



# **HOW TO MAKE OVER ONE MILLION VOTES DISAPPEAR:**

## ***ELECTORAL SLEIGHT OF HAND IN THE 2000 PRESIDENTIAL ELECTION***

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A Fifty-State Report Prepared for Rep. John Conyers, Jr.  
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## EXECUTIVE SUMMARY

In response to a request from Minority Leader Richard A. Gephardt, Congressman John Conyers, Jr., Ranking Member of the House Judiciary Committee and Dean of the Congressional Black Caucus, asked the Democratic Investigative Staff of the House Judiciary Committee to analyze whether the election irregularities revealed in the 2000 Florida Presidential election contest were unique to Florida or representative of a larger, national problem. The purpose of this report is to respond to that inquiry.

This investigation has found that the problems exposed in Florida were replicated in the vast majority of states nationwide. This report finds that: (1) a number of states experienced rampant spoilage of ballots; (2) voters in the majority of states reported being improperly excluded or purged from voting rolls; (3) disabled voters faced obstacles to voting in nearly every state; (4) intimidation at the polls still casts a shadow over our elections; and (5) the vast majority of states appear to have recount laws that would likely be found unconstitutional under *Bush v. Gore*. In sum, there is a national epidemic of disappearing votes, through faulty machines, inaccessible polling places, intimidation at the polls and faulty recount procedures. We can partially quantify the number of ballots cast aside by machines -- at least one million -- but we may never know how many frustrated or intimidated disabled, elderly or minority voters left the polls without voting in the 2000 elections. Specifically, this report finds as follows:

- While statisticians have estimated that as many as 2% of all ballots cast for the office of President nationwide were discarded because of machine errors and voter errors, this report attempts to catalogue from states in which the data is available the actual number of discarded or unrecorded ballots. The numbers are staggering. **At least 1,276,916 voters in 31 states and the District of Columbia had their votes discarded with no vote for President, greater than the difference in the popular vote between Al Gore and George W. Bush. In fact, in at least four states, the number of unrecorded ballots was greater than the margin of victory of the prevailing candidate in that state and could have resulted in a switch in electoral votes between the candidates.**
- **Astoundingly, in 19 states, the Secretary of State or other appropriate election official indicated that they kept no statewide record of uncounted ballots.**
- **As in Florida, this problem was not just about the machines. Eligible voters in at least 25 states went to the polls and found their names were illegally purged from the rolls or were not timely added.**
- **Disabled voters in at least 18 states reported inaccessible polling stations and confusing ballots. In fact, few precincts in the United States have fully accessible voting machines and the vast majority deny voters with disabilities a fundamental**

**right of American citizenship: the right to vote with privacy and independence.**

- Equally disturbing is the apparently frequent occurrence of intimidation by police and other officials on election day. **In at least 18 states, voters reported serious instances of election-related police misconduct or misconduct by other officials.**
- It appears that the problems with machines and voter error may have been exacerbated by undertrained and underpaid poll workers. **In at least 17 states and the District of Columbia, voters registered complaints about inadequate assistance at the polls.**
- **At least 38 states have recount standards and procedures that appear sufficiently discretionary that such laws would likely fail constitutional scrutiny under *Bush v. Gore*.**

As troubling as these findings are, even more troubling are the specific instances of voters who, 35 years after the passage of the Voting Rights Act, were effectively denied their franchise. The following are a few examples:

- In **Alaska**, a United States Marine Corps veteran had his ballot repeatedly rejected by the voting machine and left the polling place “frustrated, and not feeling [his] birthright as a citizen of the United States of America had been fulfilled.”
- In **California**, a disabled voter needed to use a portable ballot machine – but when one was requested, the only available one was a demonstration machine which listed either “George Washington” or “John Adams” as presidential candidates.
- In **Florida**, Donnise DeSouza, an African-American woman, said that when she finally got to the registration table on election day, after waiting 20 minutes to park, she was told her name was not on the list. She was then told to stand aside and wait with about 15 other people, and they were all finally told that they would not be allowed to vote. “Then I had to explain it to my 5-year-old son, and he couldn't understand,” she said, nearing tears. “He cried all the way home because we could not vote.” Also in Florida, Rev. Willie Whiting of Tallahassee said that he went to the polls and was told that he couldn't vote because of a felony conviction. But Whiting had been confused with someone else and had committed no crime. When asked how he felt, he said, “I was slingshotted into slavery.”
- In **Michigan**, voters at the Coleman A. Young Recreation Center in Detroit had to wait as long as three hours to vote.
- In **Missouri**, Mahina Nightsage, a 41-year-old woman, attempted to vote at 10:00

a.m. but was told by a St. Louis election judge that she was not registered for that polling place. Ms. Nightsage attempted to rectify the problem and arrived at the Board's downtown office by 12:30 p.m. Almost three hours later, at 3:15 p.m., she still had not been able to vote. During her long wait, Ms. Nightsage said that she spoke to many other frustrated voters at the Board's office, and some of them left without voting.

- In **New York**, disabled voters found widespread inaccessibility. In fact, a voter in North Tonawanda went to vote at a polling place that had a ramp for the disabled only to find that, on election day, it was locked and unavailable.
- In **Ohio**, a disabled voter found that there was no accessible path to his polling place. In order to vote, the voter was forced to park his wheelchair in the pathway leading to the poll and persuade poll workers to bring a ballot outside.
- In **Tennessee**, a voter reported that an election worker placed several white voters ahead of an African-American voter with the statement, "You know what it means to sit at the back of the bus."
- In **Texas**, one of the major complaints centered around a leaflet distributed in African-American communities in which seven African-Americans who were actively involved in elections were accused of voter fraud and "selling votes to the highest bidder."

These statistics and specific complaints can leave no doubt that serious deficiencies exist in the conduct of elections of virtually every state and that these deficiencies block voters from exercising their constitutionally protected right to vote. What this investigation uncovered was that ***Florida is just the tip of the iceberg***. Lying underneath the water are dozens of states which could find themselves unable to determine the victor of a close election. If any of these states were decisive in a Presidential election, our nation could once again find its electoral system thrown into chaos and, in turn, public confidence in democracy would -- once again -- be seriously undermined.

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Some have argued that there can be no federal solution to this national problem. The basis for this viewpoint is unclear. While it is true that Congress has long generally deferred to the states to regulate elections, it is also clear that ***the Constitution gives Congress the primary responsibility to regulate federal elections***. Article I, Section 4 of the United States Constitution provides that "(t)he Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations...*" (Emphasis added).

***If Congress does not take action, who will?*** While Florida recently passed election

reform legislation, nearly half of the state legislatures adjourned after finishing their work for the year, with only Georgia and Maryland having enacted comprehensive election reform legislation. Even those two states, however, failed to approve funding for their reforms. State legislatures are simply not acting quickly enough to repair our election systems prior to the 2002 and 2004 elections.

Most importantly, voting is a civil right and the federal government has traditionally taken the lead in ensuring that every eligible voter in every state has the right to cast a ballot and have that vote counted. If voting rights were left to the option of states over the past four decades, as some would suggest we approach voting reform today, there can be little doubt that millions of Americans would still be subjected to poll taxes and literacy tests.

It should also be noted that electoral deficiencies in one state have the potential to disrupt the entire electoral process, as Florida clearly demonstrated. Only the federal government has the ability to ensure that every eligible voter in every state has the ability to cast a ballot and have that ballot counted. Congressional action is needed and the clock is ticking.

## I. INTRODUCTION

For six long weeks in November and December of 2000, Americans witnessed an election system in Florida that was broken -- a system in which thousands of Floridians went to the polls to cast a vote for President, only to have their vote discarded. It was a strange spectacle for a nation that leads the world in high-tech innovation to have the winner of an election for President contingent upon punch card machines and butterfly ballots. Sadder still, 35 years after the passage of the historic Voting Rights Act of 1965 and 10 years after the passage of the Americans with Disabilities Act of 1990, the world's oldest democracy registered scores of complaints from Florida that African-Americans, voters with disabilities, and elderly Americans were disenfranchised. The cause of these problems can be traced back to a lack of funding for civil rights enforcement and a neglect of Congress's constitutional responsibility to ensure effective election administration and machinery in federal elections.

### A. The Right to Vote

At the founding of our nation, the Constitution's framers deliberately avoided mentioning the right to vote in order to ensure ratification.<sup>1</sup> With a silent Constitution, all manner of restrictions were put into state and local law even as the party system developed a mass base before the Civil War.<sup>2</sup> Free African-Americans were disenfranchised in all but four states by the 1850s, and even propertied women were excluded as well.<sup>3</sup>

The right to vote was finally included in the Constitution during reconstruction, with the 14<sup>th</sup> and 15<sup>th</sup> Amendments.<sup>4</sup> However, broader anti-discrimination language was paired with a proposal to abolish the electoral college and consequently failed.<sup>5</sup>

The warnings of the sponsors of the broader language that its exclusion would result in the disenfranchisement of African-Americans turned out to be prescient. In the late 1800s, in the period known as Reconstruction, the ex-Confederacy systematically excluded African-Americans

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<sup>1</sup>Richard M. Valelly, *The Vote Counts*, THE NATION, January 1, 2001-January 15, 2001.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* "Despite initial success, Senator Henry Wilson's robust version of the 15<sup>th</sup> Amendment eventually failed. It had stipulated that no suffrage restrictions could apply 'among the citizens of the United States in the exercise of elective franchise or in the right to hold office in any state on account of race, color, nativity, property, education or creed.'"



from the polls.<sup>6</sup>

Despite the fact that Congress passed election laws during the latter part of the nineteenth century, guaranteeing African-Americans the right to vote by imposing fines and criminal penalties on those convicted of conspiring to deprive citizens of their civil rights, minority voters found that disenfranchisement continued.<sup>7</sup> By using various pretexts, Southern legislators sought to find permanent legal methods to limit the voting of African-American and poor citizens. This goal was achieved through state constitutional conventions, changes in state elections codes, and the use of literacy tests.<sup>8</sup> The impact of these processes was devastating to eligible African-American voters.<sup>9</sup> In all but two southern states, literacy tests were used to eliminate and disenfranchise African-American voters.<sup>10</sup>

The wall began to break on these racist and discriminatory practices in the 1960s. Heeding the cries of the Civil Rights movement and leaders like Martin Luther King, Congress passed the Voting Rights Act of 1965 in response to widespread disenfranchisement in southern states.<sup>11</sup> The Act protects citizens' right to vote primarily by forbidding covered states from using tests of any kind to determine eligibility to vote, by requiring these states to obtain federal approval before enacting any election laws, and by assigning federal officials to monitor the registration process in certain localities.<sup>12</sup> In 1970, Congress extended the Voting Rights Act for an additional 5 years, and expanded its coverage to other jurisdictions when evidence presented at congressional hearings revealed continued racial discrimination in voting.<sup>13</sup> Coverage of the Act was eventually extended to the entire country instead of only Southern states.<sup>14</sup>

In 1975, Congress continued the Voting Rights Act for 7 more years. It extended

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<sup>6</sup>*Id.*

<sup>7</sup>Garrine P. Laney, *The Voting Rights Act of 1965, As Amended: Its History and Current Issues*, CRS Report for Congress, at 2, Feb. 2001.

<sup>8</sup>*Id.* at 2-3.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

coverage of the Act to additional jurisdictions to protect the voting rights of ethnic groups whose language is other than English.<sup>15</sup> The Act requires that bilingual election assistance be provided for voters who need it.<sup>16</sup> It permanently prohibits the use of literacy tests for voter registration and requires the Census Bureau to compile registration and voting statistics.<sup>17</sup>

Despite the passage of this landmark legislation, in the 1990s enforcement of the Act was undercut by Congress as it chronically underfunded the Civil Rights Division of the Department of Justice, the division entrusted with ensuring the effective enforcement of our civil rights laws. Until FY1999, budgetary allocations for civil rights enforcement were relatively low, in many cases not even covering usual annual increases in costs due to such factors as inflation and mandatory increases in salaries.<sup>18</sup>

## B. The Administration of Elections

### 1. State Administration and Declining Turnout

As voting rights evolved, the methods of voting also changed. At the end of the eighteenth century, elections were informal events.<sup>19</sup> Interested citizens gathered on election day and voted orally or used a ballot provided by a candidate.<sup>20</sup> During the nineteenth century, the role of the state in the electoral process was expanded by: (1) giving states the responsibility of ensuring a secret ballot, which necessitated substantial governmental control over the mechanics of voting; (2) in order to prevent ballot confusion and stop fraud, the state was given power to promulgate an official ballot listing government-sanctioned candidates; and (3) the state assumed responsibility for maintaining lists of qualified voters, who were obliged to register in advance of the election.<sup>21</sup>

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<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>Garrine P. Laney, *Funding for Major Civil Rights Enforcement Agencies*, CRS Report for Congress, Updated February 28, 2001.

<sup>19</sup>Bert Neuborne, *Reclaiming Democracy*, THE AMERICAN PROSPECT, March 12, 2001-March 26, 2001.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

These reforms had useful aims and positive results but also had the effect of suppressing turnout. As new obstacles designed to reduce fraud were placed in the paths of voters, turnout dropped from 75 percent in the nineteenth century to below 50 percent in 1924, and it has almost never exceeded 60 percent in the twentieth century.<sup>22</sup>

## 2. Election Machines: Early Warnings and Congressional Neglect

Balloting methods and election machinery also underwent radical changes. In 1889, New York introduced the paper ballot, known as the “Australian ballot” for its first use in Australia in 1856.<sup>23</sup> This system had the same pros and cons that it has today: while it is easy to use, it is time-consuming and susceptible to human counting errors.<sup>24</sup>

Mechanical lever machines were also introduced to the United States in the late nineteenth century. In 1892, the Myers Automatic Booth was used in Lockport, New York.<sup>25</sup> Mechanical lever machines assign each candidate or issue a lever, and the voter depresses the lever for each choice.<sup>26</sup> The voter finalizes his or her ballot by switching the large lever used to open the privacy curtain on the booth.<sup>27</sup> By the 1960s, more than half of the nation’s votes were recorded on these machines.<sup>28</sup> One-fifth of voters still used these machines in 1996, though they are no longer manufactured.<sup>29</sup> While these machines make it impossible to double-vote, they can jam or break down causing miscounts or wrongly applied votes, and counting errors can occur when adding up the tallies from separate machines.<sup>30</sup>

Punch card machines were first used in Fulton and DeKalb counties in Georgia in 1964.<sup>31</sup> Voters indicated their choices by punching in the proper numbered slot as indicated by

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<sup>22</sup>*Id.*

<sup>23</sup>*Major Ballot Methods*, THE HARTFORD COURANT, November 15, 2000.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

accompanying information, or in a hole next to the selected candidate or ballot question.<sup>32</sup> While some have argued that punch cards are easy to use, they pose several challenges to accurate recording of voters' preferences. Once a hole is punched, mistakes cannot be corrected without requesting a new ballot. Confusion can result when voters cannot discern which hole to punch for which candidate, as in the case of the Palm Beach County butterfly ballot or of misprinted ballots whose holes do not line up properly. A voter using a dull stylus can spoil his or her ballot without any knowledge that it has happened. Furthermore, the counting machinery may miscount partially punched holes, and ballots can tear or "double up" in scanning devices.<sup>33</sup> As of 1996, some variation of punch-card systems were used by 37.3 percent of registered voters.<sup>34</sup> This past election year, nearly 20 percent of the precincts in the country used the Votamatic punch card system, the same system that was used in Palm Beach County.<sup>35</sup>

Marksense machines, or optical scanning machines, have been used for standardized tests for decades.<sup>36</sup> The system uses optical scanning cards that place an empty rectangle, oval, circle or incomplete arrow next to each candidate name or ballot question.<sup>37</sup> To complete a ballot, voters fill in the appropriate area for their selection; the vote is then read using computer technology that reads the darkest mark in a given area.<sup>38</sup> While a single such machine can tally thousands of votes, some problems still arise: stray marks can easily confuse the machinery, poorly printed ballots can leave ink marks that may be mistaken for marks made by the voter, and ballots can tear or 'double up' in scanning devices.<sup>39</sup>

Direct recording machines, or electronic DRE machines, were used by 7.7 percent of voters in 1996.<sup>40</sup> These machine are similar to ATM machines in that a voter enters his or her selection by using a touch screen, pushbuttons or a similar device. An alphabetic keyboard is

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<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>Anya Sostek, *Goodbye Mr. Chad*, GOVERNING MAGAZINE, January 2001.

<sup>36</sup>*Major Ballot Methods*, THE HARTFORD COURANT, November 15, 2000.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

provided for write-in candidates.<sup>41</sup> A voter's choices are then stored in the machine before being added to the tally.<sup>42</sup> While these machines are easy to use because voters can clear the screen and correct mistakes, some flaws still remain: machines may record votes incorrectly, an entire ballot may not fit on one screen, and inadequate audit trails may be left for recounts.<sup>43</sup>

Despite the clear responsibility granted to Congress to ensure competent recording of votes and effective election machines in federal elections,<sup>44</sup> Congress – perhaps because the need was never as apparent as it became after the 2000 election – has traditionally declined to get involved in such matters, the National Voter Registration Act (better known as the “Motor Voter” law) being one notable exception. In the 1970s, when Congress ordered the Federal Elections Commission to set national standards for voting machines, it made the standards voluntary.<sup>45</sup> A 1998 Report for the National Bureau of Standards recommended that punch card machines be eliminated due to frequent undervotes and recounting errors.<sup>46</sup> Roy Saltman, the author of the report, cited one U.S. House election where 4 percent of the ballots registered no vote, despite the fact that the House race was the only race on the ballot.<sup>47</sup>

Despite these warnings, states and localities did little or nothing; facing difficult budgetary choices, ensuring fair and accurate elections was viewed as less important than other priorities.<sup>48</sup> At the same time, Congress took no action.

### C. The Florida Election Debacle

The photo finish of the 2000 Presidential election placed the state of Florida under a microscope. What the nation saw was the product of years of neglect by states, localities and Congress of voting rights enforcement and a lack of minimum national voting rights standards

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<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>U.S. CONST. ART. I, § 4, CL.1 states that “[t]he Times, Places and Manner of holding Elections for Senators or Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”

<sup>45</sup>Anya Sostek, *Goodbye Mr. Chad*, GOVERNING MAGAZINE, January 2001.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

for election machinery and administration. It was apparent to any observer that Florida had faulty machines, confusing ballots, and substandard election procedures. But the problems were not just with the machines. Little or no thought was given in many areas of Florida to ensuring that voters with disabilities, language minorities and other voters with special needs could effectively participate in our democracy. Voters were illegally purged from voting rolls because of overbroad felony voter purges and mysterious police roadblocks that were established that were intimidating to voters on election day.

In February 2001, House Democratic Leader Richard A. Gephardt requested that Rep. John Conyers, Jr., Ranking Member of the House Judiciary Committee and Dean of the Congressional Black Caucus, conduct a preliminary analysis designed to determine whether Florida's problems were unique or symptomatic of a national problem. During the 2000 Florida Presidential election contest, many Florida officials protested that Florida's Presidential election was not uniquely flawed. This report concludes that their statements were correct. Florida's problems were not unique – there is a national problem that requires a comprehensive national solution.

This report details a state-by-state analysis of election machinery and unrecorded ballots, election administration and complaints surrounding the 2000 election. It then provides evidence that a nationwide problem exists in a number of areas of election machinery, administration and voting rights. It also recommends that the federal government fully fund minimum national voting rights standards in a number of areas and require that states meet such standards.

