenge to the manner in which the election was conducted (e.g. alleged widespread fraud). In some countries, a decision of this ostensibly independent electoral board appears to be final and cannot be challenged in court- thus there is no prescribed proceeding equivalent to an election contest for overturning the outcome of an election. In other countries, a court can annul an election. As shown in the 2004 election for president in Ukraine, an apparent bar to judicial review is not always effective.

In the United States, a contest of the election results becomes possible only after the vote in a race is certified as final by the canvassing authority. The action may be commenced by a losing candidate, or in some states, by any voter, but only during a specified time after the vote is certified. The decision to contest an election is not one to be taken lightly. Few contests are won. An election contest may be costly, evidence-intensive and may require an attorney's full attention for the weeks leading up to a final decision. In a recent case in Travis County, Texas, the losing candidate and her attorney were assessed over \$100,000 in attorney fees and costs for bringing a frivolous election contest.

**Changing the Outcome of the Election.** Any person contesting an election in a court or before an electoral agency must plead and prove that the disputed ballots or voting irregularities or fraud are sufficient to change the outcome of the election or to make it impossible to determine the legitimate outcome. Merely showing that the number of such ballots or votes affected by the irregularities exceeds the number of votes separating the candidates is not sufficient in part because such votes may simply mirror the certified outcome.

**An Impartial Arbiter.** Issues affecting the legitimacy of an election outcome should be decided by a single impartial arbiter that assures uniformity in how the contested ballots are treated and the votes are counted in a close election. In that sense, the U.S. Supreme Court's *per curiam* opinion got it right in *Bush v. Gore* when it explained that "when a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and

fundamental fairness will be met”.<sup>[22]</sup> This obligation of equal treatment and fairness applies to all arbiters entrusted with resolving any disputes over any election outcome. The duty of the arbiter, including an electoral agency, is to decide who won the election and to apply uniform standards in doing so.

**Find the Right Forum to Hear an Election Contest.** The correct forum for an election contest varies enormously from nation to nation, state to state, and within a state according to whether the election is a primary or general election, and whether the election is strictly local, district-wide, statewide, a presidential election, a judicial election, a proposition, a state legislative election, a congressional election, etc.<sup>[23]</sup> In many nations a court has jurisdiction to hear petitions complaining of election irregularities, but often the jurisdiction is limited to a specific court or level of courts. Be sure of your forum or you may be embarrassed and miss your time for filing in the correct forum.

One of the most overlooked forum issues is set by U.S. federal elections. The U.S. Constitution leaves final resolution of a presidential election to Congress. It also provides that each house of Congress is the judge of the qualifications of its members. The law has evolved to allow state recounts and election contests in general congressional elections to proceed if not precluded by state law. Nevertheless, many disputed general elections (not party primaries) have ended up reaching the affected house of Congress – where usually the dispute is assigned to a committee, is ridden by partisan considerations, and languishes while the winner of the state proceedings occupies a seat in Congress. Many states have similar constitutional provisions making the respective house of the state legislature the ultimate judge of the qualifications of its members. In some states, the forum for an election contest over a state legislative seat actually is the state legislature.<sup>[24]</sup> The decision of the legislative body is final and cannot be appealed. Only approximately twelve nations beside the United States make the nation’s legislative body, or some part of it, responsible for judging disputed election outcomes. Most of these are in Europe. This power is mitigated in Germany because the decision of the Bundestag is appealable to the Federal Constitutional Court.

**Specificity of Pleadings.** The initial pleading in an election contest is required to be very specific about the ballots being disputed, or irregularities or fraud that is alleged to have occurred and how the election outcome would be changed if the arbiter found in the petitioner’s favor. Some states in the U.S. bar any amendment of this pleading except for grounds that were discovered through the contest process. Pleadings to an electoral agency should also be specific.