This investigation has found that the problems exposed in Florida were replicated in the vast majority of states nationwide. This report finds that: (1) a number of states experienced rampant spoilage of ballots; (2) voters in the majority of states reported being improperly excluded or purged from voting rolls; (3) disabled voters faced obstacles to voting in nearly every state; (4) intimidation at the polls still casts a shadow over our elections; and (5) the vast majority of states appear to have recount laws that would likely be found unconstitutional under *Bush v. Gore*. In sum, there is a national epidemic of disappearing votes, through faulty machines, inaccessible polling places, intimidation at the polls and faulty recount procedures. We can partially quantify the number of ballots cast aside by machines -- at least one million -- but we may never know how many frustrated or intimidated disabled, elderly or minority voters left the polls without voting in the 2000 elections. Specifically, this report finds as follows:

- While statisticians have estimated that as many as 2% of all ballots cast for the office of President nationwide were discarded because of machine errors and voter errors, this report attempts to catalogue from states in which the data is available the actual number of discarded or unrecorded ballots. The numbers are staggering. **At least 1,276,916 voters in 31 states and the District of Columbia had their votes discarded with no vote for President, greater than the difference in the popular vote between Al Gore and George W. Bush. In fact, in at least four states, the number of unrecorded ballots was greater than the margin of victory of the prevailing candidate in that**

**state and could have resulted in a switch in electoral votes between the candidates.**

- **Astoundingly, in 19 states, the Secretary of State or other appropriate election official indicated that they kept no statewide record of uncounted ballots.**
- **As in Florida, this problem was not just about the machines. Eligible voters in at least 25 states went to the polls and found their names were illegally purged from the rolls or were not timely added.**
- **Disabled voters in at least 18 states reported inaccessible polling stations and confusing ballots. In fact, few precincts in the United States have fully accessible voting machines and the vast majority deny voters with disabilities a fundamental right of American citizenship: the right to vote with privacy and independence.**
- **Equally disturbing is the apparently frequent occurrence of intimidation by police and other officials on election day. In at least 18 states, voters reported serious instances of election-related police misconduct or misconduct by other officials.**
- **It appears that the problems with machines and voter error may have been exacerbated by undertrained and underpaid poll workers. In at least 17 states and the District of Columbia, voters registered complaints about inadequate assistance at the polls.**
- **At least 38 states have recount standards and procedures that appear sufficiently discretionary that such laws would likely fail constitutional scrutiny under *Bush v. Gore*.**

As troubling as these findings are, even more troubling are the specific instances of voters who, 35 years after the passage of the Voting Rights Act, were effectively denied their franchise. The following are a few examples:

- In **Alaska**, a United States Marine Corps veteran had his ballot repeatedly rejected by the voting machine and left the polling place “frustrated, and not feeling [his] birthright as a citizen of the United States of America had been fulfilled.”
- In **California**, a disabled voter needed to use a portable ballot machine – but when one was requested, the only available one was a demonstration machine which listed either “George Washington” or “John Adams” as presidential candidates.
- In **Florida**, Donnise DeSouza, an African-American woman, said that when she finally got to the registration table on election day, after waiting 20 minutes to park, she was told her name was not on the list. She was told to stand aside and wait with about 15 other people, and they were all finally told that they would not

be allowed to vote. “Then I had to explain it to my 5-year-old son, and he couldn't understand,” she said, nearing tears. “He cried all the way home because we could not vote.” Also in Florida, Rev. Willie Whiting of Tallahassee said that he went to the polls and was told that he couldn't vote because of a felony conviction. But Whiting had been confused with someone else and had committed no crime. When asked how he felt, he said, “I was slingshotted into slavery.”

- In **Indiana**, residents of a nursing home in Lake County were prevented from voting because the traveling election board assigned to register qualified voters at the facility failed to properly complete the residents' registration forms.
- In **Maine**, at least 1,000 people whose names should not have been purged from election rolls registered complaints.
- In **Massachusetts**, Elizabeth Clay, a resident of Dorchester, noted that she and other voters were given only one minute to vote.
- In **Michigan**, voters at the Coleman A. Young Recreation Center in Detroit had to wait as long as three hours to vote.
- In **Missouri**, Mahina Nightsage, a 41-year-old woman, attempted to vote at 10:00 a.m. but was told by a St. Louis election judge that she was not registered for that polling place. Ms. Nightsage attempted to rectify the problem and arrived at the Board's downtown office by 12:30 p.m. Almost three hours later, at 3:15 p.m., she still had not been able to vote. During her long wait, Ms. Nightsage said that she spoke to many other frustrated voters at the Board's office, and some of them left without voting.
- In **New Mexico**, the Republican Party attempted to harass and intimidate Hispanic voters by creating a flier sent to predominantly Hispanic communities with a \$20,000 reward to those who reported fraud incidents, and a \$5,000 reward for information that led to the first conviction for engaging in false voting.
- In **New York**, disabled voters found widespread inaccessibility. In fact, a voter in North Tonawanda went to vote at a polling place that had a ramp for the disabled only to find that, on election day, it was locked and unavailable.
- In **Ohio**, one disabled voter found that there was no accessible path to his polling place. In order to vote, the voter was forced to park his wheelchair in the pathway leading to the poll and force poll workers to bring a ballot outside.
- In **South Carolina**, the Republican Party intimidated African-American voters. Republican poll workers who challenged African-American voters in Charleston



and Sumter Counties wore poll watcher badges that looked like police shields. There also appears to have been a Palm Beach redux in South Carolina as a Harvard University research team believes that there were voting problems in Jasper County due to unusually strong showings by presidential candidates Patrick Buchanan and Ralph Nader, who received 239 votes and 111 votes respectively.<sup>49</sup> The county is traditionally a Democratic county. George Bush and Al Gore each received only one vote, though the research team has collected approximately 40 affidavits from residents who said they voted for Bush or Gore.

- In **Tennessee**, a voter reported that an election worker placed several white voters ahead an African-American voter with the statement, “You know what it means to sit at the back of the bus.”
- In **Texas**, one of the major complaints centered around a leaflet distributed in African-American communities in which seven African-Americans who were actively involved in elections were accused of voter fraud and “selling votes to the highest bidder.”
- In **Virginia**, individuals with disabilities in Alexandria found the general polling place to be completely inaccessible. The main entrance had many steps and was difficult for an individual in a wheelchair. The only entrance accessible to disabled voters was far away and was locked.

These statistics and specific complaints can leave no doubt that serious deficiencies exist in the conduct of elections in virtually every state, and that these deficiencies block voters from exercising their constitutionally protected right to vote. What this investigation uncovered was that *Florida is just the tip of the iceberg*. Lying underneath the water are dozens of states which could find themselves unable to determine the victor of a close election. If any of these states were decisive in a Presidential election, our nation could once again find its electoral system thrown into chaos and, in turn, public confidence in democracy would -- once again -- be seriously undermined.

#### **D. The Equal Protection Clause and *Bush v. Gore***

Beyond the statistics and specific complaints, the United States Supreme Court’s opinion in *Bush v. Gore* supports the view that election reform is not only needed, but is also a constitutional imperative. On December 8, 2000, on appeal, the Florida Supreme Court ordered

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<sup>49</sup> Jonathan N. Wand *et al.*, *Researcher: Jasper Elections Worst in Nation: The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, THE BEAUFORT GAZETTE, December 28, 2000, <http://www.elections.fas.harvard.edu>.

that the Leon County Circuit Court manually recount 9,000 votes in Miami Dade County.<sup>50</sup> It also ordered the inclusion in the certified vote totals of 215 votes in Palm Beach County and 168 votes in Miami-Dade county for Vice President Gore and Senator Lieberman. The Court further ordered manual recounts in all Florida counties where “undervotes” were not manually tabulated.<sup>51</sup>

On December 12, 2000 in the case of *Bush v. Gore*, the U.S. Supreme Court reversed the Florida Supreme Court’s order to manually recount these approximately 170,000 “undervotes” in Florida.<sup>52</sup>

The Court ruled in a 5-4 decision that the manual recount violated the Equal Protection Clause of the Fourteenth Amendment<sup>53</sup> because it failed to comply with minimal constitutional standards for avoiding arbitrary and disparate treatment of the electorate in determining “voter intent.”<sup>54</sup>

The Court also reasoned that completing the recount before the December 12 deadline by which Florida was to choose its electors would be impossible if minimal constitutional standards were to be met. In its decision the Court stated, “The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.”<sup>55</sup>

The basis of the equal protection ruling in *Bush v. Gore*, which requires “minimum standards for the nonarbitrary treatment of the voter,” provides succor for the argument that conducting an election with equipment of varying accuracy is constitutionally defective. When voters at some polling location have the benefit of casting their ballots with the latest technology while voters at other locations are forced to use outdated equipment (that even the court has conceded are less accurate), their votes are arbitrarily subjected to non-uniform processing and tallying procedures. It appears to follow that such disparate treatment of votes, according to the standards established in *Bush v. Gore*, would be unconstitutional:

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<sup>50</sup>*Gore v. Harris*, 772 So. 2d 1243; 2000 Fla. (2000).

<sup>51</sup>*Bush v. Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388, at 2 (2000).

<sup>52</sup>*Bush v. Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388, (2000).

<sup>53</sup>U.S. CONST. amend. XIV, “.nor shall any State.. deny to any person within its jurisdiction the equal protection of the laws.”

<sup>54</sup>*Bush v. Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388, at 17 (2000).

<sup>55</sup>*Bush v. Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388, at 16 (2000).

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. 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. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U. S. 663, 665 (1966).<sup>56</sup>

In its opinion, the court seemed to call on legislatures to rectify this problem, as it stated that the Florida case proves that certain types of equipment have a propensity to produce errors in voting:

This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.<sup>57</sup>

## **E. The Solution**

Some have argued that there can be no federal solution to this national problem. The basis for this viewpoint is unclear. While it is true that Congress has long generally deferred to the states to regulate elections, it is also clear that *the Constitution gives Congress the primary responsibility to regulate federal elections*. Article I, Section 4 of the United States Constitution provides that “(t)he Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations...*” (Emphasis added).

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<sup>56</sup>*Bush v. Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388, at 8 (2000). Justice Stevens, dissenting, recognized the implications of the Majority’s equal protection analysis for disparities in voting machines: Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated -- if not eliminated -- by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, “[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.” *Bain Peanut Co. of Tex. v. Pinson*, 282 U. S. 499, 501 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ -- despite enormous differences in accuracy -- might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.” *Bush v. Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388(2000).

<sup>57</sup>*Bush v. Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388, at 8 (2000).

*If Congress does not take action, who will?* While Florida recently passed election reform legislation, nearly half of the state legislatures adjourned after finishing their work for the year, with only Georgia and Maryland having enacted comprehensive election reform legislation. Even those two states, however, failed to approve funding for their reforms. State legislatures are simply not acting quickly enough to repair our election systems prior to the 2002 and 2004 elections.

Most importantly, voting is a civil right and the federal government has traditionally taken the lead in ensuring that every eligible voter in every state has the right to cast a ballot and have that vote counted. If voting rights were left to the option of states over the past four decades, as some would suggest we approach voting reform today, there can be little doubt that millions of Americans would still be subjected to poll taxes and literacy tests on election day.

It should also be noted that electoral deficiencies in one state have the potential to disrupt the entire electoral process, as Florida clearly demonstrated. Only the federal government has the ability to ensure that every eligible voter in every state has the ability to cast a ballot and have that ballot counted. Congressional action is needed and the clock is ticking.

## II. STATE BY STATE DATA

### Alabama

Alabama has a history of racial discrimination in voting. In 1900, Alabama had 181,471 African-American males of voting age. However, in 1901, the constitution was amended to disenfranchise African-American Alabamans and poor, white Alabamans through poll taxes, literacy provisions, a requirement that voters own property, and a subjective requirement that the voter “be of good character.”<sup>58</sup> Thus, out of the 181,471 eligible voters, only 3,000 African-American men were registered. Nearly half a century later, in 1946, Alabama tried another tactic to limit voting by enacting the Boswell Amendment. This amendment permitted registration only of voters who “could understand and explain” any article of the Federal Constitution. This provision in effect allowed polling workers to accept or reject whomever they wished. In one Alabama county with a 36 percent African-American population, the Boswell Amendment limited the number of African-American registered voters to 104 compared to 2,800 white voters.<sup>59</sup>

Over the past 50 years, these gross abuses have been eliminated -- but some barriers to voting in Alabama unfortunately may persist. Alabama has failed to install safeguards to ensure that legal voters are not purged, such as ensuring prompt notification of such voters and giving the opportunity for voters for protest a purging determination. In January 2001, the state removed 200,000 names from the voter rolls in a purported effort to reduce the chance of “election fraud.” The state asserts that the names removed were people who could not be located by the state, or whose address could not be confirmed, or were voters who have not voted or updated their registered filed in the last four years.<sup>60</sup> Notwithstanding this assertion, without safeguards this process bears a striking similarity to the standardless purge conducted in Florida that deprived thousands of legal voters of their right vote.<sup>61</sup>

In addition to a lack of purging safeguards, Alabama has experienced difficulties with regard to absentee ballot forging. In 1997, two Wilcox County women were convicted of forging

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<sup>58</sup>Elaine Witt, *Looking at History of State’s Constitution*, BIRMINGHAM POST-HERALD (visited on May 9, 2000) <http://www.postherald.com/me040701.shtml>.

<sup>59</sup>PATRICIA GURIN, SHIRLEY HATCHETT AND JAMES S. JACKSON, *HOPE AND INDEPENDENCE, BLACKS’ RESPONSE TO ELECTORAL AND PARTY POLITICS* (Russell Sage Foundation, 1989) at 23.

<sup>60</sup>*117,000 Names Removed from State Voter Rolls*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Jan. 4, 2001.

<sup>61</sup>*Id.*

seven illegal absentee ballots and affidavits.<sup>62</sup> The Alabama Attorney General has also reported that there was a substantial problem of absentee vote forging in the 2000 election. Absentee ballots were sent to catatonic elderly nursing home patients and subsequently completed by nursing home attendants and absentee ballot distributors.<sup>63</sup> Many voters reported being paid in exchange for their absentee ballot, coercion to mark an absentee ballot for a particular candidate, and forging of names on absentee ballots.<sup>64</sup> The Attorney General's office also received a complaint from a voter that a registration application in his name was being forged in another county, and another voter found out that someone had already voted using her name.<sup>65</sup>

Additionally, there are scattered reports of vote buying in the state. Six Alabama officials were convicted on state charges of absentee voter fraud in the June 2000 primary election in Winston County. A Winston County Circuit Court judge found that the officials – who included a former sheriff, a former district judge, and a county commission chairman – violated the law when they attempted to buy absentee votes for Republican candidates with cash and alcohol.<sup>66</sup>

The voting machines used in Alabama are relatively up-to-date. The state did not use punch card systems in the 2000 elections; instead, 63 precincts used optical scanning or

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<sup>62</sup>Press Release from Bill Pryor, Alabama Attorney General, Pryor Announces Convictions for Absentee Ballot Fraud (August 27, 1997) (on file with the U.S. House of Representatives Judiciary Committee, Democratic Staff).

<sup>63</sup>Telephone Interview with Buddy Sharpless, Executive Director of Association of County Commissioners (April 27, 2001).

<sup>64</sup>*Id.*

<sup>65</sup>*Types of Complaints received by the Alabama Attorney General Office for the primary and general elections in 2000*, Attorney General's Office, Opinions Division (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>66</sup>Telephone interview with Buddy Sharpless, Executive Director of Association of County Commissioners (April 27, 2001); Jay Reeves, *Winston County Sheriff pleads guilty in voting scam*, ASSOCIATED PRESS, November 3, 2000; *Four sentenced in vote fraud scheme, including ex-sheriff*, ASSOCIATED PRESS, January 30, 2001; Former Sheriff David Sutherland, who pled guilty, stated that he notifying bootleggers of upcoming state raids in Winston County and then would send "runners" to pay voters either fifteen dollars or alcohol for their vote, a practice he allegedly also used to win the office six years ago. For his felony, Sutherland was sentenced to five years probation, a \$15,000 fine and 1,000 hours of community service. Ten other people were indicted with Sutherland, including the husband of a former district judge, a circuit county clerk, a county commission chairman and a school board candidate. The defendants plead guilty to the state charges of the violation of the Code of Alabama Sec. 17-10-17 for illegal absentee voting, and federal charges of buying votes in the election.

“Marksense” machines, three precincts used DRE machines, and one precinct used a lever machine.<sup>67</sup> While each of these voting technologies can be configured to prevent overvoting, and while the optical scan and DRE machines can be configured to reduce undervoting,<sup>68</sup> it is not known whether the machines used in Alabama counties in the past election were adjusted to provide these features.<sup>69</sup> The state of Alabama does not have a central recording mechanism for counties or precincts to report overvotes or undervotes or any other information about miscounted ballots, and thus it is more difficult to determine if Alabama’s election machines are working.

Like Florida, Alabama provides for a subjective determination of voters’ intent when ballots are unclearly marked. Specifically, Alabama law states that if there are more or fewer ballot marks than are allowed for the particular office or ballot question, or if it is impossible to determine the voter’s choice, the voter’s ballot “shall not be counted for such office.”<sup>70</sup> Nevertheless, no instructions are issued as to what objective criteria should be used to determine a voter’s intent, and it is therefore questionable if the Alabama statute would survive judicial scrutiny under the equal protection standard enunciated by the Supreme Court in *Bush v. Gore*.<sup>71</sup>

Alabama’s Secretary of State has no record of the total statewide number of unrecorded ballots in the 2000 Presidential election.<sup>72</sup>

## **Alaska**

In the 2000 election, 287,835 ballots were cast in Alaska. Of those ballots, 285,560 were registered as votes for presidential electors, meaning that 2,265 of the cast ballots did not register as votes for a presidential candidate.<sup>73</sup>

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<sup>67</sup>Telephone Interview with staff member from Alabama Secretary of State office (May 2, 2001); see also <http://www.sos.state.al.us/election/2000/2000.htm>.

<sup>68</sup>Eric A. Fischer, *Voting Technologies in the United States: Overview and Issues for Congress*, CRS Report for Congress, at 6-7, March 21, 2001.

<sup>69</sup>*Id.*

<sup>70</sup>ALA. CODE §17-13-2 (1975).

<sup>71</sup>No. 00-949 (2000).

<sup>72</sup>Telephone Interview with staff member from Alabama Secretary of State office (May 2, 2001); see also <http://www.sos.state.al.us/election/2000/2000.htm>.

<sup>73</sup> *Election Summary Report, State of Alaska General Election 2000, Summary for Jurisdiction Wide, All Races, OFFICIAL RESULTS* (visited on April 27, 2001),

Several frustrated voters in Alaska registered complaints of the 2000 Election in the *Anchorage Daily News*, including one couple whose son repeatedly requested an absentee ballot and did not receive it, and a United States Marine Corps veteran whose ballot was repeatedly rejected by the voting machine and who left the polling place “frustrated, and not feeling [his] birthright as a citizen of the United States of America had been fulfilled.”<sup>74</sup>

However, despite being the third least populous state,<sup>75</sup> Alaska’s voting system is relatively modern: the state has introduced optical scanning and has continued to use this voting method since 1998.<sup>76</sup> Using the Accu-vote system, voters scan their own ballots on the polling premises, allowing for the immediate correction of improperly completed ballots.<sup>77</sup> In addition, Alaska has implemented several procedures to streamline its election process, including uniform ballots and procedures statewide, increased election worker training, and voter outreach and education.<sup>78</sup>

The Alaskan legislature also has passed very specific procedures for recounts. The method used depends on the type of voting equipment used to cast the ballot. If hand-marked ballots were used, the vote is generally counted if the voter marks the ballot in the oval opposite the name of the candidate that the voter designated.<sup>79</sup> The failure to properly mark a ballot as to one or more candidate does not invalidate the entire ballot, but only that section of the ballot in which it appears. Improper marks on the ballot may not be counted and do not invalidate marks for candidates properly made.<sup>80</sup>

Prior to 1998, when punch-card machines were still used in Alaska elections, the Alaska courts set clear directives for the evaluation of punch-card ballots. Punch-card ballots were to be counted if the punched holes were not directly centered in the candidate’s square but touched the

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<http://www.gov.state.ak.us/ltgov/elections/elect00/00genr/index.shtml>.

<sup>74</sup>*Letters From the People*, ANCHORAGE DAILY NEWS, Nov. 12, 2000.

<sup>75</sup>U.S. States, Population and Ranking (visited June 25, 2001).  
<http://www.enchantedlearning.com/usa/states/population.shtml>

<sup>76</sup>Alaska Division of Elections, Voting Technology (visited May 2, 2001).  
<http://www.gov.state.ak.us/ltgov/elections/avintro.htm>.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>ALASKA STAT. § 15.15.360 (2000).

<sup>80</sup>*Id.*



square and obliterated at least the upper line of the square, were marked with a pen or pencil instead of being punched, or were punched immediately above or in the first square in the list of candidates.<sup>81</sup>

Today, Alaska is equally specific in regulations regarding the voter registration list maintenance. At least once a year, the director examines the voter roll and sends a notice requesting address correction from voters whose mail from the division has been returned or who have not voted or appeared to vote in the last two years.<sup>82</sup> If the notice is returned as undeliverable or the voter has not voted in the last four years, he or she is placed on the inactive list.<sup>83</sup> After the second general election passes without contact from or appearance by the voter, his or her inactive registration is canceled.<sup>84</sup>

### **Arizona**

In the past election, as reported in the state's Official Canvass, a total of 1,559,520 ballots were cast in Arizona. Of those ballots, 1,531,906 registered as votes for presidential electors, leaving 27,614 of the cast ballots unrecorded for any presidential candidate.<sup>85</sup>

Arizona has a history of racial discrimination in voting, and its election law must under the Voting Rights Act be approved by the Justice Department before taking effect.<sup>86</sup> In the 2000 election, Arizona Secretary of State and State Election Director Jessica Funkhouser reported that the voting was plagued by long lines, untrained poll workers, and problems with registration.<sup>87</sup> Many voters who had attempted to register with the Department of Motor Vehicles found out at the polls that they were not registered to vote.<sup>88</sup> Although Arizona has a provisional or

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<sup>81</sup>*Id.*

<sup>82</sup>ALASKA STAT. § 15.07.130 (2000).

<sup>83</sup>*Id.*

<sup>84</sup>*Id.*

<sup>85</sup>State of Arizona Official Canvass (visited on April 27, 2001)  
<http://www.sosaz.com/election/>.

<sup>86</sup>Chip Scutari, *Redistricting Commission Interest High*, THE ARIZONA REPUBLIC, December 7, 2000, at B1.

<sup>87</sup>Telephone Interview with Jessica Funkhouser, Arizona Secretary of State and State Election Director (April 27, 2001).

<sup>88</sup>*Id.*

“questioned” ballot procedure, most voters were neither aware nor informed of this option.<sup>89</sup> Finally, the names of voters were divided between active and inactive voting lists, which caused a great deal of confusion when trying to determine whether or not a voter was registered.<sup>90</sup>

Although the full impact of these voting difficulties is unclear, the rates of unrecorded ballots varied greatly in different regions of the state. In 1995, Maricopa County voted to replace old and failing punch card equipment with new optical scanning machines, and five counties of Arizona (representing 80 percent of the state’s registered voters) now use optical scanning equipment.<sup>91</sup> Meanwhile, ten Arizona counties (representing 20 percent of the state’s registered voters) are still using punch card voting machines.<sup>92</sup> The latter experienced higher rates of ballot invalidation than those counties using optical scanner technology.<sup>93</sup> In addition, the proportion of ballots in counties using punch cards that showed undervotes or overvotes for President was two to ten times as high as the proportion in counties using ballots marked with ink and counted by optical scanner.<sup>94</sup>

As a result of the high rate of unrecorded ballots, the Arizona Secretary of State has publicly recommended changing the voting system statewide and prohibiting the use of punch cards for both federal and state elections by 2002.<sup>95</sup> As an alternative method, Arizona is exploring the use of Internet voting,<sup>96</sup> and introduced Internet voting for the Democratic

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<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>Letter from Betsey Bayless, Arizona Secretary of State, *Arizona Election Law*, White Paper (December 7, 2000). [http://www.sosaz.com/Az\\_election\\_law\\_white\\_paper.htm](http://www.sosaz.com/Az_election_law_white_paper.htm)

<sup>92</sup>*Id.*

<sup>93</sup>Jon Kamman, *System Durable, Americans Found; Memorable Lessons on Election We’ll Never Ever Forget*, THE ARIZONA REPUBLIC, at A28, December 17, 2000.

<sup>94</sup>*Id.*

<sup>95</sup>Press Release, Betsey Bayless, Arizona Secretary of State, Secretary of State Betsey Bayless asks Governor to reconsider funding to eliminate punch card voting systems in Arizona (July 10, 2001) (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>96</sup>Mark Harrington, *Arizona’s Online Primary a Hit*, NEWSDAY, March 9, 2000, at A46.

presidential primary in March 2000.<sup>97</sup>

Arizona's recount procedures are marred by subjectivity. First, only the Secretary of State can conduct an automatic recount.<sup>98</sup> Second, the statute states that the recount must be run on the same type of equipment used during the voting process. Further, the Secretary of State adopted a Procedures Manual which requires an "Inspections Board" to examine punch card ballots and remove hanging chad before the ballots are counted the first time.<sup>99</sup> Nevertheless, this does not address determining a voter's intent. In fact, Arizona's Election statute which governs state required automatic recounts and privately initiated recounts provides no guidance for determining a voter's choice if the ballot is unclearly marked.

If a recount were to occur in Arizona, the procedure followed would not be clearly specified in state law. As in election contests, the recount is overseen by a superior court, but no clear standards are given for its decision-making; the court has near-complete discretion to assess the evidence and confirm or annul the election.<sup>100</sup> It is highly unlikely that this procedure would survive scrutiny under the Supreme Court's decision in *Bush v. Gore*.

The state's provisions for verifying voter rolls are more instructive, providing that if a voter's election mail is returned undelivered, a county recorder will attempt to contact the voter through a forwarding mail address. If the voter cannot be located, his or her name is transferred to the inactive voter list, where it will remain for four years or for two general elections before being removed from the records. Twice-convicted felons in Arizona are permanently barred from voting.<sup>101</sup>

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<sup>97</sup>*Campaign 2000: The Republicans*, THE ATLANTA JOURNAL -CONSTITUTION, March 8, 2000, at 3B.

<sup>98</sup>Arizona does not provide a statutory privately initiated recount but a recount may occur as the result of a election contest.

<sup>99</sup> Letter from Betsey Bayless, Arizona Secretary of State, *Arizona Election Law*, White Paper (December 7, 2000). [http://www.sosaz.com/Az\\_election\\_law\\_white\\_paper.htm](http://www.sosaz.com/Az_election_law_white_paper.htm)

<sup>100</sup>ARIZ. REV. STAT. ANN. § 16-676 (2001). State law does specify, however, that automatic recounts are to be held whenever the margin of victory is less than one-tenth of one percent, and that such recounts must be conducted on the same type of equipment as was used in the original count (ARIZ. REV. STAT. ANN. §§ 16-661, 16-664 (2001)).

<sup>101</sup>Paul Zielbauer, *Felons Gain Voting Rights in Connecticut*, THE NEW YORK TIMES, May 15, 2001 at B5.

## Arkansas

Arkansas has had a long history of voter disenfranchisement. In the 1800s, Arkansas, like many other southern states, attempted to maintain a “white only” voting strategy.<sup>102</sup> Although this system was eventually disassembled, Arkansas continued to disenfranchise voters by imposing lengthy residence requirements, limiting party membership to whites, and establishing separate primaries and run-off elections for African-Americans and whites.<sup>103</sup> In addition, in the mid-1920s, Arkansas abolished voting rights for immigrants.<sup>104</sup>

In this election, the state received 255 complaints of election irregularities. Of those, 192 involved Pulaski County, where many voters failed to receive absentee ballots despite numerous attempts to apply for them.<sup>105</sup> The State Board of Elections Commissioner’s Office forwarded those complaints to the Pulaski County Prosecutor’s Office on November 20, 2000.<sup>106</sup> On March 16, 2001, a response from the Pulaski County Prosecutor’s Office was issued stating that a preliminary investigation had been concluded and no determination had yet been made as to whether any criminal charges would be filed.<sup>107</sup> The remaining 63 complaints included reports of long lines, voters’ names not being found on the polling site registration lists, and Motor Voter applications not being sent by the Department of Motor Vehicles to the State Board of Elections.<sup>108</sup>

Forty-nine counties in Arkansas use paper ballot systems (three have tabulating equipment on the polling site and 46 send the ballots to centralized tabulating equipment), nine

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<sup>102</sup>Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, CASE W. L. REV, 732 (1998).

<sup>103</sup>*Id.*

<sup>104</sup>Valerie L. Barth, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants*, 29 ST. MARY’S L. J. 105 (1997).

<sup>105</sup>Facsimile from Susie Stormes, Director, Arkansas State Board of Election Commissioners, General Election, November 7, 2000 Problems, County Breakdown (May 2001) (on file with the U.S. House of Representative Judiciary Committee, Democratic Staff).

<sup>106</sup>*Id.*

<sup>107</sup>Letter from Larry Jegley, Prosecuting Attorney, Sixth Judicial District to Ms. Susie Stormes, Director, Arkansas State Board of Election Commissioners (March 21, 2001) (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>108</sup>Facsimile from Susie Stormes, *supra* note 105.

counties use paper ballots that are hand-counted, eight counties use lever machines, and seven counties use punch card machines.<sup>109</sup> These systems often result in counting errors; however, Arkansas maintains no centralized record of unrecorded ballots.

Arkansas fails to provide for a method for the determination of a voter's intent when ballots are unclearly marked. The relevant provisions of the Arkansas Code state only that overvotes will not be counted and that two or more ballots folded together is considered conclusive evidence of fraudulence.<sup>110</sup> As a guide to interpreting the voter's intent, this statute would not survive scrutiny under the *Bush v. Gore* standard.

Arkansas' Secretary of State has no record of the total statewide number of unrecorded ballots in the 2000 Presidential election.<sup>111</sup>

## **California**

Of the 11,142,850 California ballots cast in the recent elections, 176,994 ballots (or 1.6 percent) were not recorded as a vote for a presidential candidate.<sup>112</sup> The rates of unrecorded ballots in California's counties depended heavily on the voting systems used; punch-card systems, which were used in 30 counties by 53.4 percent of California voters, accounted for almost 75 percent of all unrecorded ballots.<sup>113</sup> Twenty-six other counties relied on optical

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<sup>109</sup>Telephone Interview with Susie Stormes, Director, Arkansas State Board Election Commissioners (May 3, 2001).

<sup>110</sup>ARK. CODE. ANN. § 7-5-315 (1987).

<sup>111</sup>Telephone Interview with Susie Stormes, Director, Arkansas State Board Election Commissioners (May 3, 2001).

<sup>112</sup>Statement of Vote, Summary Pages (visited on June 21, 2001) [http://www.ss.ca.gov/elections/sov/2000\\_general/sum.pdf](http://www.ss.ca.gov/elections/sov/2000_general/sum.pdf); telephone interview conducted with the Secretary of State's office, May 1, 2001.

<sup>113</sup>David Reyes, *Study Aims to see if O.C.'s Ready for Electronic Voting*, LOS ANGELES TIMES, December 13, 2000, at B1; Henry Weinstein, *Suits Seek Uniformity in States' Vote-Counting*, LOS ANGELES TIMES, April 18, 2001, at A1; Voting Systems used by the Counties (visited on June 21, 2001), [http://www.ss.ca.gov/elections/sov/2000\\_general/vs.pdf](http://www.ss.ca.gov/elections/sov/2000_general/vs.pdf). The counties using punch cards are Alpine, Calaveras, Colusa, Del Norte, El Dorado, Glenn, Imperial, Inyo, Kern, Modoc, Monterey, Napa, Orange, Plumas, San Benito, Sierra, Stanislaus, Tehama, Ventura, Yolo, Yuba, Alameda, Los Angeles, Menedocino, San Deigo, Shasta, and Solano, Sacramento, San Bernardino, and Santa Clara.

scanning machines, and one California county used a touch-screen system.<sup>114</sup>

Historically, the state of California was a refuge for individuals fleeing other states where they were disenfranchised.<sup>115</sup> In the 1930s African-Americans moved from southern states where their political participation was most restricted to key western states such as California that were more influential in presidential elections. Nevertheless, there were and still are instances of alleged discrimination and disenfranchisement of Californian voters. In the 1970s, California countered previously established laws granting Chinese-Americans the right to vote by establishing literacy tests. In addition, Hispanic Californians were hindered from becoming elected officials by the use of redistricting tactics. As a result, four California counties – Kings, Monterey, Yuba and Merced – are under Voting Rights Act supervision and the Justice Department must review any redistricting plan affecting those counties.<sup>116</sup>

In the 2000 elections, a number of irregularities were reported in South Central Los Angeles. Voters in approximately 250 precincts encountered polls that contained no ballots, lacked election workers, or were closed during voting hours, according to Rev. Norman Johnson, interim executive director of the Southern Christian Leadership Conference (“SCLC”) in Los Angeles.<sup>117</sup> Voters also reported to SCLC representatives incidents of not being listed on voter rolls, difficulty calling the registrar, and seeing completed ballots that were not placed in locked boxes.<sup>118</sup>

In addition, some voters in predominately Latino communities in Orange County were

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<sup>114</sup>Voting Systems used by the Counties (visited on June 21, 2001), [http://www.ss.ca.gov/elections/sov/2000\\_general/vs.pdf](http://www.ss.ca.gov/elections/sov/2000_general/vs.pdf). The counties using optical scanning are Butte, Contra Costa, Lake Madera, San Joaquin, Santa Cruz, Sonoma, Sutter, Armador, Kings, Mariposa, Mono, Placer, San Francisco, San Mateo, Merced, Nevada, Tuolumne, Fresno, Humboldt, Lassen, Marin, San Luis Obispo, Santa Barbara, Siskiyou, Trinity, and Tulare. Riverside is the only county to use a touch screen voting system.

<sup>115</sup>Lewinson, Race, Class and Party, A History of Negro Suffrage and White Politics in the South, Russell and Russel Inc. (1963).

<sup>116</sup>Dan Walters, *Democrats Face Remap Obstacles*, THE FRESNO BEE, May 18, 2001 at A21.

<sup>117</sup>Andrea Cavanaugh, *New Program Is Response to Alleged Voting Irregularities*, ASSOCIATED PRESS STATE & LOCAL WIRE, Jan. 8, 2001.

<sup>118</sup>*Id.*

turned away from the polls, and some polling places ran out of provisional ballots.<sup>119</sup> County officials cite staff cutbacks as the predominant reason why there was unusual delay at several polling places.<sup>120</sup> While leaders in the Latino community recognized that the events were not intentional, they counseled that “[t]here may have been a discriminatory effect” and made it clear that this was a serious matter.<sup>121</sup>

Disabled Californians also reported serious problems while trying to vote in the November 2000 elections. A speech-impaired voter complained of patronizing and untrained polling staff who had to be forced to listen to and assist a voter so that she could receive a ballot.<sup>122</sup> An Oakland voter found that there were no booths at the right height for a wheel chair or individuals with scooters.<sup>123</sup> When a portable ballot machine was requested, the only machine available was a demonstration machine which listed either “George Washington” or “John Adams” as presidential candidates.<sup>124</sup> The voter was forced to tell a personal care attendant his choices and have the attendant vote in his absence, depriving him of privacy and independence.<sup>125</sup>

A close presidential election in California would come under significant judicial scrutiny. Under California election law, ballots challenged for incompleteness, ambiguity, or other defects will be counted as the counter believes proper and then set aside.<sup>126</sup> A final determination by an elections official, before the recount is completed, determines whether the challenge will be allowed.<sup>127</sup> This procedure does not address the specific determination of the legality of a vote, and it therefore appears to violate the strictures of *Bush v. Gore*.<sup>128</sup>

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<sup>119</sup>David Reyes, *Study Aims to See if O.C. 's Ready for Electronic Voting*, LOS ANGELES TIMES, December 13, 2000, at B1.

<sup>120</sup>*Id.*

<sup>121</sup>*Id.*

<sup>122</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 13.

<sup>123</sup>*Id.*

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>CAL. ELEC. CODE § 15631 (2001).

<sup>127</sup>*Id.*

<sup>128</sup>*Id.*

Fortunately, California's laws concerning voter registration maintenance seem to protect against purging voters without cause: the registration of a voter is permanent for all purposes throughout his or her life, unless specifically canceled.<sup>129</sup> A county election official may cancel the registration only upon evidence or legal proof that an individual is ineligible to vote.<sup>130</sup> Thus, removal from voting rolls cannot take place unless there is clear evidence for the removal.

## **Colorado**

Colorado has long been a progressive state with regard to suffrage, extending voting rights to women as early as 1894. However, in the recent elections a number of complaints were recorded by disabled Colorado voters. In Golden, while a polling place was accessible from its parking lot, the ramps used to reach the site were blocked either by cones used to redirect voters to the side entrance or by a large pool of water.<sup>131</sup> No booth was available to individuals with wheelchairs, who were instead expected to ask assistance of a poll worker.<sup>132</sup>

Colorado's voting systems are relatively modern: most of the counties use optical scanning systems, while the remaining counties use DRE systems and paper ballots.<sup>133</sup> However, if a national election were ever to depend on a Colorado recount, the process would not necessarily be any easier than it was in Florida. Colorado law uses a "voter's intent" standard for assessing ballots; votes will be counted unless it is impossible to determine the voter's choice, and defective or incomplete marks or punches will be accepted as long as there are no other marks or punches indicating a contrary intent.<sup>134</sup> As this standard was looked on unfavorably by the Court in *Bush v. Gore*, it is unlikely that Colorado's procedures would survive judicial scrutiny.

The Colorado Secretary of State, Rose Sanchez, has established a Blue Ribbon Election

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<sup>129</sup>*Id.*

<sup>130</sup>*Id.*

<sup>131</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 19.

<sup>132</sup>*Id.*

<sup>133</sup>No breakdown of voting systems by use in county is available. Telephone Interview with Rose Sanchez, Election Department of the Secretary of State's Office (May 7, 2001).

<sup>134</sup>COL. REV. STAT. § 1-7-508 (2000).



Task Force to review Colorado's election laws.<sup>135</sup> At its first meeting, the Task Force agreed that the process of transferring voter registration information from the Motor Vehicle Offices to the county clerks must be modernized, and proposals were offered for the automatic transfer of data electronically.<sup>136</sup> Colorado statutes do not contain explicit standards for maintaining voter records, although a voter's registration will be canceled after a federal felony conviction.<sup>137</sup>

Colorado's Secretary of State has no record of the total statewide number of unrecorded ballots in the 2000 Presidential election.<sup>138</sup>

## **Connecticut**

Connecticut appears to have a mixed history in the area of voting rights. In 1804, Connecticut allowed African-Americans to vote if they had been admitted as freemen prior to 1818.<sup>139</sup> However, on the eve of the Civil War, almost every Northern state barred African-Americans from voting.<sup>140</sup> Today, there are still examples of discriminatory practices. For instance, Hartford, Connecticut has a city rule disqualifying voters who fail to report changes of address, a rule which has led to the purging of predominately African-American and Latino votes from the voting rolls.<sup>141</sup>

This year, a conflict arose pertaining to a 1997 law that allows voters to obtain ballots up

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<sup>135</sup>Press Release from Colorado Secretary of State, Donetta Davidson, Secretary of State Task Force to Review Election Process (Dec. 21 2000) (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>136</sup>Colorado Secretary of State, Blue Ribbon Election Task Force, Minutes of Jan. 19, 2001 Public Meeting, [http://www.sos.state.co.us/pubs/blue\\_ribbon/minutes1.htm](http://www.sos.state.co.us/pubs/blue_ribbon/minutes1.htm).

<sup>137</sup>COL. REV. STAT. § 1-2-606 (2000).

<sup>138</sup>Telephone Interview with Rose Sanchez, Election Department of the Secretary of State's Office (May 7, 2001).

<sup>139</sup>Xi Wang, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography: Emancipation and the New Conception of Freedom: Black Suffrage and the Redefinition of American Freedom, 1860-1870*, CARODOZO L. REV., 2162 (May 1996).

<sup>140</sup>*Id.*

<sup>141</sup>American Civil Liberties Union, *Reaffirmation or Requiem for the Voting Rights Act? The Court Will Decide: A Public Policy Alert from the American Civil Liberties Union May 1995* (visited on May 24, 2001) <http://www.aclu.org/issues/racial/racevote.html>.

until election day. Connecticut Republicans alleged that clerks' offices were swamped on election day, which forced them to photocopy existing ballots to meet the demand and hindered their ability to confirm a voter's eligibility.<sup>142</sup> There was also allegedly confusion over whether local officials could require voters to show identification, although the law does not specifically require applicants to produce identification. It is alleged that some voters used the same-day ballots to vote twice.<sup>143</sup> In response to these accusations, on November 20, 2000, Connecticut Secretary of State Susan Bysiewicz asked the U.S. Attorney's Office to investigate allegations of voter fraud in the casting of tens of thousands of same-day Presidential ballots on election day.<sup>144</sup> The investigation was concluded, finding no evidence of voter fraud.

Connecticut has used lever machines since 1901 and has required their use since 1953.<sup>145</sup> Connecticut is in the process of certifying Marksense machines, but the process has not yet been completed.<sup>146</sup> This voting system resulted in 14,578 of the cast ballots not registering a vote for a presidential candidate.<sup>147</sup>

In the event of a recount, Connecticut state law describes the circumstances under which the tally will occur and the procedures it will follow, and it specifies that re-canvassed votes are to be counted manually.<sup>148</sup> However, it does not specify the objective standards under which an unclear ballot will be interpreted during a manual recount, and thus is unlikely to survive Supreme Court scrutiny.