**Presumptions in Favor of Election Results.** A challenge to an election is not an invitation for a “fishing” expedition. It must clearly set out the alleged wrongdoing and how correction of the wrongdoing would alter the election outcome. As mentioned earlier, the petitioner bears a very heavy burden of proof. Gore lost his election contest in Florida because he failed to carry this burden.<sup>[25]</sup> A similar fate occurred in other litigation challenging alleged irregularities in the Florida election.<sup>[26]</sup>

**Expedited Proceedings.** Both the law and practical circumstances dictate that any election contest or challenge to an election outcome must proceed expeditiously. There are many traps. For example, it is important whether the statutory timeframe for filing an action runs from the vote certification by the local canvassing board or, when applicable, by the national or regional electoral authority. Events move rapidly. In Florida, the extended recounts ended and the vote was certified by the state canvassing authority on November 26, 2000. Gore filed his election contest petition one day later. The evidentiary hearing on the contest began on December 3, but was dismissed by the trial judge on December 5 for Gore’s failure to meet his burden of proof. The lawsuit was reinstated three days later by a divided (4-3) Florida Supreme Court.<sup>[27]</sup> The U.S. Supreme Court enjoined the election contest proceeding on December 9, and overturned the Florida Court’s ruling on December 12, 2000 in *Bush v. Gore*.

**Grounds for an Election Contest.** The cases deciding an election contest can be generally organized as follows:

- Those alleging that the election outcome would be changed by the counting of specific votes that were disallowed by the canvassing authority or by the disallowance of specific votes that were counted by the canvassing authority;
- Those alleging that ineligible persons voted, or that eligible voters were prevented from voting and changed the outcome of the election;
- Those alleging election irregularities or illegal conduct by election officials that amounted to mistakes unintended to benefit a particular candidate, but that changed the outcome of the election; or
- Those alleging fraudulent or intentional misconduct by election officials, voters or the opposing candidate that changed the outcome of an election.

This separation of grounds is based on my own review of election contest cases and personal experience with actual election contest proceedings, not a specific court holding. Many election contests contain two or more of these grounds. These same grounds are the basis for remedies sought from electoral agencies worldwide.

**Voting by Ineligible Persons.** Election officials and voting procedure ostensibly prevent an ineligible person from voting. Sometimes, however, it occurs. The vote is illegal when the voter is unregistered or ineligible, registered in a jurisdiction outside the boundaries of the election district, voting more than once, or voting in the primaries of more than one party. If an ineligible person votes and could change the outcome of an election, there is one very big problem - how to discern how an ineligible person voted so that their illegal vote can be subtracted from a candidate total?<sup>[28]</sup> Proving that a person is ineligible is only part of the problem – maybe he voted for your candidate.

Another common problem in eligibility is that a person may appear to live outside an electoral district, but is registered at a precinct within the district. Should he or she be declared ineligible and their vote disallowed? This question raises the legally complicated issue of a person’s residency. Some persons currently living outside of an electoral district deny that they ever intended to make this new location permanent

and that they kept registration within the electoral district because they intended to return (e.g. college students in the United States or expatriates where permitted to vote). An interesting extension of this problem occurs in the United States with persons who live in recreational vehicles and regularly travel around the country. They may be registered to vote at a location where they seldom are present. These persons may be eligible to vote where registered so long as they are not registered in more than one jurisdiction. Trying to disqualify an out-of-district voter is almost impossible if the voter is not registered elsewhere and claims that his or her intent was to remain a resident of the electoral district in question. Even if shown to be ineligible to vote, the problem remains of discerning how the ineligible person actually voted. These problems are enhanced when the country's election system is new or not well developed.

The claim that ineligible persons regularly vote in the United States by impersonating someone else entitled to vote is untrue. In my 40 years of litigating and observing election cases, I can recall only a single occasion when a person tried to vote by impersonating someone else (his mother). A favorite allegation in the United States is that disqualified felons have voted. When this issue has been raised in litigation, however, it has been disproven. In some instances, it was discovered that the person who voted was qualified, but had the same name as the felon, or that the felon had had his or her rights restored or had registered, but never voted. There is simply no benefit for an impersonator or felon that equals the risk of being caught. I doubt that any election outcome in the United States has been changed by such illegal voting.

**Unintentional Voting Irregularities.** Few major elections are flawless. Equipment may malfunction, election officials may take shortcuts instead of strictly complying with applicable law, candidates may violate regulations, voters may be given misinformation, ballots may be improperly handled, there may be too few ballots, etc. Very seldom, however, do such irregularities or violations of state law or election rules constitute an adequate reason for changing the outcome of an election. The effect of many of these irregularities or wrongs simply cannot be measured and usually cannot be shown to have changed an election outcome. The courts try to avoid interfering with election outcomes by often concluding that an election official was acting in good faith and that an irregularity or apparent violation of the law, even if proven, was only a "technical" or "insubstantial" violation of the law or occurred under a statute that was "directory", not "mandatory". There are circumstances, however, when an irregularity is so systematic and egregious that it affects the integrity of an election even though the official's action was not intended to benefit one candidate over another and the effect of the irregularity cannot necessarily be measured in specific votes. Under these circumstances, a court may require a new election. These circumstances are rare.