The state requires voter registration applicants to declare if they were previously registered. If an applicant was previously registered in the state, the registrar of the town from

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<sup>142</sup>*Indecision 2000 -- Other States: NM -- Gore Lead Gets Even Bigger*, THE HOTLINE, Nov. 21, 2000.

<sup>143</sup>*Id.*

<sup>144</sup>*Id.*

<sup>145</sup>Telephone Interview with Mary Young, Staff Attorney in the Connecticut Secretary of State's Office (May 29, 2001)

<sup>146</sup>*Id.*

<sup>147</sup> November 7, 2000 General Election Results for Presidential Electors (visited on April 27, 2001)  
<http://www.sov-sots.state.ct.us/ReportList.asp?radio1=2&office=PE&offdesc=Presidential Electors For&party=&distcd=SW&elecnumber=4&reptype=Election Results&electype=G&title=November 07, 2000 General Election>.

<sup>148</sup>CONN. GEN. STAT. § 9-311 (2001).

which the elector has moved removes the name of the elector from the registry list of the town.<sup>149</sup> The Secretary of State also has the authority to order reviews of computerized voter registration records to locate the names of voters with registrations in more than one town. After voters are notified that they are no longer eligible to vote in the towns which they have moved from, they have 30 days to contact their registrar and confirm that they are entitled to be on the list. If they do not do so, their names are removed.<sup>150</sup> While the notification provision of Connecticut law is a step in the right direction, it could be improved with the addition of a safeguard that would allow voters to correct duplicative or erroneous registration information at the polls on election day.

## **Delaware**

Delaware experienced a relatively trouble-free 2000 election. According to the Office of the Commissioner of Elections, the registration forms of some voters who had registered through the Department of Motor Vehicles were not delivered; however, the forms were eventually discovered and the voters allowed to cast their ballots.<sup>151</sup>

Delaware also had a very low rate of unrecorded ballots; of the 333,053 ballots cast, 327,529 were recorded as votes for presidential candidates, leaving only 5,324 ballots unrecorded.<sup>152</sup> Electronic voting is used statewide, which perhaps explains the low number of unrecorded ballots.<sup>153</sup>

Delaware does not allow felons to vote, and checks names of applicants for registration against the Criminal Justice Information System and other data. Some felonies result in permanent disenfranchisement; others disenfranchise for only 5 years.<sup>154</sup> The state identifies persons who are no longer eligible to vote by contracting with a U.S. Postal Service-licensed vendor to identify voters who have moved, as well as obtaining a list from the Department of Motor Vehicles of individuals who have surrendered their driver's license while obtaining a

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<sup>149</sup>CONN. GEN. STAT. § 9-21.Chapter 143 (2001).

<sup>150</sup>CONN. GEN. STAT. § 9-21a. Chapter 143 (2001).

<sup>151</sup>Telephone Interview with Staff of Commissioner of Elections Office (May 4, 2001).

<sup>152</sup> State of Delaware, General Election (Official Results) (visited on April 27, 2001) <http://www.state.de.us/election/archive/elect00/2000genofficial.html>.

<sup>153</sup>Telephone Interview with Department of Elections, Secretary of State's Office (May 2, 2001).

<sup>154</sup>DEL. CODE ANN. tit. 15, § 6103 (2000).

driver's license from another state. Individuals are then contacted and asked to certify their address; those who do not respond are given 'inactive' status, but are eligible to vote by affirming their place of residence in writing at a polling station.<sup>155</sup>

### **District of Columbia**

In 1964, the 23<sup>rd</sup> Amendment to the Constitution granted the District of Columbia the right to vote in presidential elections.<sup>156</sup> In the 2000 presidential election, voting in the District of Columbia was marred by "long lines, spoiled ballots, broken equipment and overwhelmed poll workers."<sup>157</sup> Fifty-eight percent of District voters went to the polls in November, and the unexpectedly heavy turnout strained the system's resources, especially since the majority of election workers were senior citizens who worked four days for \$100.<sup>158</sup> Final results in the District were not released until 2:20 a.m. primarily because of human error and mechanical breakdowns.<sup>159</sup> In light of numerous complaints, the District is considering using optical scanning machines that would make vote counting nearly instantaneous.<sup>160</sup>

Additionally, some polling places in the District of Columbia offered an accessible path to the polling site, but not to the actual booths where the voting took place. One voter was told prior to the election that "curb side assistance" would be available but saw no one available to assist on election day.<sup>161</sup>

The District of Columbia has used a punch-card system for several decades. In the November elections, there were 2,748 overvotes and more than 1,000 undervotes, for a total of at

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<sup>155</sup>DEL. CODE ANN. tit. 15, § 1704 (2000).

<sup>156</sup>Prior to that time, District of Columbia voted only for party officials and delegates to the Democratic and Republican national conventions. D.C. Board of Elections and Ethics: The History of Voting in District of Columbia, <http://www.dcboee.org/htmldocs/history.htm>.

<sup>157</sup>Spencer S. Hsu, *D.C. Testing Technology to Speed up Voting Tally*, THE WASHINGTON POST, April 11, 2001, at B3.

<sup>158</sup>*Id.*

<sup>159</sup>*Id* at 4.

<sup>160</sup>*Id.*; Telephone Interview with Bill O'Field, Public Information Officer of the DC Board of Elections and Ethics (May 2, 2001).

<sup>161</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 17.

least 3,748 unrecorded ballots.<sup>162</sup>

The District of Columbia does not specify any recount procedures in statute. It appears to have adequate safeguards to assist voters who are mistakenly purged or otherwise wrongly omitted from voting rolls. Those adjudged mentally incompetent and those incarcerated for conviction of a felony are not permitted to vote. District of Columbia statutes permit those who have been deemed inactive due to change of residence and those who claim to have been erroneously omitted from voter roles to submit ballots as “special voters.”<sup>163</sup>

## **Florida**

The flaws in the Florida election process -- including untrained poll workers, flawed ballot designs, and poor management -- have been publicly documented and discussed in excruciating detail. In total, up to 180,000 ballots may not have been counted in the Florida presidential vote,<sup>164</sup> 64,328 of which were undervotes and at least 110,000 of which were overvotes.<sup>165</sup>

After the initial tally, George W. Bush held on to a slim lead in Florida of 1,784 votes.<sup>166</sup> This margin was a small enough percentage of the total votes cast to trigger an automatic recount,<sup>167</sup> and Al Gore called Bush to retract his earlier concession. On November 9, the Gore campaign requested a hand count in four counties with demonstrated voting irregularities: Palm Beach, Volusia, Broward, and Miami-Dade.<sup>168</sup> In these four counties in which the hand recount

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<sup>162</sup>*Id.*

<sup>163</sup>D.C. CODE ANN. § 710.4 , § 710.5 (2000).

<sup>164</sup>Gwyneth K. Shaw, Jim Leusner & Sean Holton, *Uncounted Ballots May Add Up to 180,000*, ORLANDO SENTINEL, November 15, 2000, at A1.

<sup>165</sup>Martin Merzer, *Review Shows Ballots Say Bush*, MIAMI HERALD, April 4, 2001.

<sup>166</sup>Florida Secretary of State, <http://election.dos.state.fl.us/>.

<sup>167</sup>FLA. STAT. ch. 102.141(4) (2000).

<sup>168</sup>Angie Cannon and Kenneth T. Walsh, *Messier by the Minute: Kicking the Presidential Race into Court Raises Questions Without Many Answers*, U.S. NEWS AND WORLD REPORT, November 20, 2000, at 27.

was sought – all heavily Democratic areas – over 73,000<sup>169</sup> ballots were not counted in the presidential tally due to either overvotes or undervotes.<sup>170</sup>

The subsequent arguments over the interpretation of “dimpled” or “hanging” chad focused on the 26 Florida counties using punch card machines; 40 counties use Marksense machines, either in a central tabulation facility or in each voting precinct, and one county uses manually tabulated paper ballots.<sup>171</sup>

Controversy also swirled around the vote in Palm Beach County, where approximately 29,000 presidential votes were invalidated because voters either punched more than one hole (19,120 overvotes) or had no mark that the machines could read (10,000 undervotes).<sup>172</sup> As a result of hand recounts of some of the “undervotes,” Gore picked up a net gain of 215 votes, though these were not included in the tally certified by Florida Republican Secretary of State and Bush campaign co-chair Katherine Harris on November 26.<sup>173</sup>

Many believe that the design of the Palm Beach County ballot was responsible for the extremely high number of invalidated ballots in Palm Beach. The Palm Beach County ballot was the only Presidential “butterfly ballot” used in Florida, in which candidates’ names were listed on both sides of the punch holes. As the ballot was laid out, although Al Gore’s name was listed *second* in the column to the left of the punch holes, voters intending to vote for Gore were required to punch the *third* hole on the page. Pat Buchanan’s name appeared *first* in a column to the right of the punch holes, and his punch hole appeared *second*.

As a result of this confusing -- and potentially illegal<sup>174</sup> -- design, a number of voters

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<sup>169</sup>Eric Diamond, *Chad’s Back and Ready to Hang in L.A.*, LOS ANGELES TIMES, April 8, 2001, at M5.

<sup>170</sup>Dan Keating and George Lardner, Jr., *Hand Count Could Lift Gore Total*, WASHINGTON POST, November 11, 2000.

<sup>171</sup>Division of Elections, Florida Department of State, <http://election.dos.state.fl.us/votemeth/cvs.shtml>.

<sup>172</sup>Angie Cannon and Kenneth T. Walsh, *Messier by the Minute: Kicking the Presidential Race into Court Raises Questions Without Many Answers*, U.S. NEWS AND WORLD REPORT, November 20, 2000, at 28.

<sup>173</sup>Complaint to Contest Election, *Gore v. Harris*, Leon County Circuit Court, Case # 00.2808, November 27, 2000.

<sup>174</sup>FLA. STAT. Ch. 101.151(3)(a) (2000). The Florida Supreme Court, however, upheld the legality of the ballot. *Fladell v. Palm Beach Canvassing Board*, Nos. SC00-2373, SC00-2376

claim that, although they intended to vote for Gore, they mistakenly voted for Buchanan.<sup>175</sup> Indeed, Pat Buchanan apparently received an inordinate number of votes in Palm Beach County, a heavily Democratic county. Buchanan received 3,407 votes -- more than three times the votes in any other Florida county, and almost 20 percent of his total in the state.<sup>176</sup> Greg Adams, an assistant professor of statistics and research methods at Carnegie Mellon University in Pittsburgh concluded that it would be statistically impossible for Buchanan to have received as many votes as he did in Palm Beach County, absent any unusual circumstances.<sup>177</sup> This research has been seconded by a Harvard-led research team which analyzed returns in 2,998 U.S. counties and concluded that Buchanan had received more than 2,000 votes in error.<sup>178</sup>

The election contest was ultimately settled by the U.S. Supreme Court. On December 9, 2000, the Court stayed the order of the Florida Supreme Court.<sup>179</sup> In his concurrence, Justice Scalia stated that the court was taking the unusual step of granting the injunction because the continued recount “threatens irreparable harm” to Bush “and to the country, by casting a cloud on what he claims to be the legitimacy of his election.”<sup>180</sup> Subsequently, after oral argument, the Court held that the lack of standards for hand recounts violated the equal protection clause of the Fourteenth Amendment, and that there was insufficient time before the Electoral College was to meet to craft and conduct a constitutionally permissible recount.<sup>181</sup> Al Gore conceded the election the next day.

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(2000).

<sup>175</sup>Sue Anne Pressley and George Lardner Jr., *In a Confused Palm Beach County, Complaints Came Early and Often*, WASHINGTON POST, November 11, 2000, at A01.

<sup>176</sup>John Lantigua, *County Official Knew About Ballot Confusion*, SALON, November 9, 2000, <http://www.salon.com/politics/feature/2000/11/09/lapore/index.html>.

<sup>177</sup>*Vote Uncertainty Bothers Buchanan; Reform Candidate Expresses Regret Over Florida Ballot Confusion*, THE ATLANTA JOURNAL-CONSTITUTION, November 10, 2001 at 2E. Professor Adams concluded that Buchanan should have received somewhere between 600 and 800 votes in Palm Beach County, when he calculated how many votes Buchanan got in the other counties, compared to Bush and Gore. *Id.*

<sup>178</sup>Jonathan N. Wand *et al.*, *Researcher: Jasper Elections Worst in Nation, “The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida,”* THE BEAUFORT GAZETTE, December 28, 2000; <http://elections.fas.harvard.edu>.

<sup>179</sup>*Bush v. Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388 (2000).

<sup>180</sup>*Id.*, at 2.

<sup>181</sup>*Bush v. Gore*, 531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388 (2000).

However, a number of investigations into the 2000 Florida Presidential election are ongoing. A *Miami Herald* recount of undervotes in Florida counties found thousands of uncounted votes.<sup>182</sup> This recount also found that, if every county was recounted, under most standards (including the standard used in the state of Texas), Al Gore would have won Florida and the Presidential election.<sup>183</sup> The *Herald* is currently reviewing approximately 110,000 Florida Presidential overvotes. A consortium of other news organizations, including the *Washington Post* and *New York Times*, are currently reviewing both the overvotes and undervotes.

On June 8, 2001 the U.S. Commission on Civil Rights approved by a 6-2 margin an independent, bipartisan investigative report that found the 2000 presidential election in Florida was marred by "injustice, ineptitude and inefficiency" that disenfranchised minority voters.<sup>184</sup>

According to the report, "countless unknown eligible voters" were wrongfully turned away from the polls or purged from voter registration lists because of procedures and practices used by election officials.<sup>185</sup> African-American voters in particular were harmed as the report stated that lists of ineligible voters, compiled by a private firm, had an error rate of at least 14 percent, and African-American voters had a "significantly greater chance" of appearing on the inaccurate lists than white voters.<sup>186</sup>

The report also found that outdated voting equipment was disproportionately used in predominantly minority districts, and that African-American voters were nine times more likely than white voters to have their ballots rejected.<sup>187</sup> Even in counties where uniform voting

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<sup>182</sup>Martine Merzer, *In Ballot Audit, Bush Prevails, Newspapers' Review Finds a Few Scenarios That Favor Gore*, WASHINGTON POST, April 4, 2001.

<sup>183</sup>*Id.* "Here's what the Herald group found in all Florida counties, including those that were not part of the court-ordered recount: Standard: Every dimple, pinprick or hanging chad on a punch-card ballot is considered a valid vote, the most inclusive standard. Result: Gore would have won by 393 votes. Standard: Dimples were counted as presidential votes only on ballots that had dimples in other races, suggesting a fault with either the machine or the voter's ability to use it. Result: Gore would have won by 299 votes...."

<sup>184</sup>U.S. Civil Rights Commission, *Voting Irregularities in Florida During the 2000 Presidential Election* (June 8, 2001) Chapter 9, at 1.

<sup>185</sup>*Id.*

<sup>186</sup>*Id.*, at 3.

<sup>187</sup>*Id.*, at 2.



systems were used, African-American voters had a higher rejection rate than white voters.<sup>188</sup>

The commission's report charges state officials, including Governor Jeb Bush and Secretary of State Katherine Harris, with ignoring evidence of outdated equipment and not responding to requests for guidance and assistance from local election officials.<sup>189</sup>

The report also indicated that the recent election reform package passed by the Florida legislature requiring advanced voting methods would not "standing alone, eliminate the racial disparity in ballot rejection rates," and called on the state to determine why African-American voters have a higher rejection rate.<sup>190</sup>

## **Georgia**

In the 1980s, many southern states (including Georgia) were compelled by lawsuits or the Justice Department to change their voting systems.<sup>191</sup> Between 1974 and 1990, vote dilution suits were filed in 40 cities, most of which were successful.<sup>192</sup> In 1991, the Justice Department required that Georgia revise its proposed redistricting scheme to increase the number of majority-African-American districts from two to three.<sup>193</sup> After the Supreme Court ruled racial gerrymandering unconstitutional in 1993, a congressional district that ran from the Atlanta suburbs to Savannah was thrown out, and the districts were redrawn with just one majority-African-American district.<sup>194</sup>

Concerns for access to the ballot in Georgia have continued to the present. As a result of widespread complaints regarding the 2000 elections, Georgia Secretary of State Cathy Cox issued a report in January 2001 (the "Election Report") that documents problems with the

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<sup>188</sup>*Id.*

<sup>189</sup>*Id.*, at 1, 4, 12.

<sup>190</sup>*Id.*, at 2.

<sup>191</sup>American Civil Liberties Union, *Reaffirmation or Requiem for the Voting Rights Act? The Court Will Decide: A Public Policy Alert from the American Civil Liberties Union May 1995* (visited on May 24, 2001) <http://www.aclu.org/issues/racial/racevote.html>.

<sup>192</sup>*Id.*

<sup>193</sup>*The Supreme Court's Backward March*, ST. LOUIS POST-DISPATCH, June 20, 1997, 06B.

<sup>194</sup>*Id.*; *Shaw v. Reno*, 509 U.S. 630 (1993).

election and makes recommendations for how to avoid these problems in the future.<sup>195</sup> In compiling the report, Secretary Cox collected comments from election officials, complaints from Georgia citizens, and findings from their internal analysis. The major conclusions of the report were as follows:

### Outdated Voting Equipment

Georgia officials found that the state's current system of counting votes is "unsatisfactory and should be thoroughly overhauled."<sup>196</sup> In the recent elections, out of 2,684,951 ballots cast, only 2,583,208 ballots registered as votes for presidential electors, meaning that 101,743 ballots (or 3.8 percent) were unrecorded.<sup>197</sup> One hundred thousand Georgia voters either did not vote for president, made a mistake that voided their ballot, or did not have their vote counted by a machine -- a rate even higher than the Florida undervote percentage of 2.9 percent.<sup>198</sup>

The rates of unrecorded ballots varied significantly with the types of ballot used. Paper ballots were used in two counties, punch card ballots were used in 17 counties, lever machines were used in 73 counties, and optical scan ballots were used in 67 counties.<sup>199</sup> The punch card system, which was used by 30.5 percent of voters, performed worst, with 4.67 percent of the ballots registering as uncounted votes. By comparison, only 2.72 percent of ballots counted with optical scanning technology were discarded, paper ballots showed an average 3.3 percent undervote, and the lever system had a 3.98 percent rate of uncounted votes.<sup>200</sup>

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<sup>195</sup>Secretary of State Cathy Cox, "*The 2000 Election: A Wake-Up Call for Reform and Change, Report to the Governor and Members of the General Assembly*," [hereinafter "Georgia Election Report"]. The Report can be obtained at [http://www.sos.state.ga.us/pressrel/2000\\_election\\_report.htm](http://www.sos.state.ga.us/pressrel/2000_election_report.htm).

<sup>196</sup>*Id.* at 26.

<sup>197</sup>Facsimile from Georgia Secretary of State's office on file with the U.S. House of Representative Judiciary Committee, Democratic Staff; Election Results, Official results of the November 7, 2000 General Election (visited on May 4, 2001) [http://www.sos.state.ga.us/elections/results/2000\\_1107/0000100.htm](http://www.sos.state.ga.us/elections/results/2000_1107/0000100.htm).

<sup>198</sup>*Id.* at 3.

<sup>199</sup>*Id.* at 6 Secretary of State Cathy Cox, "*The 2000 Election: A Wake-Up Call for Reform and Change, Report to the Governor and Members of the General Assembly*," [hereinafter "Georgia Election Report"]. The Report can be obtained at [http://www.sos.state.ga.us/pressrel/2000\\_election\\_report.htm](http://www.sos.state.ga.us/pressrel/2000_election_report.htm).

<sup>200</sup>Southern Regional Council, *New Evidence of Voting Equipment Disparities in Counties: Uncounted Votes Vary by Race and Party Affiliation; Current Error-Prone Voting*

The disparity in the error rates for ballots had a significant racial impact. African-American voters in Georgia were almost two times more likely than white voters to live in counties that use the most error-prone voting machinery. Almost half (46.23 percent) of Georgia's African-American voters live in punch card counties, as compared to less than one quarter (24.73 percent) of Georgia's white voters; conversely, white voters in Georgia were 1.5 times more likely than African-American voters to use optical scanning equipment, which is the least likely to result in uncounted votes.<sup>201</sup>

As a result of the varying error rates caused by the different voting methods, the American Civil Liberties Union has filed suit in Fulton County Superior Court on the grounds that Georgia's electoral machinery is inconsistent with Georgia law, deprives its citizens of equal protection and due process as guaranteed by the U.S. Constitution, and violates the federal Voting Rights Act.<sup>202</sup>

Georgia Secretary of State Cox is currently seeking funding from the 2001 Georgia General Assembly to field test new electronic voting equipment in several Georgia cities, with the goal of implementing a state-of-the-art, uniform system of voting for all of Georgia's 159 counties by 2004.<sup>203</sup>

### Ballot Problems

The Georgia Election Report also documented problems relating to the ballot itself, such as lack of familiarity with constitutional amendments and referendum questions, a lengthy ballot with confusing and unnecessary choices, and ballot materials that were defective or missing. In the 2000 election, one county was advised to utilize hair dryers in an effort to remove the dampness that was believed to be preventing an optical scan reader from reading the ballots

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*Systems Affect All Voters*, Feb. 1, 2001 [hereinafter "Southern Regional Council Report"]; Georgia Election Report at 7. The report calculated the "mean average" undervote for each voting method by computing the percentage undervote in each county that used a given type of equipment and then averaging those percentages. Because the Georgia Election Report lists the "average" undervote -- rather than the absolute undervote -- we have used the absolute undervote figures where available.

<sup>201</sup>Southern Regional Council Report.

<sup>202</sup>*Andrews v. Cox*, Fulton County Super. Ct. Jan. 5, 2001.

<sup>203</sup>Press Release from Cathy Cox, Georgia Secretary of State, Secretary Cox Joins Manufacturers of Electronic Voting Equipment, State Legislators and Election Officials for Demonstration of Electronic Voting Systems, (Jan. 29, 2001).

properly. All of these problems contributed to delays at the polls.<sup>204</sup>

#### “Lines Too Long” and Other Polling Place Deficiencies

“Lines too long” was the single most commonly heard complaint from voters. Citizens in some communities waited at the polls for two hours or more, and some metro Atlanta voters did not cast ballots until after 11:00 p.m. -- a more than four-hour wait. Contributing factors in some polling places was poor layout, a shortage of well-trained poll workers, and a shortage of poll locations.<sup>205</sup>

#### Election Law Violations

The Georgia Office of Secretary of State received numerous complaints on and after Election Day 2000 relating to violations of current election law, including voter intimidation by poll workers, differing treatment for voters of different races and parties, electioneering within the prohibited area, or problems with voting equipment and mishandling of absentee ballots.<sup>206</sup> In Cherokee County, approximately 1,000 absentee ballots were initially not counted because the file cabinet that held them was under a table and was not discovered until the morning after the election. These ballots were counted a week later and were added to the official tally.<sup>207</sup> Investigations of any substantiated allegations of wrongdoing are underway by State Election Board investigators.<sup>208</sup>

#### Problems With Voter Registration

The Office of Secretary of State received numerous complaints from people who believed they had properly registered to vote but whose names did not appear on the voter roll. A majority of these complaints came from metro Atlanta residents. Voter registration through the Department of Public Safety (an implementation of the “Motor Voter” law) was typically the target of most complaints.<sup>209</sup> According to election officials in Muscogee County, the problem

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<sup>204</sup>Georgia Election Report, at 8.

<sup>205</sup>*Id.* at 9-10, 12-13.

<sup>206</sup>*Id.* at 14.

<sup>207</sup>*State Looking Into Alleged Voting Irregularities*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 10, 2000.

<sup>208</sup>Georgia Election Report, at 14.

<sup>209</sup>*Id.* at 21-22.

affected between 400 to 500 would-be voters in Columbus, Georgia.<sup>210</sup>

### Other Issues

Other reported complaints included difficulties in finding precincts; excessive paperwork at the polls before obtaining a ballot; slow processing of absentee ballots; votes recorded for citizens who had died before the election; challenges resulting from the growth of “language minorities”; unreliability of the state mainframe computer system; delays in the reporting of county election results; staffing issues that required overworked probate judges to run local elections; and concerns with making voting more convenient and accessible.<sup>211</sup>

Georgia recount provisions allow the secretary of state or the superintendent of an election precinct to order a recount under certain circumstances and in the presence of observers sent by the candidates.<sup>212</sup> However, the state does not set as clear a standard for counting votes as *Bush v. Gore* requires, instead relying on a “voter’s intent” standard that counts ballots as long as it is not impossible to determine the voter’s choice.<sup>213</sup> Given the problems outlined by the election report, a Florida-style recount in Georgia would likely be just as painful for the nation.

### Hawaii

Hawaii’s four counties – Hawaii, Maui, Honolulu, and Kauai – use Marksense optical scanning machines.<sup>214</sup> This system has allowed Hawaii to have a low number of unrecorded ballots; of 371,113 ballots cast in the recent presidential election, only 3,162 (or 0.8 percent)

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<sup>210</sup>*State Looking Into Alleged Voting Irregularities*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 10, 2000.

<sup>211</sup>Georgia Election Report. The report recognized that significant delays can occur between a death and the issuance of a death certificate, the completion of a death record, and the receipt of the information by the State Elections Division. The report, however, questioned the accuracy of claims that over 5,000 “dead voters” voted in the last ten years. Georgia Election Report, at 11-12 & n.3.

<sup>212</sup>GA. CODE ANN. § 21-2-495 (2000).

<sup>213</sup>GA. CODE ANN. § 21-2-437(d) (2000).

<sup>214</sup>Telephone Interview with Dwayne D. Yoshina, Chief Elections Officer of the State of Hawaii (May 1, 2001).

were registered as undervotes or overvotes.<sup>215</sup>

According to Dwayne D. Yoshina, Hawaii's Chief Elections Officer, the Hawaii elections shared the general complaint of long lines but otherwise proceeded smoothly.<sup>216</sup> There were also complaints by registered voters that their names were not found on the voting rolls.<sup>217</sup> If a voter's name is not found on present or past voting rolls, he or she can attempt to cast a 'challenged' ballot, but the Board of Elections member present at the polling place has the power to decide whether that opportunity will be offered.<sup>218</sup>

Hawaii appears to have adequate safeguards to protect against wrongful purges. A voter must be removed from the voting rolls 60 days after a general election, if the voter did not vote in that election, the primary election preceding it or the general election preceding the primary.<sup>219</sup> A voter may also be removed if a notice sent by the elections clerk that was properly addressed is returned as undeliverable.<sup>220</sup> However, such a voter may vote if he or she completes an affidavit certifying that the voter is at the address on file or still resides within the precinct.<sup>221</sup>

Hawaii has no recount statute and, therefore, has no procedure for counting contested ballots that would be consistent with *Bush v. Gore*.<sup>222</sup> Such a recount could run afoul of both the Equal Protection Clause and, if the recount was in a Presidential election under Article II of the Constitution. Hawaii appears to have recognized that such a problem exists: on May 24, 2001, the Governor signed a bill which called for a study of, *inter alia*, "the feasibility of implementing an automatic recount and improved contest procedure."<sup>223</sup>

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<sup>215</sup> State of Hawaii's, November 7, 2000, Final Report (visited on April 27, 2001)  
<http://www.hawaii.gov/elections/reslt00/general/00swgen4.html>.

<sup>216</sup>Telephone Interview with Dwayne D. Yoshina, Chief Elections Officer of the State of Hawaii (May 1, 2001).

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

<sup>219</sup>HAWAII REV. STAT. § 11-17 (2000).

<sup>220</sup>*Id.*

<sup>221</sup>*Id.*

<sup>222</sup>Telephone Interview with Scott Nago, Hawaii Elections Office Staff (July 2, 2001).

<sup>223</sup>H. R.168, 106<sup>th</sup> Congress (2001).

## Idaho

In the 2000 elections, the state of Idaho used optical scanning machines as well as punch card machines.<sup>224</sup> According to the Election Division of the Secretary of State's office, a total of 531,685 ballots were cast; of those ballots, 516,647 registered as votes for presidential electors. The remaining 15,038 ballots (or 2.8 percent) were unrecorded.<sup>225</sup>

Should a recount occur in Idaho, it would be conducted under the same conditions and in the same manner as the original count.<sup>226</sup> However, in describing its original election procedures, Idaho does not specify any means of resolving disputes over an unclear ballot, stating only that "any ballot or part of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted."<sup>227</sup> It is unlikely that this standard would survive scrutiny under the *Bush v. Gore* test.

Idaho does not allow voters who are wrongly purged to cast provisional ballots and, therefore, lacks adequate safeguards to protect such voters. State statutes allow county clerks to remove the names of voters who have not voted in a general election for four years. They may remove names up until 120 days after a general election takes place.<sup>228</sup> County clerks also have the authority to remove the names of those who appear by the registration records not to be a citizen of the United States.<sup>229</sup> Nevertheless, there is a state statute that prevents purging the names of voters serving in the armed services.<sup>230</sup>

Idaho experienced no significant difficulties with the November elections. However, in January 2001, the Idaho Democratic Party called for an investigation into Republican Party tactics concerning absentee ballots. Idaho State Party Chair Carolyn Boyce appealed to the Idaho Secretary of State and the U.S. Department of Justice, claiming that a Republican mailing with the title "Official Absentee Ballot Application Request" and imprinted with the Idaho state

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<sup>224</sup>Telephone Interview with Idaho Secretary of State Election Division (May 2, 2001).

<sup>225</sup>Idaho Secretary of State Election Division, November 7, 2000 General Election Results (visited on April 27, 2001) [http://www.idsos.state.id.us/ELECT/2000rslt/general/tot\\_stwd.html](http://www.idsos.state.id.us/ELECT/2000rslt/general/tot_stwd.html).

<sup>226</sup>IDAHO CODE ANN. § 34-2305.

<sup>227</sup>IDAHO CODE ANN. §§ 34-1202A, 34-1203.

<sup>228</sup>IDAHO CODE ANN. § 34-435.

<sup>229</sup>IDAHO CODE ANN. § 34-419.

<sup>230</sup>IDAHO CODE ANN. § 34-420.

seal was misleading to voters.<sup>231</sup> Boyce claimed that the ballot request was not returned directly to the appropriate county clerk's office, but was instead returned to the Republican Party.<sup>232</sup> Boyce questioned the fact that the ballot request was returned to a partisan entity and demanded to know what was done with the documents when they were received.<sup>233</sup> The Idaho Secretary of State concluded that there had been no wrongdoing in the Republican Party's actions, emphasizing that the information sent out was a ballot request, not a ballot.<sup>234</sup> Although the Secretary of State did show some concern over the fact that the State Seal was placed on the mailer and was not used in conjunction with a state function, he stated that such action was not illegal and did not warrant further review.<sup>235</sup>

## **Illinois**

According to the official returns, the total number of ballots cast in November elections in Illinois was 5,149,400. Of those ballots, 4,932,192 registered as votes for presidential electors, meaning that 217,208 (or 4.2 percent) of the cast ballots went unrecorded, a rate significantly higher than in Florida.<sup>236</sup>

This high rate of error was by no means uniform across the state. Punch card ballots are used in 98 Illinois jurisdictions, and paper ballot sheets with optical scanners are used in 12 others.<sup>237</sup> As could be expected, the punch card ballots had a significantly higher error rate than did the paper ballots.<sup>238</sup> In fact, the primary complaints about the election focused on the use of the punch card voting system. According to data released by the Illinois State Board of Elections, the rate of unrecorded votes in jurisdictions using punch card systems was approximately 4.08

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<sup>231</sup>Telephone Interview with Carolyn Boyce and Patty Nance, *Idaho Democratic Party*, April 2, 2001.

<sup>232</sup>*Id.*

<sup>233</sup>*Id.*

<sup>234</sup>*Id.*

<sup>235</sup>*Id.*

<sup>236</sup>Illinois State Election Information (visited on April 30, 2001) <http://www.elections.state.il.us/elecinfo/pages/VoteTotalsList.asp?office=PRESIDENT+AND+V ICE+PRESIDENT&Election=8>.

<sup>237</sup>*Black v. McGuffage*, Complaint, U.S. District Court, N.D. Ill., ¶ 14.

<sup>238</sup>*Id.*



percent, while the rate in jurisdictions using optical scanning systems was 0.88 percent.<sup>239</sup> In individual counties, the error rates were more widely divergent. For example, DeKalb County and McHenry County used optical scanning systems and had error rates of 0.34 percent and 0.32 percent, respectively. In contrast, the city of Chicago, which used a punch card voting system, had an error rate of 7.06 percent, 20 times as great.<sup>240</sup>

Furthermore, many voters in optical scan jurisdictions were afforded “error notification” regarding their ballots. This option allows the voter or polling place personnel to insert a ballot directly into the tabulation equipment while the voter is still present. The tabulating equipment then returns any ballot with an overvote or which cannot be read, and allows the voter whose ballot is returned to correct the vote by obtaining a new ballot.<sup>241</sup> In the 2000 Presidential election, 10 of the 12 Illinois voting districts with optical scan systems provided error notification to voters.<sup>242</sup> However, Illinois law prohibits error notification on punch card voting systems, even though these systems are technologically capable of providing such notice.<sup>243</sup>

The different error rates between the punch card and optical scan ballots and the differential use of error notification appears to have a disparate impact on African-American voters in Illinois. In jurisdictions with substantial African-American populations, there is a disproportionately high use of punch card voting systems, for which error notification is prohibited. Even within these jurisdictions, the highest rates of unrecorded votes are found in precincts with high African-American populations. As a result, African-American voters in Illinois are significantly less likely to have their votes counted than non-minority voters.<sup>244</sup>

Illinois vest the authority to hear federal election contests in the circuit courts.<sup>245</sup> The

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<sup>239</sup>*Id.* at ¶ 23.

<sup>240</sup>*Id.* at ¶ 24.

<sup>241</sup>*Id.* at ¶ 18.

<sup>242</sup>*Id.* at ¶ 19.

<sup>243</sup>*Id.* at ¶ 20. The prohibition of the use of error notification in punch card ballot jurisdictions has been challenged as a violation of the Illinois Constitution in *Tully v. Orr*, No. 01-009F-9, Cook County Cir. Ct., Jan. 18, 2001. On February 7, 2001, the court entered a preliminary injunction in this case, prohibiting the Illinois State Board of Elections from enforcing provisions of the Election Code that would prohibit the use of the error notification system in the City of Chicago and Cook County. *Tully*, Order, Feb. 7, 2001.

<sup>244</sup>*Black*, Complaint at ¶ 26.

<sup>245</sup>10 ILCS 5 Sec.23-5.

Illinois courts have repeatedly held that, whenever the intent of the voter can be determined with reasonable certainty, the ballot should be counted.<sup>246</sup> This is virtually identical to the Florida standard struck down in *Bush v. Gore* and, therefore, would not survive constitutional scrutiny.

## **Indiana**

Just before the November election, an investigation by *The Indianapolis Star* revealed that hundreds of thousands of names on the voter rolls -- as many as one in five statewide, and more in some counties -- were incorrect and that the people behind those names had moved, died, or gone to prison.<sup>247</sup> Invalid names have piled up in the Indiana system primarily because the state has not been able to process voter registrations made possible by the National Voter Registration Act, or “motor voter” law.<sup>248</sup> Unlike some of the states that have been able to easily process new registrants, Indiana does not have a statewide computerized voter registration database, and some have pointed to a lack of cooperation, communication, and trust among state and county election officials.<sup>249</sup> Although officials do not believe that widespread, systematic voter fraud is occurring, the system creates the potential for illegal voter fraud.<sup>250</sup>

Although Indiana’s rolls contain many dead voters, they also exclude many live ones. One Gary, Indiana voter complained that he arrived at the polling place and found that his name did not appear on the poll book.<sup>251</sup> He was a legal resident and a legally registered voter, yet the elections workers had no procedure in place through which they could have double-checked the books so that he could vote.<sup>252</sup> In another instance, residents of a care facility in Lake County, Indiana were prevented from voting because the traveling election board assigned to register

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<sup>246</sup>*Pullen v. Mulligan*, 138 Ill. 2d. 21 (1990); *Gulino v. Cerny*, 13 Ill. 2d. 244 (1958); *Griffin v. Rausa*, 2 Ill. 2d. 421 (1954).

<sup>247</sup>Bill Theobald, *False Counts: Special Report; Bogus Names Jam Indiana’s Voter List; Invalid, Repeat Entries Damaging Credibility*, THE INDIANAPOLIS STAR, Nov. 5, 2000, at A1.

<sup>248</sup>*Id.*

<sup>249</sup>*Id.*

<sup>250</sup>*Id.*

<sup>251</sup>Telephone Interview with Robin Winston, Chairman, Indiana Democratic Party (April 9, 2001).

<sup>252</sup>*Id.*

qualified voters at the facility failed to complete the registration.<sup>253</sup> In Bloomington, Indiana, election workers were uninformed about the accessibility voting laws. When told that Federal law states that all voting facilities needed to be accessible to all voters, one poll worker claimed that she had never heard of such a law and thought people in wheelchairs could just vote absentee.<sup>254</sup> At another Bloomington polling site, a disabled voter was told that two people (one from each party) were required to come into the booth with the disabled voter needing assistance, making no effort to preserve the voter's privacy.<sup>255</sup> Additionally, in Grant County, Indiana, there were reported complaints of problems with motor voter registration and broken voting machines, which in some cases caused voters to leave the precinct without voting.<sup>256</sup>

In light of these difficulties, on February 1, Indiana Governor Frank O'Bannon and Secretary of State Sue Anne Gilroy announced the creation of a Bipartisan Task Force on Election Integrity to review Indiana voting procedures, and to ensure accurate and reliable election results. The 16-member task force will conduct public hearings to gauge the accuracy of Indiana elections, and will submit a report to the Governor by November 6, 2001.<sup>257</sup>

Indiana's lack of centralized information on voter registration is compounded by the unavailability of centralized information on unrecorded ballots. Although 35 Indiana counties use punch card voting machines, 25 use DRE's, 23 use optical scanning and 9 use lever machines, no comparisons among the counties can be made, as no totals of ballot information are compiled.<sup>258</sup> On January 30, 2001, a class action lawsuit was filed in Marion County Superior Court against the Secretary of State, the co-directors of the Indiana State Elections Division, and the Indiana Election Commission. The suit alleges that the use of punch card ballots violates the Indiana Constitution's requirement that elections be "fair and equal," because punch-card ballots

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<sup>253</sup>*Id.*

<sup>254</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 14.

<sup>255</sup>*Id.* at 17.

<sup>256</sup>*Id.*

<sup>257</sup>Press Release from Frank O'Bannon, Governor of Indiana, *O'Bannon, Gilroy form Task Force To Examine Indiana Election Laws* (Feb. 1, 2001) (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>258</sup>Telephone Interview with Dale Simmons, Co-General Counsel in the Indiana Secretary of State's Office (May 3, 2001).

have a higher error rate in recording votes than other types of voting equipment.<sup>259</sup> The Indiana Secretary of State has stated that she agrees with the goal of the lawsuit and would like to eliminate obsolete voting technologies, including punch card systems and lever machines.<sup>260</sup>

One positive aspect of the Indiana election system is that its provisions for interpreting ballots are extremely precise. Indiana state law specifies that “the primary factor to be considered in determining a voter's choice on a ballot is the intent of the voter.”<sup>261</sup> However, the statute also provides that the voter's intent can be determined by voting marks made on or in a voting square at the left of a candidate's name,<sup>262</sup> a voting square following the word "Yes" or "No" before a public question,<sup>263</sup> or a circle containing a political party device.<sup>264</sup> Voting marks that touch a circle or square are to be counted as if they were on or in the circle or square.<sup>265</sup> Regarding punch card ballots, Indiana counts chads that have been pierced but not entirely separated from the card, but not chads that have merely been indented.<sup>266</sup> A hole punched in the numbered box indicating which chad should be punched out for each candidate is also counted as a vote.<sup>267</sup> This level of specificity seems likely to pass the test imposed by *Bush v. Gore*.

Indiana also has a strict voter purging system. Voters who claim to have been erroneously removed or left off a registration list may not vote unless the circuit court clerk or board of registration provides a signed certificate of error or advises the precinct election board that the office has approved the application, or unless the registration office has no record of approving or rejecting the application.<sup>268</sup> Persons who provide a receipt of a voter registration

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<sup>259</sup>Mary Beth Schneider, *Suit Seeks Ban of Punch-Card Ballot Systems Used in State; Class Action Demands that Indiana Replace Equipment in 35 Counties To Avoid Messy Election Recounts*, THE INDIANAPOLIS STAR, Jan. 31, 2001, at A1.