**Fraud by an Election Official.** One of the worst circumstances that may be disclosed by an election contest is that an election official or candidate intentionally violated the law. There are many election contest cases involving alleged lost ballots, intentional miscounting of ballots, forged signatures, stuffing of ballot boxes, bribery, etc. Even in such cases the person bringing the election contest is expected to

show that the fraud or intentional misconduct actually occurred and actually affected the outcome of the election. In reality, however, while the standard of proof technically may remain the same as in cases involving unintentional irregularities, an arbiter is far more likely to rule with the petitioner if fraud or intentional wrongdoing is shown. This tendency is explained in part by an impartial arbiter's fear that, if fraud was proven to exist in one aspect of the election, it might also exist elsewhere although not yet discovered. Gore never alleged fraud in the Florida election.

**The Defendant's Rights.** A defending candidate can, of course, be expected to use the many favorable presumptions and evidentiary burdens to contest and dismiss a petitioner's claims, and to contest facts alleged by the petitioner to constitute any irregularity or fraud that can change the election outcome. Often overlooked, however, is the right of the defendant (winning candidate) to present allegations that, if proven, will add to his or her own total of votes or subtract from his or her opponent. In Florida, Bush's attorneys presented 18 affirmative defenses to Gore's election contest claims. Some were legal; some were factual, such as challenges to the handling and security of certain ballots that Gore wanted counted. The lawsuit ended before any of these defenses was litigated.

**Relief.** The arbiter in an election contest or at a national electoral agency can:

- Dismiss the claims;
- Conduct a whole or partial recount of the votes;
- Affirm the election outcome as shown in the original tally of votes;
- Find that legal votes were uncounted or illegal votes were counted, change the vote tally accordingly, and declare the outcome of the election; or
- Find that fraud or irregularities make it impossible to determine the outcome of the election, annul the election result and declare that a new election must be held.

Often a candidate who has lost an election grasps at the possibility of winning a new one. This hope inspires a losing candidate to want to ask for a second chance (i.e. new election). The candidate's counsel must look realistically at the possibility for such a ruling and dispel any unfounded hopes. Many factors weigh against a new election, including the costs to the jurisdiction, inconvenience for the voters, instability in governance, uncertainty whether a new election will resolve the dispute, and the reality that the losing candidate can always try again in the next election. As indicated above, courts have generally refrained from overturning election results. New elections are very rare.<sup>[29]</sup>

For a prescribed recount or election contest process to work, it must have the public's confidence as to its fairness and adherence to the law. Often street protests show public discontent with the process. In some nations, such as Mexico, confidence in the integrity of the recount process resolves such protests. In other nations, however, extraordinary steps have been taken to build public confidence. For example, in Ukraine in 2004, the Supreme Court resolved the disputed presidential election between candidates Yanukovich and Yushchenko by televising the court hearing to build public trust in the fairness of the court proceeding. In Iran, the reelection of President



Ahmadinejad in 2009 was confirmed through a recount process despite the claims of fraud and public protests (“the green revolution”). A limited recount took place and was televised. In an attempt to avoid similar allegations of fraud in the future, the administration of elections was removed from under the president and placed with an independent board of election experts.

In some instances, violence or the threat of violence has led to an accommodation between the two leading candidates. Such an accommodation was reached in the 2007 presidential election in Kenya <sup>[30]</sup> and the 2014 presidential election in Afghanistan <sup>[31]</sup>.

### 3. Conclusion

The availability of impartial voting recounts and election contests is essential for assuring that an election reflects the will of the qualified voters voting in the election. These procedures are intended to protect the efficacy of elections, while also safeguarding the stability of governance. It is the duty of a candidate’s advisor or legal counsel to assure that this mechanism is not abused.