<sup>260</sup>*Id.*

<sup>261</sup>IND. CODE § 3-12-1-1 (2001).

<sup>262</sup>IND. CODE § 3-12-1-5 (2001).

<sup>263</sup>IND. CODE § 3-12-1-6 (2001).

<sup>264</sup>IND. CODE § 3-12-1-8 (2001).

<sup>265</sup>IND. CODE § 3-12-1-9 (2001).

<sup>266</sup>IND. CODE § 3-12-1-9.5(c,d) (2001).

<sup>267</sup>IND. CODE § 3-12-1-9.5(e) (2001).

<sup>268</sup>IND. CODE § 3-7-46.

form are also permitted to vote under such circumstances.<sup>269</sup> Persons convicted of federal felonies are removed from the official list of registered voters.<sup>270</sup>

## Iowa

In Iowa, a problem with the state's "motor voter" program left hundreds of Iowans who thought they had registered unable to vote in the November 2000 election. A *Des Moines Register* survey of 99 county auditors showed that in almost every county, some Iowans who thought they had registered when renewing their license found their names missing when they went to a polling site. Although these individuals were allowed to vote by special ballot, many of their votes were not counted.<sup>271</sup> For example, Scott County Deputy Auditor Joyce Corken said that the majority of the estimated 150 special ballots that were unrecorded in her county involved voters who said they registered with the Transportation Department.<sup>272</sup> It is unclear the degree to which the motor voter problem in Iowa stemmed from a computer error with the Iowa Department of Transportation. In October 2000, a Department of Transportation computer malfunction caused the names of 5,600 people to be erased; however, state officials said that they remedied this error by later sending the names out to county auditors.<sup>273</sup>

A post-election review of Iowa's voting precincts also found that one in seven polling places is inaccessible to disabled people. In the November 2000 election, 310 of the 2,126 polling places were listed with the Iowa Secretary of State's office as inaccessible to the elderly or the disabled.<sup>274</sup> Each of Lee County's 23 polling places was inaccessible to the disabled.<sup>275</sup> Federal law requires that in the selection of polling places preference must be given to buildings

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<sup>269</sup>IND. CODE § 3-7-48-7.

<sup>270</sup>IND. CODE § 3-7-46.

<sup>271</sup>*Votes thrown out after "motor voter" registration failed*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 17, 2000.

<sup>272</sup>*Id.*

<sup>273</sup>*Id.*

<sup>274</sup>Clark Kauffman, *310 Polling Sites Found Inaccessible*, THE DES MOINES REGISTER, Nov. 8, 2000, at 2.

<sup>275</sup>*Id.* Lee County Auditor Anne Pederson blamed the problem on the regulations being too strict. She said, for example, that if a handicapped parking space was marked on the parking lot surface, instead of on a post-mounted sign, that alone would classify a polling place as inaccessible. She acknowledged, however, that some Lee County sites also have physical barriers, such as gravel parking lots or thresholds that block wheelchair access.

accessible to elderly and disabled people, with specific guidelines to be established by the states.<sup>276</sup>

On March 12, 2001, Chat Culver, Secretary of State of Iowa, issued a report on the need to update the present voting systems, including improved training for county auditors, staff, and election day polling workers, increased pay for poll workers, and production and distribution of nonpartisan voter guides.<sup>277</sup>

It is difficult to assess the number of unrecorded ballots in Iowa because Iowa's Secretary of State has no record of the total statewide number of unrecorded ballots in the 2000 Presidential election.<sup>278</sup> Currently, 80 percent of Iowa precincts use optical scan machines, 12 percent use Direct Recording Electronic Devices (DRE's), seven percent use lever machines, and less than one percent use paper ballots.<sup>279</sup> However, Iowa does not collect centralized information regarding the undercount/overcount votes of an election; although optical scanning machines tend to have low error rates, no other information is available to calculate the number of unrecorded ballots.<sup>280</sup>

Furthermore, the voters whose ballots were unrecorded would be unable to register their vote in the case of a recount. According to Iowa law, recount boards consider only those ballots which were voted and counted for the office in question. If an electronic tabulating system was used to count the ballots, the recount board may request that the ballots be recounted by the same method.<sup>281</sup>

Voter registration in Iowa can be canceled if a registered voter dies, moves to a residence in another jurisdiction, requests cancellation in writing, is convicted of a felony, is declared

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<sup>276</sup>*Id.*

<sup>277</sup>Chester J. Culver, Iowa Secretary of State, Commissioner of Elections and Registrar of Voters, *Iowa's Election 2000: Facts, Findings and Our Future* (March 12, 2001).

<sup>278</sup>Telephone Interview with staff member in the Elections Division of the Iowa Secretary of State's Office (May 3, 2001).

<sup>279</sup>Chester J. Culver, Iowa Secretary of State, Commissioner of Elections, and Registrar of Voters, *Iowa's Election 2000: Facts, Findings, and Our Future* (March 12, 2001).

<sup>280</sup>Telephone Interview with staff member in the Election Division of the Iowa Secretary of State's Office (May 3, 2001).

<sup>281</sup>IOWA CODE §50.48.

mentally incompetent to vote, or has an inactive registration record for two general elections.<sup>282</sup>

## **Kansas**

The November 2000 election brought an increased number of complaints in Kansas by voters who had used the “motor voter” registration mechanism. It was reported that applications received at the department of motor vehicles were not all forwarded to the State Elections Board, leaving the voters who filled out those applications off the voting rolls on election day and depriving them of their right to vote.<sup>283</sup>

According to Deputy Assistant Secretary of State Brad Bryant, no punch-card ballots were used in Kansas in the November 2000 election. Instead, it was reported that 81 counties used optical scanning machines, 21 counties used hand-counted paper ballots, and three counties used DRE machines.<sup>284</sup> Of the 1,113,214 ballots cast, 1,092,716 registered as votes for presidential electors, meaning that 20,498 of the cast ballots (or 1.8 percent) did not register as votes for a presidential candidate.<sup>285</sup>

Kansas law regarding recounts provides that, in a county that uses optical scanning systems, the method of conducting the recount shall be at the discretion of the person requesting the recount; however, it does not provide further guidance on deciding the results of unclear ballots. As a result, a recount in Kansas would likely be subject to the same constitutional challenges as the 2000 Florida recount.<sup>286</sup>

The Kansas Statute protects against needless purging of voter rolls by having safeguards to remove individuals from the voting roll lists. Registration can be canceled if a registered voter dies, moves to a residence in another jurisdiction, or is convicted of a felony. In the case of a change in residence, registrants may not be removed from the voter registration list unless they confirm that they have moved, or if they fail to respond to a change of address form sent from the

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<sup>282</sup>IOWA CODE § 48A.30.

<sup>283</sup>*Id.*

<sup>284</sup>Telephone Interview with Brad Bryant, Deputy Assistant Secretary of State, Elections and Legislative Matters Division, Secretary of State’s Office (April 27, 2001).

<sup>285</sup>2000 Kansas Official General Election Results (visited on April 27, 2001).  
<http://www.kssos.org/elmpast/2kgwin1.html>.

<sup>286</sup>KANSAS STAT. ANN. § 25-3107.

registration office for two general elections after the notice is sent.<sup>287</sup>

## **Kentucky**

In the 2000 elections, Kentucky faced difficulties regarding ballot layouts, reliability of voting machines, integrity of absentee ballots and voter registration rolls, and clarity of election laws.<sup>288</sup> In Franklin County, a stack of voter registration cards from Kentucky State University was turned in to the county clerk's office a day after the deadline. Though the Franklin County Board of Elections rejected the late cards, Franklin Circuit Judge William Graham allowed the affected residents to fill out paper ballots so their votes could be counted if someone successfully contested the board's decision.<sup>289</sup> The problem affected as many as 130 people, including several first-time voters and students who had filled out registration cards during a registration drive by a university group.<sup>290</sup>

A few technical glitches also occurred on election day, such as a power outage and a brief interruption of the state's online registration system early in the day. In addition, just before 8:00 p.m., a malfunction occurred in the Secretary of State's electronic reporting of statewide results.<sup>291</sup>

Finally, disabled voters stated that at least two polling places in Franklin had barriers present and were inaccessible to individuals with wheelchairs.<sup>292</sup>

Kentucky Secretary of State John Y. Brown III has drafted a 10-point list of reforms to address these subjects and others. The election reform agenda includes: (1) uniform ballot standards, (2) upgrading voting equipment, (3) improving election-night reporting, (4) improving voter registration integrity, (5) recruiting poll workers and improving their training, (6) clarifying

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<sup>287</sup>KANSAS STAT. ANN. § 25-2316c.

<sup>288</sup>Al Cross, *2001 Kentucky General Assembly, Election Laws; Secretary of State's Plan Would Fine-Tune Voting System*, THE COURIER-JOURNAL, Feb. 4, 2001, at 6.

<sup>289</sup>Darla Carter, *Election 2000; Problems at the Polls; Some Franklin County Votes Are in Limbo; Few Other Glitches Are Reported as Voters Turn Out*, THE COURIER-JOURNAL, Nov. 8, 2000, at 16.

<sup>290</sup>*Id.*

<sup>291</sup>*Id.*

<sup>292</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 17.



unclear election statutes, (7) identifying voters who are members of third parties and improving their ballot access, (8) requiring accurate campaign finance disclosures, (9) enhancing voter outreach and education, and (10) reforming the absentee voting system.<sup>293</sup>

On May 1, 2000, Brown stated that he would ask the 2002 Kentucky General Assembly to approve his election reform plan.<sup>294</sup> House Speaker Judy Richards has agreed in principle to sponsor legislation to effectuate these reforms.<sup>295</sup>

The state of Kentucky uses optical scanning machines and DRE machines.<sup>296</sup> These voting systems do not allow for overvotes, but no other information is centrally available to calculate the number of spoiled ballots.<sup>297</sup>

Kentucky provides for recounts and election contests to be conducted through the court system; an action requesting a recount is brought in the county Circuit Court.<sup>298</sup> However, no standards for the interpretation of unclear ballots are offered, meaning that a recount in Kansas that would decide a presidential election would likely come under constitutional scrutiny.

Registration in Kentucky can be canceled if a registered voter dies, requests cancellation, is declared incompetent, moves to a residence in another jurisdiction, or is convicted of a felony. In the case of a change in residence, registrants may not be removed from the voter registration list unless they confirm that they have moved, or if they fail to respond to a change of address form sent from the registration office for two general elections after the notice is sent.<sup>299</sup>

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<sup>293</sup>Kentucky Secretary of State's Office Election Reform Agenda, <http://www.kysos.com/ELECFIL/reformproposals.htm>.

<sup>294</sup>Press Release, Kentucky Secretary of State's Office, Rally Demonstrates Need for Election Reform (May 2, 2001).

<sup>295</sup>Al Cross, *2001 Kentucky General Assembly, Election Laws; Secretary of State's Plan Would Fine-Tune Voting System*, THE COURIER-JOURNAL, Feb. 4, 2001, at 6.

<sup>296</sup>Voting Systems Certified by the Kentucky State Board of Election (visited on May 2, 2001) <http://www.sos.state.ky.us/ELECFIL/State%20Board%20Files/votingsystems.htm>.

<sup>297</sup>Telephone Interview with Sarah Johnson, Assistant Director of State Board of Election of Kentucky (May 3, 2001).

<sup>298</sup>KY. REV. STAT. ANN. § 120.165 (2000).

<sup>299</sup>KY. REV. STAT. ANN. § 116.0452 (2000).

## Louisiana

There were many complaints in Louisiana from residents who lost their opportunity to vote in the 2000 elections because their registration at local driver's licence bureaus under the "motor voter" law were never processed.<sup>300</sup> According to the Jefferson Parish Registrar of Voters, dozens of parish residents in Jefferson Parish alone found themselves with no designated precinct to go to. On the west bank of New Orleans, there were 75-100 calls from people who claimed that they had changed their address, but were not found in the Registrar's records. And in St. Tammany, Registrar of Voters M. Dwayne Wall said that approximately 100 people experienced difficulties with "motor voter" registrations that were never properly processed.<sup>301</sup> In addition, some voters attempted to register to vote on-line through websites unaffiliated with the Department of Elections and Registration. The State of Louisiana does not accept on-line registration and those individuals were not registered.<sup>302</sup>

Irregularities in registration were also found in Donaldsonville, including claims of voting by children and the use of a public bus to transport voters to the polls.<sup>303</sup> Greg Malveux, the fraud liaison director for the Louisiana Department of Elections, confirmed that at least twelve minors, ranging in age from five to 14, had been registered to vote.<sup>304</sup>

Each precinct is equipped with either mechanical or electronic voting machines. Only absentee votes are recorded on punch card ballots.<sup>305</sup> The state is currently studying the possibility of touch-screen and ballot-on-demand systems.<sup>306</sup> However, because the Secretary of

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<sup>300</sup>Richard Boyd, *DMV Vote Registrants Find Names Off Rolls; Some 'Motor Voter' Forms Not Processed*, THE TIMES-PICAYUNE, Nov. 9, 2000, at 23.

<sup>301</sup>*Id.*

<sup>302</sup>Letter from Juliet T. Rizzo, General Counsel, State of Louisiana, Department of Elections and Registration, to Congressman John Conyers, Jr. (April 27, 2001) (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>303</sup>*Fraud Investigator Reviewing Donaldsonville Votes*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 14, 2000.

<sup>304</sup>*Id.*

<sup>305</sup>Letter from Juliet T. Rizzo, General Counsel, State of Louisiana, Department of Elections and Registration, to Congressman John Conyers, Jr. (April 27, 2001) (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>306</sup>Facsimile from Keith Edmonston, State of Louisiana, Department of Elections and Registration on Voting Machines (May 28, 2001).

State's office does not compile the information, no information is centrally available to calculate the number of spoiled ballots.<sup>307</sup> Furthermore, although a procedure exists in Louisiana for trial courts to appoint officials to conduct a recount, state law does not set a clear standard for accepting possible undervotes or ballots that are unclearly marked.<sup>308</sup>

When the parish Registrar of Voters has reason to believe that an individual is no longer eligible to vote, has changed address, or has been illegally placed in the registration records, the individual must be notified with a confirmation card and his or her name added to the list of inactive voters.<sup>309</sup> If voters do not return the card by the second general election, they will be removed from the registration list. Those removed from the rolls because of felony convictions, suspicion of fraud or other reasons unrelated to a change of address are given 21 days to appear and show cause why their registrations should not be suspended.<sup>310</sup> If the registrar finds that a registration has been canceled or suspended in error, he or she must reinstate it as though the cancellation had never occurred and notify the registrant.<sup>311</sup>

## **Maine**

Inaccurate voter rolls caused significant problems in Maine's 2000 elections. On election day, lawyers for the Democratic Party accused Portland officials of illegally purging the names of as many as 15,000 voters, then requiring them to wait in long lines at City Hall to register again and vote. Approximately 1,000 people whose names should not have been purged called the Democratic headquarters to complain, and some of those people apparently decided not to vote.<sup>312</sup> A judge of the First Circuit Court of Appeals found that the City of Portland appeared to violate federal law by improperly purging the names of voters from the rolls. The court refused to require the polls to stay open after their designated closing time of 8:00 p.m., ruling that it would have a "disruptive effect" and that it would do more than merely allow those improperly

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<sup>307</sup>Telephone message from Nancy Underwood, Elections Division, Secretary of State's Office of Louisiana (May 3, 2001).

<sup>308</sup>LA. REV. STAT. ANN. § 18:1453 (2000).

<sup>309</sup>LA. REV. STAT. ANN. § 18:193 (2000). An exception is made when the U.S. Postal Service reports a change of address.

<sup>310</sup>*Id.*

<sup>311</sup>*Id.*

<sup>312</sup>*Federal Judge Declines to Extend Voting Hours in Portland*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 8, 2000.

purged to vote.<sup>313</sup> Nevertheless, the judge ordered the city in the future to abide by a federal law that allows voters who were purged to re-register and vote at their regular polling place. Portland officials stated that a federally mandated update of the city voter list and a related clerical error caused the problem.<sup>314</sup>

In addition, the applications of some voters who had registered through the Department of Motor Vehicles were not forwarded to the Elections Division.<sup>315</sup>

In Maine, 419 municipalities use paper ballot systems and 104 municipalities use an optical scanning system.<sup>316</sup> Although these systems typically have low error rates, counties are not required to report unrecorded ballot rates to the state, and no centralized information is available to calculate the number of unrecorded ballots.<sup>317</sup>

Maine holds automatic recounts when the margin of victory is less than one percent, and also allows any losing candidate to request a recount. The Secretary of State supervises the recount, and disputed ballots are segregated and photocopied by the Secretary to be preserved for release to a court in case of an appeal.<sup>318</sup> Maine law requires that unclear ballots are to be interpreted with regard to voter's intent; if a voter fails to follow the instructions but marks the ballot such that it is possible to determine his or her choice, the vote must be counted.<sup>319</sup> Should a presidential election depend on a Maine recount, then a court challenge similar to *Bush v. Gore* could be brought.

Maine law explicitly states that registered voters may not be removed from voting lists simply because they did not vote in the previous election. However, deceased residents are removed from voting rolls.<sup>320</sup> A voter may only be removed if he or she fails to respond to a

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<sup>313</sup>*Id.*

<sup>314</sup>*Id.*

<sup>315</sup>Telephone Interview with Adam Thompson, Executive Director of the Maine Democratic National Committee (May 1, 2001).

<sup>316</sup>*Id.*

<sup>317</sup>Telephone Interview with Melissa Packard, Director of Elections, Division of Elections, Secretary of State (May 3, 2001).

<sup>318</sup>ME. REV. STAT. ANN. tit. 21-A § 737-A (2000).

<sup>319</sup>ME. REV. STAT. ANN. tit. 21-A § 696 (2000).

<sup>320</sup>ME. REV. STAT. ANN. tit. 21-A § 161 (2000).

change of address confirmation notice and then fails to vote in two consecutive elections.<sup>321</sup> It should be noted that Maine allows felons to vote while they are in prison.

## **Maryland**

In the 2000 elections, many polling places in Maryland were inaccessible to individuals with hearing disabilities. The Bethesda polling sites, for example, had no trained staff, no listening systems, and no considerations of acoustics in the site selections.<sup>322</sup> Additionally, Maryland voters who had moved since the last election did not appear in voter files in their new home counties.<sup>323</sup> As a result, it is estimated that thousands of voters around the state were wrongfully prohibited from voting.<sup>324</sup>

Most of Maryland's counties used modern election equipment: 19 counties in Maryland used optical scanning systems, three counties (Allegany, Dorechester, and Prince George's counties) used mechanical lever machines, Montgomery County used the Datavote machine (a punch card system), and Baltimore City used a Direct Recording Electronic voting system.<sup>325</sup> Of the 2,036,455 ballots cast using these systems, only 10,553 (or 0.5 percent) were not recorded as casting a vote for President.<sup>326</sup> Since November, an election task force has recommended that the state help its counties replace voting machines with an electronic statewide system.<sup>327</sup> The system would cost \$7 million annually to lease and would represent the first time the state has helped to pay for local voting mechanisms.<sup>328</sup> Maryland Governor Parris Glendening has also

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<sup>321</sup>ME. REV. STAT. ANN. tit. 21-A § 162-A (2000).

<sup>322</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 19.

<sup>323</sup>*Id.*

<sup>324</sup>*Id.* Some residents in Eastport, Maryland are seeking to move the location of a precinct because it is allegedly located in a high crime neighborhood, with limited parking. Sara Marsh, *Eastport Polling Site Criticized*, THE CAPITAL, Dec. 5, 2000, at B1.

<sup>325</sup>*Id.*

<sup>326</sup>Special Committee on Voting Systems and Election Procedures (visited on May 2, 2001). <http://www.sos.state.md.us/sos/admin/pdf/reportall1.pdf>

<sup>327</sup>Thomas W. Waldron, *New voting system sought: Panel recommends replacing machines with help of the state; 23 counties affected; Glendening backing change in law to allow selection of method*, THE BALTIMORE SUN, March 17, 2001, at 1B.

<sup>328</sup>*Id.*

announced the creation of a Special Committee on Voting Systems and Election Procedures to ensure that all votes in Maryland are counted accurately and that voting is as easily understood and as convenient as possible.<sup>329</sup> The Governor would like to allocate state funds toward an effort to standardize Maryland's locally controlled voting systems.<sup>330</sup>

Maryland allows all unsuccessful candidates to petition for a recount; however, it does not provide explicit standards as to how an unclear ballot is to be counted, as the *Bush v. Gore* decision requires.<sup>331</sup>

Voter registration in Maryland can be canceled if a registered voter dies, requests cancellation, or moves to a residence in another jurisdiction.<sup>332</sup> In 1996, an order to purge inactive voters by the State Administrative Board of Election Laws was held unlawful.<sup>333</sup>

## **Massachusetts**

After previous denials by city officials, a Boston election official acknowledged that there were voting "irregularities" in Boston in the November 2000 elections. David Viera, an acting election commissioner, testified at a Boston City Council hearing that in many precincts, the elections department failed to provide adequate staff and equipment.<sup>334</sup>

Voters in Boston reported being turned away from the polls, being rushed through their turns in voting booths, waiting in extremely long lines, and encountering irritable poll workers. Elizabeth Clay, a resident of Dorchester, claimed that she and other voters were given only one minute to vote. William Parker, a poll checker at a Roxbury poll, said that he witnessed between 75 and 100 people being turned away at the polls because, without prior notification, their names

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<sup>329</sup>Exec. Order No. 01.01.2000.25, (MD)(Dec. 4, 2001).

<sup>330</sup>Larry Carson, *Elections Officials Hopeful on State Aid; Governor's Plan To Fund Voting System Changes Could Benefit Howard*, THE BALTIMORE SUN, Dec. 6, 2000, at 6B.

<sup>331</sup>MD. CODE ANN., ELEC. § 12-101 (2001).

<sup>332</sup>MD. CODE 1957, Art. 33, § 3-502.

<sup>333</sup>State Admin. Bd. of Election Laws v. Board of Supvrs., 342 MD. 586, 679 A.2d 96 (1996).

<sup>334</sup>Katherine Zezima, *City Official Admits Election Day Problems*, THE BOSTON GLOBE, Feb. 9, 2001, at B12.

had been removed from that precinct's roster.<sup>335</sup> There were also calls for increased help for bilingual voters and voters with language barriers, and some individuals did not receive the absentee ballots they had requested.<sup>336</sup>

Massachusetts poll workers complained of organizational problems, such as missing precinct lists and a broken ballot box that required ballots to be placed in an open box.<sup>337</sup> Yet numerous complaints were also registered concerning problems with the poll workers themselves. It was reported that some poll workers were not trained to allow people to vote with proper identification if their names did not appear on the list. Many were not helpful in directing people to their proper precinct -- even if that precinct was located in the same polling place. In addition, some poll workers and wardens did not cooperate with poll checkers, or allow the poll checkers to remain inside the polling place.<sup>338</sup>

Disability access was also at issue. In Waltham, Massachusetts, voters complained that most voting booths were too small and too short for most wheelchair users to reach the levers on the voting machine. In addition, one sight impaired voter wondered whether an election official faithfully performed his duty of assisting her after he asked her if she wanted to vote for a certain candidate and then remarked, "Good."<sup>339</sup>

In Massachusetts, 203 counties use optical scanning machines, 79 counties use paper ballots, and 23 counties use lever machines.<sup>340</sup> Using those systems, Massachusetts found that 2,734,006 total ballots were cast with 2,702,942 registered as votes for presidential electors,

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<sup>335</sup>Regina Montague, *Election Gripes Aired at Hearing; Some Voters Say Rights Impeded*, THE BOSTON GLOBE, Nov. 29, 2000, at B3.

<sup>336</sup>Jamal E. Watson, *Hearing Explores Reports of Inequities in Northeast Voting*, THE BOSTON GLOBE, Feb. 11, 2001, at A23; Denise Dube, *Locally, Too, Election Day Snafus Aired; Late Ballots, Open Boxes Upset Voters*, BOSTON GLOBE, at Globe West p. 1.

<sup>337</sup>Denise Dube, *Locally, Too, Election Day Snafus Aired; Late Ballots, Open Boxes Upset Voters*, BOSTON GLOBE, at Globe West p. 1.

<sup>338</sup>See, e.g., Lawyer's Committee for Civil Rights Under Law of the Boston Bar Association, *Report on Matters of Voting Irregularities in Boston on Election Day -- November 7, 2000* (Nov. 28, 2000).

<sup>339</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 19.

<sup>340</sup>Massachusetts Voting Equipment Chart produced by the Massachusetts Secretary of State of Elections (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

meaning that 31,064 of the cast ballots (or 1.1 percent) were not recorded as votes for a presidential candidate.<sup>341</sup>

Massachusetts allows any candidate to file a petition for a recount. Unless the candidate requests only a partial recount, all paper ballots are entirely re-tallied.<sup>342</sup> Ballots cast by electronic voting systems are recounted by a computer or other tabulating mechanism; if requested, a hand-count of the ballots must be performed.<sup>343</sup> However, the law does not specify how unclear ballots should be interpreted, and would therefore raise equal protection issues under *Bush v. Gore*.

Voters whose names do not appear on voter lists may cast a ballot if their names are found on inactive voting lists located at the polling location. If the presiding officer at a polling location is unable to find a voter's name on the inactive list, the voter may request permission to vote from the registrar of voters. The voter may cast a ballot if the registrar determines that his or her name was omitted or that a clerical error was made.<sup>344</sup> A voter may vote at his or her former residence for up to six months after moving.<sup>345</sup>

## **Michigan**

On election day last November, many Detroit voters complained of long lines in under-prepared polls. Voters alleged that at certain polling places, there were too few voting booths, too few pens, problems with the voting machines, ballot box malfunctions, and voter registrations missing from city files.<sup>346</sup> The wait to vote at the Coleman A. Young Recreation

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<sup>341</sup>Official 2000 Massachusetts State Election Results (visited on April 27, 2001)  
<http://www.state.ma.us/sec/ele/eleres00/res00idx.htm>.

<sup>342</sup>MASS. GEN. LAWS ch. 54, § 135 (2000).

<sup>343</sup>MASS. GEN. LAWS ch. 54, § 135A (2000).

<sup>344</sup>MASS. CODE Title VIII: Chapter 1: § 59.

<sup>345</sup>MASS. CODE Title VIII: Chapter 51: § 1.

<sup>346</sup>In 1998, Detroit changed from a punch card voting system to one that uses paper ballots that voters mark with felt-tip pens and that can be scanned optically. Darren A. Nichols & Kim Kozlowski, *City To Grill Election Bosses; Detroit Council Probes Complaints From Voters at Polls*, THE DETROIT NEWS, Nov. 9, 2000, at 7.



Center was as long as three hours.<sup>347</sup> Based on these alleged problems, Democratic Party lawyers unsuccessfully sought a court order to keep Detroit polls open later than the 8:00 p.m. closing time.<sup>348</sup>

There were also reported problems around the state of unresponsive local elections clerks at polling places.<sup>349</sup> On Election Day, hundreds of students at Michigan State University were reportedly deprived of their right to vote.<sup>350</sup> The problems were reportedly caused by administrative confusion, and the Michigan Democratic Party is monitoring that district 's local clerk to ensure that there are no future problems.<sup>351</sup>

Disturbingly, it was reported that prior to the election, the Republican Party sent lawyers and off-duty police officers to predominantly African-American communities to repeatedly harass, intimidate and question voters.<sup>352</sup> Michigan Democrats publicized the GOP's actions and demanded that they cease, provoking investigation from the Department of Justice, which has not yet been concluded.<sup>353</sup> In addition, certain absentee voter ballots in Grand Rapids failed to list an African-American Democratic candidate.<sup>354</sup>

Michigan's 18 Electoral College members issued a sharply worded resolution criticizing the election process and calling for changes in 2002. The two-page resolution suggested that voting irregularities in Florida and Michigan -- including uncounted ballots, long lines, and poorly trained election staff -- disenfranchised thousands of voters.<sup>355</sup>

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<sup>347</sup>*Id.*

<sup>348</sup>*Id.*

<sup>349</sup>Telephone Interview with Mark Brewer, Director, Michigan Democratic Party (March 19, 2001).

<sup>350</sup>*Id.*

<sup>351</sup>*Id.*

<sup>352</sup>Dennis Denno, *Republicans Plan Voter Intimidation: Actions Will Not Be Tolerated in Michigan*, Michigan Democratic Party, November 2, 2000.

<sup>353</sup>*Id.*

<sup>354</sup>Telephone Interview with Mark Brewer, Director, Michigan Democratic Part (March 19, 2001).

<sup>355</sup>*Highlights of the Past Week's Action at the Capitol*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Dec. 23, 2000.

These difficulties may have been compounded by old and unreliable voting systems. The first voting system used by Michigan was paper ballots. Currently, however, Michigan uses 3,006 optical scanning machines, 1,443 punch card machines, 693 mechanical lever machines, 137 paper ballot systems, and 97 DREs.<sup>356</sup> Using those systems, 4,279,299 ballots were cast, of which 4,182,501 registered as votes for presidential electors. The remainder of 96,798 ballots (or 2.3 percent) did not register as votes for a presidential candidate.<sup>357</sup>

A recount in Michigan would be unlikely to catch these unrecorded ballots. By state law, recounts are automatic in elections with a margin of victory smaller than 2,000 votes, and may also be requested by candidates. A board of canvassers may conduct the recount by manual tally, by computer tabulation using specially designed software, or computer tabulation using the same software as was used in the precinct on election day.<sup>358</sup> However, the law does not provide the board with any instructions to determine the status of an unclear ballot, as *Bush v. Gore* would require.

The statute providing for the Michigan voter rolls provides no protection against accidental purging. Voter registration lists are updated annually. If in the last 5 years an elector has neither voted, continued or reinstated his or her registration, nor recorded a change in address on his or her registration, the clerk may cancel the voter's registration.<sup>359</sup>

## **Minnesota**

Two significant episodes of misconduct were alleged in last November's Minnesota elections. Just before the presidential election, the Minnesota Democratic-Farmer-Labor Party (DFL) held a press conference to denounce phone calls that were being made to voters in the name of the Democratic Party.<sup>360</sup> State Party Chair Mike Erlandson cited several phone calls in which the caller would identify himself as being connected to the Democratic Party and would in many cases be "rude and unintelligible."<sup>361</sup> In many instances, the phone calls seemed to target

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<sup>356</sup>Telephone Interview with Michigan Election Division of the Michigan Secretary of State's office (May 2, 2001).

<sup>357</sup> 2000 Official Michigan General Election Results (visited on April 30, 2001). <http://www.sos.state.mi.us/election/results/00gen/00genall.html>.

<sup>358</sup>MICH. CODE § 168.866.

<sup>359</sup>MICH. CODE §168.509.

<sup>360</sup>*Fraudulent Campaign Calls Being Made*, Minnesota Democratic Farmer Labor Party, November 3, 2000.

<sup>361</sup>*Id.*

registered Democrats or swing-voters, and were an attempt to discourage them from going to the polls or tended to lead them to believe they would not be able to vote once they got there.<sup>362</sup> A second episode was reported in Mankato, Minnesota, where defeated state representative Julie Storm sought an investigation into alleged voting irregularities by Gustavus Adolphus College students. In a complaint filed with the Nicollet County attorney, Ms. Storm complained that a student voter list compiled by the college did not properly list students' addresses and that polling judges did not require proper identification from student voters.<sup>363</sup>

One hundred counties in Minnesota use optical scanning machines, and 31 counties use a handcounted paper ballot system.<sup>364</sup> There were a substantial number of spoiled ballots in the 2000 election; of 2,458,317 ballots cast, only 5,973 ballots (or 0.2 percent) showed overvotes in the presidential election<sup>365</sup> but 12,498 were undervotes.<sup>366</sup>

Although Minnesota has flexible provisions for recounts, the state law would likely survive constitutional scrutiny. Minnesota directs that recounts be held automatically whenever the margin of victory is 100 votes or less, and allows any losing candidate to request a recount at his or her own expense. Beyond these basic requirements, the Secretary of State has the power to make all rules establishing uniform recount procedures, and all ballots are to be interpreted on a "voter's intent" standard.<sup>367</sup> However, the statutory criteria for determining a voter's intent seem sufficiently specific as to be acceptable under *Bush v. Gore*. The intent is to be gathered only from the face of the ballot. Voters are to place a marks in the square opposite the printed names of candidates, or write a candidate's name on the lines provided;<sup>368</sup> however, ballots will not be rejected due to technical error, misspelling, abbreviation or slight defacement, and attempted erasures will be respected. Marks other than "X" will be counted, as will a mark that is out of the

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<sup>362</sup>*Id.*

<sup>363</sup>*Ex-State Representative Wants Investigation Into Voting List of Students*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Jan. 29, 2001.

<sup>364</sup>Facsimile from Evan Hiltunen of Minnesota Secretary of State's office (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>365</sup>*Id.*

<sup>366</sup>Email from Michele McNulty, Elections Administrator, (July 10, 2001) (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff). Of the undervotes, 3039 had invalid write-in votes.

<sup>367</sup>MINN. STAT. § 204C.361 (2000).

<sup>368</sup>MINN. STAT. § 204C.13 (2000).

proper place but close enough to show clear intent.<sup>369</sup>

Minnesota voters may be purged from the voting rolls if the voter is deceased, moves or requests removal from the list.<sup>370</sup> In addition, felons are not allowed to vote while in prison, while on parole and while on probation.<sup>371</sup> It does not appear that Minnesota has enacted any statutory safeguards, such as mail notification and election day contested ballot procedures, to protect voters from wrongful purges.

## **Mississippi**

It is well-known that many incidents of discrimination and disenfranchisement took place in Mississippi. In 1890, the Supreme Court found that although African-Americans outnumbered whites in Mississippi, literacy tests, grandfather clauses, requirements that voters read and interpret a section of the state constitution, and the ‘white primary’ provision of the 1890 Mississippi convention effectively barred African-Americans from voting.<sup>372</sup> In 1965, the Voting Rights Act allowed large numbers of African-American citizens to register and vote; however, the Mississippi state legislature soon carved up the majority-African-American district among three majority-white districts to counter the Act’s effects.<sup>373</sup> African-Americans were effectively barred from representing Mississippi in Congress until the African-American “Delta” district was restored by court order in the 1980s.<sup>374</sup> Nevertheless, the Voting Act of 1968 did increase the number of African Americans registered to vote from 0.7 percent in 1964 to 70.8 percent by 1986.

In the 2000 elections, many Mississippi voters complained that despite their “motor voter” registrations at the driver’s license bureau, they were not included on the voter rolls. Secretary of State Eric Clark received complaints from people across the state who thought they had registered to vote while getting their driver’s license. The state has reportedly had an

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<sup>369</sup>MINN. STAT. § 204C.22 (2000).

<sup>370</sup>MINN. STAT. § 201.13 (2000).

<sup>371</sup>The Sentencing Project, *Losing the Vote*, (1998).  
[www.hrw.org/reports98/vote/usvot98.htm](http://www.hrw.org/reports98/vote/usvot98.htm).

<sup>372</sup>Virginia E. Hench, *The Legal Disenfranchisement of Minority Voters*, 45 CASE W. RES. 727, 740 (1998).

<sup>373</sup>Frank R. Parker, *The Damaging Consequences of the Rehnquist Court’s Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763 (1996).

<sup>374</sup>*Id.*

ongoing problem with employees of the Mississippi Highway Patrol, which oversees the Department of Motor Vehicles, not forwarding voter registration forms to circuit clerks.<sup>375</sup> Hancock County Circuit Clerk Pam Metzler confirmed that she has had difficulties obtaining registration forms from the DMV, especially during the recent election, as had Harrison County Circuit Clerk Gayle Parker: this year, the Highway Patrol withheld 105 registration forms until just before the election, and in the past, the DMV has failed to submit approximately 800 registration forms to her office.<sup>376</sup>

\_\_\_\_\_ It is difficult to determine the rates of ballot error in Mississippi. Optical scanning machines are used by 52 Mississippi counties; 13 counties use punch card systems, nine counties use Lever machines, seven counties use Precinct Counter optical scanning machines, and two counties use DRE's.<sup>377</sup> However, Mississippi counties have no central mechanism available to calculate the number of unrecorded ballots.<sup>378</sup>

It is difficult to predict whether these unrecorded ballots could create a situation similar to Florida's, as Mississippi does not have statutory provisions for a recount (although election contests are available). No clear standards to guide counting of ballots are provided in statute, except for ballots that have been rejected by optical scanning equipment. If these ballots were considered "blank," the election officials should see if they were marked with a pen or pencil that the machine could not detect, and mark over the voter's marks with a detectible marking device. Ballots that were rejected by the machines as containing overvotes will be reviewed to determine the voter's intent.<sup>379</sup> These standards are unlikely to be upheld by the Supreme Court under the *Bush v. Gore* test.

## Missouri

Both Democrats and Republicans claim that fraudulent voter registration activity occurred in St. Louis on election day. Democrats contend that several irregularities at the polls occurred: judges failed to verify voter registrations in a timely manner, voters were inaccurately stricken from the rolls after a mail canvas, procedures to re-register "inactive" voters were too

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<sup>375</sup>*Mississippi Voter Registration Snafu Causes Ballot Confusion*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, NOV. 15, 2000.

<sup>376</sup>*Id.*

<sup>377</sup>*Id.*

<sup>378</sup>Telephone Interview with Ursala Price, Special Projects Officer, Division of Elections, Secretary of States office (May 3, 2001).

<sup>379</sup>MISS. CODE ANN. § 23-15-523.

cumbersome, and many polling places were understaffed or had no telephone contact with the downtown headquarters of the St. Louis City Board of Election Commissioners (the “Board”).<sup>380</sup> These problems created a situation in which voters whose registration was not on record at their polling places had to travel to the Board’s downtown office, where several hundred people waited up to three hours to confirm their registration.<sup>381</sup>

For example, at least two employees of the *Riverfront Times* newspaper were registered to vote and had not moved since voting in the last election, but when they arrived at their usual polling place, their names were not on the list. This started an “interminable” process in which election judges attempted to get through on the phone lines to the Board’s headquarters downtown.<sup>382</sup>

These types of communication problems among the election judges and the Board were confirmed by Michael Chance, a Republican election deputy who worked with a Democratic deputy overseeing the precincts in the 3<sup>rd</sup> Ward in St. Louis. Minutes after the polling places opened at 6:00 a.m., he says, election judges began dialing the Board to verify names, but they kept getting busy signals. This continued the rest of the day at all the precincts in the ward, resulting in frustrated residents having to wait to vote. “There was a constant complaint from judges -- they just couldn’t get through,” he said.<sup>383</sup>

In response to these and other difficulties, Democratic congressional candidate William Lacy Clay (who won his race to become a U.S. Representative), the Missouri Democratic State Committee, and the Gore-Lieberman campaign filed a petition in Missouri circuit court to keep the polls open in St. Louis beyond the scheduled 7:00 p.m. closing time.<sup>384</sup>

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<sup>380</sup>*Cook Begins Investigation Into Election in St. Louis*, COURIER -POST ONLINE ELECTION SECTION, Nov. 18, 2000; *St. Louis Election Dispute Promises Trouble; Lawsuits Predicted if Races Stay Close*, [www.KansasCityChannel.com](http://www.KansasCityChannel.com), Nov. 7, 2000.

<sup>381</sup>*Id.*, For example, it was reported that Mahina Nightsage (age 41) attempted to vote at 10:00 a.m. but was told by a St. Louis election judge that she was not registered for that polling place. Ms. Nightsage arrived at the Board’s downtown office by 12:30 p.m., and that by 3:15 p.m., she still had not been able to vote. Ms. Nightsage said that she spoke to many other frustrated voters at the Board’s office, and some of them left without voting.

<sup>382</sup>Safir Ahmed, *Slimin’ in the City; When It Comes to Election Day Problems in St. Louis, the Politicians’ Rhetoric Doesn’t Match the Reality*, RIVERFRONT TIMES, Nov. 15, 2000.

<sup>383</sup>*Id.*

<sup>384</sup>*St. Louis Election Dispute Promises Trouble; Lawsuits Predicted if Races Stay Close*, [www.KansasCityChannel.com](http://www.KansasCityChannel.com), Nov. 7, 2000; Renee Fullerton, *Polls in St. Louis Extend Hours*, [Maneater.com](http://Maneater.com), Nov. 8, 2000.