It is a tribute to the effort to eliminate fraud in elections that in most developed countries the frequency of recounts and election contests has declined as voters and candidates have gained confidence in the fairness of the ballot-counting process. A recount may still be routine in a close race, but an actual challenge of election results is less common. Such a challenge requires evidence that the election outcome is in doubt. Hopeful thinking, fishing for wrongdoing, or harboring an unwillingness to give up a losing campaign is never sufficient reason. When real evidence exists, the presence of a fair and transparent process trusted by the public is essential. Effective use of these post-election remedies requires pre-election precautions, a knowledgeable legal counsel, and the ability to gather and to effectively present evidence.

### 4. References

1. See, generally, Young (Ed.) *International Election Principles: Democracy & the Rule of Law* at Chapters 9 and 10 (2009) and Vickery (Ed), *Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections* at 230 et seq (2011) citing the UN resolutions - Universal Declaration of Human Rights, art 21 (1948) available at [www.un.org/en/documents/udhr](http://www.un.org/en/documents/udhr) and the Covenant on Civil and Political Rights, 999 UNTS 171 (1966) available at [www.ohchr.org/en](http://www.ohchr.org/en). See also, *Resolving Election Disputes in the OSCE Area: Towards a Standard Elections Disputes Monitoring System*, OSCE/ODHIR (Warsaw 2001) and *Handbook for Domestic Election Observers*, OSCE/ODHIR (Chapter 4, 2003) available at <http://www.osce.org/odihr/elections>.
2. The specific sources for the information on the 2000 presidential election are set out in Bickerstaff, *Counts, Recounts and Election Contests: Lessons of the Presidential Election in Florida*, 29 Fla. St. U. L. Rev 425 (2001) and Bickerstaff, *Post-Election Legal Strategy in Florida: The Anatomy of Defeat and Victory*, 34 Loy. U. Chi. L.J. 149 (2002). I have not repeated them in this chapter.
3. Readers may never have seen “punch-card” voting equipment. It made its appearance in 1964 as the first computer system used to count votes in the United States.

By the late 1980s, it was the most popular voting equipment nationwide. At a polling station, voters were given a computer card with perforated rectangles (later notorious as “chad”) corresponding to the various candidates for which the voter was eligible to vote. In the voting booth, the voter inserted the card into (behind) a clip-board sized, multi-page device that had a hole alongside the name of each candidate for each race. Voters used a stylus to punch the hole for the preferred candidate and, by doing so, to punch out the corresponding perforated rectangle for that candidate in the underlying computer card. These cards were collected and, after the election, run through a computer. The system made results quickly available, but had a high error rate. Often the stylus did not fully detach the chad. The computer read the ballot as containing no vote when the chad was not cleanly detached. During recounts (such as in Florida), officials tried to discern a voter’s intent by examining the computer card. This process is difficult and was immortalized by the search of Florida officials for votes on ballots not counted by the computers, the coining of phrases such as “hanging or dimpled chad” and the image of officials peering intently at the computer cards from Miami-Dade and Palm Beach Counties to discern voter intent. Punch card systems are now <1% of voting systems nationwide in the United States.

4. The election contest developed as an alternative to a quo warranto proceeding in which a person’s right to office could be challenged, but only through, or with the permission of a state attorney.
5. In Florida in 2000, the recounts in Palm Beach and Miami-Dade Counties became ensnarled in a partisan fight in which both sides were attempting to maximize the votes for their candidate while minimizing the votes for the opponent. As a result, neither of these recounts was actually finished. By contrast the recount in Volusia and Broward counties went relatively smoothly and netted over 600 votes for Gore even though many of the election officials were Republican.
6. See, e.g., *Gooch v. Hendrix*, 851 P.2d 1321, 1327 (Calif. 1993) (“A primary principle of law as applied to election contests is that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal”); *Jackson v. Maley*, 806 P.2d 610, 615 (Okla. 1991) (“Courts indulge every presumption in favor of the validity of an election and, where possible, the validity will be sustained. . . Mere possibilities will not suffice to carry this initial burden”).
7. See, e.g., *In re Contest of the Election for the Offices of Governor and Lieutenant Governor Held at the General Election on Nov. 2, 1982*, 444 N.E.2d 170, 178 (Ill. 1983) (Concluding that “Until such an election contest is resolved, the political turmoil surrounding it . . . could effectively prevent the legislative and executive branches of government from dealing with the urgent problems facing this State. The State of Illinois should not be forced to endure these consequences on the mere suspicion of defeated candidates or on their belief or hope that an election contest would change the results”.) But see, Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 143–44 n. 196 (2012) (suggesting that declaring the wrong

- person the winner is worse than leaving a seat vacant even after the person is supposed to take office especially in the case of a multimember body that can still function while the election contest is resolved).
8. E.g. Australia, India, Brazil, and Venezuela. Iran says it is planning an e-voting system for 2015 or 2016. 248545
  9. E.g. Organizers of the referendum to remove President Chavez in Venezuela lamented the lack of a reliable audit when two apparent statistical anomalies showed that the machines allegedly had been subject to tampering.
  10. The Delhi High Court has said that the India e-voting system is “not tamper-proof”. See Security Analysis of India’s Electronic Voting Machines (2010); available at <https://jhalderm.com/pub/papers/evm-ccs10.pdf>. See also, Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711 (2005); Roy G. Saltman, U. S. Dept. of Commerce, *Accuracy, Integrity and Security in Computerized Vote-Tallying* (August 1988) (National Bureau of Standards Special Publication No. 500-156).
  11. I recall the Texas presidential primary in 2008. I was representing Obama; one of my law partners was representing Clinton. We both were constantly fielding accusations (especially during the Election Day precinct meetings) of misdeeds by the other candidate’s followers; none proved true.
  12. See, *Democracy International, Election Audits, and International Principles that Protect Election Integrity* (2015).
  13. In Florida, an automatic recount was triggered in the 2000 presidential election because the initial tally showed a difference of only 1,784 votes between Bush and Gore out of the approximately six million (a difference of .03%).
  14. In Florida, the automatic recount reduced Bush’s lead from 1,784 votes to only 327 votes. (The reason for this change is a story itself). Once in a South Texas congressional primary, the automatic recount netted approximately 200 votes for my client and made him the winner. In a subsequent contest proceeding, the opposing counsel said that in his 35 years of experience in election matters he had never seen such a large change and that the change could only be a result of fraud. The change was due to honest human error. On election night a software malfunction forced the election officials in a small South Texas county to count all ballots by hand (using the high school’s honor government students called out near midnight for the task). The students inadvertently overlooked the ballots from one precinct – so the tally for every candidate in every race was short the precinct’s votes. The addition of the precinct’s results in the recount gave my client victory in the multi-county congressional primary.
  15. The canvassing authorities in all four counties asked by Gore to manually recount their ballots went through this process and decided in favor of a full manual recount. A partial recount of ballot boxes selected at random from across Iran failed to warrant a nationwide recount in the 2009 presidential election.
  16. A subsequent review of ballots statewide by the National Opinion Research Center (NORC) found that Gore would have won if all valid votes (both undervotes and overvotes) had been counted statewide.
  17. 531 U.S. 98 (2000) (per curium).
  18. 531 U.S. at 119.
  19. My first recount experience came in the 1978 gubernatorial race in Texas. At the time there was no fax or express package delivery, much less an Internet. We utilized telephones, buses, commercial airline package services, and personal friends throughout the state to timely obtain recounts in 219 of the state’s 254 counties. Only the smallest, least populated counties were not reached. The Gore team’s failure to reach across the state meant their candidate’s defeat.
  20. Bush’s lawyers reasoned that in general the Gore voters were less educated and more prone to mistakes in casting their votes. As a result, they feared that even if a majority of the counted votes in a county had been for Bush a majority of the uncounted ballots might be for Gore. It turned out that they were right.
  21. See, *Miller v. Boone County, West Virginia*, 539 S.E.2d 770 (West Va. 2000) (indicating that a recount gives candidates the opportunity (1) to observe the manner in which the recount is conducted, (2) to notify the canvassing board of their intentions regarding requesting a recount in precincts not requested by the candidate originally requesting the recount, and (3) to identify ballots that may be challenged as irregular or illegal in an election contest).
  22. 531 U.S. at 109. I personally prefer the statement by Justice Stevens in his opinion in which he agrees that the remedial scheme devised by the Florida Supreme Court was flawed, but favored letting the election contest to go forward because “Those concerns are alleviated – if not eliminated – by the fact that a single impartial magistrate will adjudicate all objections arising from the recount process”.
  23. For example, if the Florida dispute over the presidential vote had occurred in Texas, any contest of the electors had to be filed with the governor (who at the time was, of course, George W. Bush) not in state court.
  24. If so, a committee of the respective house sometimes takes evidence, hears argument, and recommends a winner to the whole house or senate in accordance with the general rules of an election contest. The final decision rests with the legislative body.
  25. Gore’s election contest focused on the approximately 9,000 punch-card, undervote ballots from Miami-Dade County that had not been manually reviewed. The Gore legal team, however, could not show that these ballots had valid votes or could have changed the election outcome. Bush’s lawyers countered that these ballots came from the precincts that had voted for Bush and that, if they contained any valid vote, it was probably for Bush. A subsequent examination of these ballots showed that the Bush lawyers were correct.
  26. The threshold requirements applicable to an election contest proved too great for several lawsuits filed to challenge perceived irregularities in the Florida presidential election. See, e.g. *Fladell v. Palm Beach County Canvassing Board*, 772 So. 2d 1240 (2000) (Concluding as a matter of law that the Palm Beach [butterfly] ballot did not constitute substantial noncompliance with statutory requirements); *Jacobs v. Seminole County Canvassing Board*, No. CV No. 00-2816 (Fla. 2d DCA Dec. 8, 2000) (Rejecting a challenge to

absentee balloting in Seminole and Martin counties on the basis that plaintiffs' evidence failed to support a finding of fraud, gross negligence, or intentional wrongdoing by election officials); *Taylor v. The Martin County Canvassing Board*, No. CV No. 00 2850 (Fla. 2d DCA Dec. 8, 2000) (Rejecting a challenge to absentee balloting in Martin County despite irregularities because the election in Martin County was a full and fair expression of the will of the people). On the same day as the Supreme Court decision in *Bush v. Gore*, Leon County Circuit Judge Terry Lewis dismissed a challenge to voting in Duval County, Florida on the basis that "The problem here is simply one of time and the resultant lack of due process that could be afforded in resolving the issues raised by the Complaint in a meaningful way". *Order of Dismissal, Congresswoman Corrine Brown v. John Stafford*, CV 00-2878 (Fla. 2d Cir. 2000) in *Congresswoman Brown v. Stafford*, No. CV 00-2878 (Fla. 2d DCA Dec. 13, 2000).

27. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).
28. This dilemma is shown in an election contest that arose in 1992 in the Democratic primary for Texas Congressional District 29. The Democratic general primary race went to a runoff. At least 431 persons who had voted in the Republican general primary then voted in the Democratic runoff. This number was enough to have changed the runoff election result and was illegal under state law. The identity of these voters was determined by comparing the sign-in sheets from the Republican general primary and the Democratic runoff. The quandary was "How did they vote?" in the runoff. Since they voted illegally, Texas law allowed these persons to be compelled to testify as to how they voted, but failed memory, failure to respond to questioning, obstacles to service, and the lack of any means for challenging the veracity of a witness made the judge's search for a winner futile. Ultimately the judge gave up the process of trying to determine the outcome of the runoff, rejected the petitioner's request to allocate (subtract) the votes among the candidates, and ordered a new election. *Green v. Reyes*, 836 S.W. 2d 203 (Texas Court of Appeals [Houston] 1992).
29. In Florida, the circumstances of the presidential election were particularly complicated. Should any new election occur only in one county? One state? Nationwide? Should one county or state be allowed to determine who will become the nation's president? There was no simple and fair answer. A new election was not a reasonable alternative.
30. In the Republic of Kenya, incumbent president Mwai Kibaki claimed reelection on December 30, 2007 according to official results. Unofficial polls showed that his adversary, Raila Odinga, had won. Violence erupted – with over 1,000 persons killed. In the aftermath, the two candidates agreed to a power sharing agreement. In 2013, Odinga ran again for President, but lost the election.
31. The runoff election between Abdullah Abdullah and Ashraf Ghani took place on June 14, 2014. Final voting results were expected by July 22d, but were delayed amidst accusations of widespread fraud. Incumbent president Hamid Karzai remained in office pending a resolution. Finally in September Ghani was declared the winner, but within hours a power-sharing agreement was signed by the

two candidates in which Ghani was named president and Abdullah assumed an important role in the government.