Circuit Judge Evelyn Baker conducted a hearing and ordered that the polls in St. Louis be kept open until 10:00 p.m. to allow everyone present in the lines to vote.<sup>385</sup> She concluded that the Board “failed to live up to its duty to the voters of the city.”<sup>386</sup> She stated that she based her decision on “the overwhelming weight of the testimony at the hearing from registered voters who had voted at the same polling places, who had not changed their addresses, who arrived at the polls in a timely fashion in the morning to vote and had been told that their names had been removed from the rolls.”<sup>387</sup> She also stated that the Board was unprepared for the volume of voters and that the problem could have been alleviated, if not solved, had election judges been given the “inactive” voter lists instead of having to call the Board offices downtown to verify the names on the “inactive” lists.<sup>388</sup>

Republicans in Missouri opposed Judge Baker’s order, alleging that the voting extension would unfairly aid both Gore and the Senate campaign of the late Governor Mel Carnahan.<sup>389</sup> The Bush-Cheney campaign appealed the decision to another judge in the circuit, who denied the appeal.<sup>390</sup> At 7:45 p.m., however, a three-judge panel of the Missouri Court of Appeals-Eastern District overturned the circuit court order and the polls in St. Louis were closed at that time.<sup>391</sup>

In response to the late polling in St. Louis, U.S. Senator Christopher “Kit” Bond asked the U.S. Attorney and the FBI to investigate what he called “a major criminal enterprise designed to defraud voters” in St. Louis.<sup>392</sup> In letters he wrote to the two federal agencies, Senator Bond wrote that “there is abundant evidence that the appellate order was ignored and widespread voter

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<sup>385</sup>Renee Fullerton, *Polls in St. Louis Extend Hours*, [Maneater.com](http://Maneater.com), Nov. 8, 2000. Judge Baker was appointed by Republican Christopher “Kit” Bond, now a U.S. Senator, in 1983. Safir Ahmed, *Slimin’ in the City; When It Comes to Election Day Problems in St. Louis, the Politicians’ Rhetoric Doesn’t Match the Reality*, RIVERFRONT TIMES, Nov. 15, 2000.

<sup>386</sup>*Judges Order St. Louis Polls Closed*, [FoxNews.com](http://FoxNews.com), Nov. 7, 2000.

<sup>387</sup>Safir Ahmed, *Slimin’ in the City; When It Comes to Election Day Problems in St. Louis, the Politicians’ Rhetoric Doesn’t Match the Reality*, RIVERFRONT TIMES, Nov. 15, 2000.

<sup>388</sup>*Id.*

<sup>389</sup>Dirk Johnson, *Judge Delays St. Louis Poll Closing Due to Heavy Turnout*, NEW YORK TIMES NEWS SERVICE, Nov. 8, 2000.

<sup>390</sup>Renee Fullerton, *Polls in St. Louis Extend Hours*, [Maneater.com](http://Maneater.com), Nov. 8, 2000.

<sup>391</sup>*Judges Order St. Louis Polls Closed*, [FoxNews.com](http://FoxNews.com), Nov. 7, 2000.

<sup>392</sup>Safir Ahmed, *Slimin’ in the City; When It Comes to Election Day Problems in St. Louis, the Politicians’ Rhetoric Doesn’t Match the Reality*, RIVERFRONT TIMES, Nov. 15, 2000.

fraud occurred throughout the city of St. Louis.” He also alleged that there was a “deliberate scheme” planned in advance so that unregistered voters could vote illegally. He stated, “[t]here is reason to believe that collusion existed to commit voter fraud and voter fraud occurred on a wide scale throughout the city of St. Louis.”<sup>393</sup> Election officials, however, estimated that fewer than 100 people showed up after the 7:00 p.m. closing time to cast ballots.<sup>394</sup>

Republicans also have alleged that over 200 people were improperly allowed to vote in St. Louis. Kevin Coan, the Republican director of elections for St. Louis, stated that U.S. Representative Clay, a Democrat, came to the election board offices downtown and -- after failing to get the board to approve voters who were not registered -- called the city’s circuit judges to authorize unregistered voters to vote. Thus, in the early afternoon, Presiding Judge Michael Calvin and six other judges allegedly improperly approved 233 people to vote. Once the judges authorized those voters to vote, the election board could not stop them from voting.<sup>395</sup>

In response to both Democratic and Republican allegations of fraud and impropriety, Secretary of State Bekki Cook, a Republican, announced on November 17 that she began an investigation into the Election Day confusion in St. Louis.<sup>396</sup> Her report concluded that human error -- not fraud -- was behind most of the problems reported on election day.<sup>397</sup>

The newly-elected Secretary of State, Matt Blunt, established a commission to study ways to improve Missouri election laws. The commission is examining issues including “motor voter” registration, public notice of elections, integrity and security of elections, absentee balloting, polling places and staffing, election observers, rules for challenges and recounts, and voter education.<sup>398</sup>

The panel will also examine whether punch card machines should still be used in

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<sup>393</sup>*Id.*

<sup>394</sup>*Indecision 2000 -- Other States: GOPers Examining Undervote in NM*, THE HOTLINE, Dec. 4, 2000.

<sup>395</sup>Safir Ahmed, *Slimin’ in the City; When It Comes to Election Day Problems in St. Louis, the Politicians’ Rhetoric Doesn’t Match the Reality*, RIVERFRONT TIMES, Nov. 15, 2000.

<sup>396</sup>*Cook Begins Investigation Into Election in St. Louis*, COURIER-POST ONLINE ELECTION SECTION, Nov. 18, 2000.

<sup>397</sup>Tim Hoover, *Missouri Commission Discusses Election Changes*, KANSAS CITY STAR, Jan.10, 2001, at B8.

<sup>398</sup>*Id.*



Missouri elections in light of the problems that occurred in Florida.<sup>399</sup> Missouri had used paper ballots and lever machines until 1972, after which the Votamatic system (a punch card machine) was certified and put into use. By the end of the 1980s, optical scanning machines were certified.<sup>400</sup> Currently, 63 counties in Missouri use optical scanning machines, 43 counties use punch card machines, and ten counties use manual lever machines.<sup>401</sup> Unfortunately, information is not centrally available to calculate the number of unrecorded ballots.<sup>402</sup>

Missouri grants the right to a recount to those defeated by less than one percent of the votes;<sup>403</sup> recounts can also be declared by election officials on the grounds of misconduct by election personnel,<sup>404</sup> and a court can declare a recount pursuant to an election contest.<sup>405</sup> However, such recounts would quickly encounter the same constitutional difficulties as those in Florida. In counting paper ballots, Missouri election judges are to count votes “substantially” in compliance with statutory requirements whenever the intent of the voter seems clear.<sup>406</sup> Furthermore, no standards are provided in statute for interpreting unclear ballots from punch card or optical scanning machines.

In Missouri, a voter’s registration can be canceled if he or she dies, requests cancellation, is adjudged incapacitated, moves to a residence in another jurisdiction, or is convicted of a felony.<sup>407</sup> It appears that Missouri has no statutory safeguards, such as mail notification or provisional balloting, to protect against wrongful purges.

## **Montana**

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<sup>399</sup>*Id.*

<sup>400</sup>Telephone Interview with Don Hayes, Elections Division ( May 29, 2001).

<sup>401</sup>Voting Systems in Use in Missouri, Missouri State Information Center (visited May 3, 2001) <http://mosl.sos.state.mo.us/sos-elec/votesystems.html>.

<sup>402</sup>Telephone Interview with Betsy Byers, Co-Director of Elections, Division of Elections, Secretary of State of Missouri’s Office (May 3, 2001).

<sup>403</sup>MO. REV. STAT. § 115.601 (2000).

<sup>404</sup>MO. REV. STAT. § 115.600 (2000).

<sup>405</sup>MO. REV. STAT. § 115.583 (2000).

<sup>406</sup>MO. REV. STAT. § 115.453 (2000).

<sup>407</sup>MO. REV. STAT. § 115.195 (2000).

A few minor problems were found in Montana's elections. In Gallatin County, human error resulted in dozens of people being left off official voter lists.<sup>408</sup> Errors included the misfiling of voter registration cards, the inaccurate entry of registration data, and the failure of the Department of Motor Vehicles to forward registration cards to election officials. Most people affected by the errors were reportedly allowed to vote on election day after completing voter affidavits.<sup>409</sup> Other complaints came from the disabled community; disabled voters found that while Lake County had parking for the disabled and a special table for disabled voters, there was no way for them to enter the polling place.<sup>410</sup>

Elaine Gravely, the Montana Deputy Director for Elections, stated that variance in voting machines was not a source of problems in the state.<sup>411</sup> In Montana, 30 counties use optical scanning systems, 20 counties use paper ballots, and six counties use punch card ballots.<sup>412</sup> However, no information is centrally available to calculate the number of unrecorded ballots,<sup>413</sup> and such information would not necessarily be revealed in the course of a recount. Recounts in Montana are conducted by county recount boards, which re-tally the votes cast in each precinct. Votes cast through machines are recounted in the same manner as the original count was made; in fact, the same tabulating equipment is used unless errors are revealed in testing.<sup>414</sup> Although some provision is made for voters who mark their optical scanning ballot with an "X" instead of in the manner prescribed,<sup>415</sup> no special procedures are outlined for interpreting unclear ballots, so a recount in Montana may not pass the test imposed by *Bush v. Gore*.

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<sup>408</sup>*Human Error Caused Some of Gallatin County's Election Day Problems*, ASSOCIATED PRESS, Nov. 18, 2000.

<sup>409</sup>*Id.*

<sup>410</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 16.

<sup>411</sup>Telephone Interview with Elaine Gravely, the Deputy Director for Elections for the State of Montana (April 27, 2001); see also Montana Voting Technologies (visited on May 2, 2001) [http://www.state.mt.us/sos/Elections/montana\\_voting\\_technologies.htm](http://www.state.mt.us/sos/Elections/montana_voting_technologies.htm).

<sup>412</sup>*Id.*

<sup>413</sup>Telephone Interview with Fara Sheppard, Elections Specialist, Elections Division, Secretary of State's Office (May 3, 2001).

<sup>414</sup>MONT. CODE ANN. § 13-16-413 (1999).

<sup>415</sup>MONT. CODE ANN. § 13-13-117 (1999).

Voter registration in Montana can be canceled if a registered voter dies, requests cancellation, is of unsound mind as established by a court, moves to a residence in another jurisdiction, is convicted of a felony, or fails to respond to certain confirmation mailings and fails to vote in two consecutive federal general elections. Registration can also be canceled if a certified copy of a court order directing a cancellation is filed with the election administrator, or if an elector is successfully challenged and not allowed to vote at an election upon determination of an election judge.<sup>416</sup>

## **Nebraska**

In the 2000 elections, Nebraska had expected high turnout; Secretary of State Scott Moore predicted that 71 percent of Nebraska's 1.1 million voters would cast ballots because of the tight presidential race, and a contentious U.S. Senate race and several controversial questions were also on the ballot. However, several polling places still ran out of ballots early, especially in Sarpy, Buffalo, Otoe, Douglas, and Cuming counties.<sup>417</sup> Voters were asked to wait as photocopied ballots were made. There also were reports that certain polling places had long lines when the polls closed, a problem compounded by a shortage of volunteers to work at polling places. Additionally, in Dawson County, a voting machine malfunctioned resulting in a delay,<sup>418</sup> and procedural flaws in motor voter registration resulted in some voters being left off of voter registration lists.<sup>419</sup>

In the last election, Nebraska had a remarkably high rate of unrecorded ballots given its voting systems. The state stopped using punch cards in 1991; currently, one half of Nebraska counties count their ballots at an optical scan machine at a central location, while the other half of the votes are hand-counted.<sup>420</sup> Of the 707,223 ballots cast, 675,019 were registered as votes for presidential electors and 32,204 of the cast ballots (or 4.6 percent) were not recorded as votes for a presidential candidate.<sup>421</sup>

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<sup>416</sup>MONT. CODE ANN. §13-2-402 (1999).

<sup>417</sup>Kevin O'Hanlon, *Voting Problems Might Prompt Some Changes*, ASSOCIATED PRESS, Nov. 13, 2000.

<sup>418</sup>*Id.*

<sup>419</sup>*Close Election Exposes Possible Flaws in Motor-Voter Registration*, ASSOCIATED PRESS, Nov. 15, 2000.

<sup>420</sup>Telephone Interview with Neal Erickson, Assistant Secretary of Elections (May 2, 2001).

<sup>421</sup>*Id.*

Furthermore, there is little chance that these ballots would be recorded in a recount. Nebraska recounts utilize the same procedures as were used for the counting on election day; the original vote-counting devices will be used, and a manual recount is then conducted if any precinct shows a substantial change.<sup>422</sup> Questions as to the legality of a vote are to be unanimously resolved by the entire counting board; if the board cannot reach a unanimous decision, the ballot will be rejected.<sup>423</sup> Nebraska law provides no instructions to assist the board in determining how to record an unclear ballot and it is, therefore, unlikely that these standards would survive constitutional scrutiny under *Bush v. Gore*.

A voter's registration in Nebraska can be canceled if the voter dies, requests cancellation, moves to a residence in another jurisdiction, or fails to respond to confirmation mailings and fails to vote in two consecutive federal general elections.<sup>424</sup>

## Nevada

Although Nevada experienced minor problems with "motor voter" registration forms not being sent to the Elections Division and late submission of absentee ballots, there were few other complaints reported during the November 2000 election.

According to the Nevada Deputy Secretary of Elections, Susan Marandi, voting machines used in Nevada vary from county to county: eight counties use punch card balloting, eight counties use optical scanning systems, and one county uses a DRE system.<sup>425</sup> As reported in Nevada's Election Results State Summary, a total of 608,970 ballots were cast in the November elections, of which 3,315 (or 0.5 percent) were not recorded as votes for a presidential candidate.<sup>426</sup>

In addition to a low percentage of unrecorded ballots, Nevada has a fairly specific recount system which would likely pass Supreme Court scrutiny. Nevada allows recounts at the demand

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<sup>422</sup>NEB. REV. STAT. ANN. § 32-1119 (2000).

<sup>423</sup>NEB. REV. STAT. ANN. § 32-1024 (2000).

<sup>424</sup>NEB. REV. STAT. ANN. § 32-326 (2001).

<sup>425</sup>Telephone Interview with Susan Marandi, Nevada Deputy Secretary for Elections, (May 2001).

<sup>426</sup>Federal Government of United States Elections Results State Summary (visited on June 26, 2001) [http://sos.state.nv.us/nvelection/nvers\\_gen/results/regular.cfm](http://sos.state.nv.us/nvelection/nvers_gen/results/regular.cfm).

of any candidate (or, in the case of ballot questions, of any voter). These recounts must include a count and inspection of all ballots, including rejected ballots, and must determine whether those ballots are marked as required by law.<sup>427</sup> In both the recount and the original count, election boards are instructed to tally only those votes that are indicated by a cross in the appropriate square; if it is impossible to determine a voter's choice for any office or question, the vote will not be counted. An error in marking one or more votes does not invalidate properly marked votes, and votes for more choices than are permitted will not be counted.<sup>428</sup> For mechanical voting systems, although a superfluous punch will not by itself constitute grounds for rejection of a ballot,<sup>429</sup> an over-vote will not be counted.<sup>430</sup>

Nevada has a limited statute regarding maintenance of voter rolls. Registration can be canceled if a registered voter dies, requests cancellation, is legally established as insane or mentally incompetent, or is convicted of a felony. Registration can also be canceled if a certified copy of a court order directing a cancellation is filed with the election administrator, or if the elector has discovered an incorrect registration. Duplicate registrations can also be canceled.<sup>431</sup>

### **New Hampshire**

At least three minor incidents of voting irregularities occurred in the state of New Hampshire during the November 2000 election. In Keene, New Hampshire, several elected officials sent or gave to students at polling places letters that outlined the consequences of registering to vote in the state.<sup>432</sup> The letter stated that if students chose to register, they had to register their car in the state, get a New Hampshire driver's licenses and could be called for jury duty.<sup>433</sup> While the letter generally correctly stated the law, members of the state's Democratic Party stated that such a letter was designed to intimidate students, and that under New Hampshire

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<sup>427</sup>NEV REV. STAT. 293.404 (1999).

<sup>428</sup>NEV REV. STAT. 293.367 (1999).

<sup>429</sup>NEV REV. STAT. 293.367(i) (1999).

<sup>430</sup>NEV REV. STAT. 293B.095 (1999).

<sup>431</sup>NEV REV. STAT. 293.540 (1999).

<sup>432</sup>Telephone Interview with Kathleen N. Sullivan, Chair, New Hampshire Democratic Party (March 20, 2001); Bobby Gates, *New Hampshire's secretary of state says there's no easy answer in determining where college students may vote*, KEENE SENTINEL (Keene, New Hampshire), February 20, 2001.

<sup>433</sup>*Id.*

law, a student has the right as “any inhabitant of this state, having a fixed and permanent established domicile, being a citizen of the United States, to vote in the town in which he or she is domiciled.”<sup>434</sup> Despite the furor the letter created in the past election, government officials intend to distribute the disputed material in future elections as their way of educating young voters and encouraging them to vote in their hometowns rather than in their college towns, despite the greater time they spend at their college.<sup>435</sup>

In a second incident, the New Hampshire Ballot Law Commission found that officials in the town of Loudon violated three election laws.<sup>436</sup> First, the town clerk failed to maintain a list of all applicants to whom official absentee ballots were sent, and to identify those that had been returned. Second, the town moderator failed to sign the seal when boxes containing the ballots were sealed after being tabulated.<sup>437</sup> Finally, absentee ballots that were not sent to absentee voters were destroyed, although state law requires that any ballot remaining in the possession of the clerk should not be destroyed until 60 days after the election.<sup>438</sup>

Additionally, a candidate for the New Hampshire House of Representatives acted as an election official on election day in violation of state law, which forbids any person whose name appears on a ballot for an elected office from acting as an election official.<sup>439</sup>

Along with the absence of any major difficulties, New Hampshire had a relatively low rate of unrecorded ballots. According to Deputy Secretary of State Bob Ambrose, punch card machines were not used during the November 2000 election.<sup>440</sup> Instead, 88 municipalities used optical scanning machines, and the remaining municipalities used paper ballots. Of the 578,638 ballots cast, 569,081 registered as votes for presidential electors, and 9557 (or 1.7 percent) of the

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<sup>434</sup>*Id.*

<sup>435</sup>*Id.*

<sup>436</sup>Telephone Interview with Kathleen N. Sullivan, Chair, New Hampshire Democratic Party (March 20, 2001); Dan Tuohy, *Dover recount reveals big errors; recount asked in District 11*, KEENE SENTINEL (Keene, New Hampshire), November 29, 2000.

<sup>437</sup>*Id.*

<sup>438</sup>*Id.*

<sup>439</sup>*Id.*

<sup>440</sup>Telephone Interview with Deputy Secretary of State Bob Ambrose (April 26, 2001).

cast ballots were not recorded as votes for a presidential candidate.<sup>441</sup>

Despite this low proportion of unrecorded ballots, the flexibility of New Hampshire's recount provisions may create constitutional issues that would render a presidential recount in New Hampshire problematic. Any defeated candidate may apply for a recount; the Secretary of State will conduct the recount and decide its procedures.<sup>442</sup> No clear criteria are offered that the Secretary of State must use in interpreting an unclear ballot; even in the original count, the statute only states that the election officers present must resolve disputes over the voter's intent through majority vote.<sup>443</sup> This may be deficient under *Bush v. Gore* both under the Equal Protection Clause and on the basis that Article II, Section 1 of the U.S. Constitution grants state legislatures the sole authority to determine the manner of appointing Presidential electors and the view of a minority of the court that 3 U.S.C. 5 places an affirmative duty on states to fix their method of appointing electors prior to an election. Here, the Secretary of State is granted extraordinary latitude to set the criteria for appointing electors after election day.

New Hampshire's voter registration laws are vague and appear to have no enumerated safeguards to protect against wrongful purges. The statute states a voter's registration can be canceled if a registered voter is convicted of a felony, or is convicted of bribery or intimidation relating to elections.<sup>444</sup> There appear to be no provisions that provide for mail notification to a voter that he or she has been purged.

## New Jersey

In connection with the close Congressional election between Republican Dick Zimmer and Democrat Rush Holt last November, Republicans expressed concern about voting irregularities and called for a state investigation.<sup>445</sup> According to Peter Sheridan, counsel to New Jersey Republicans, concerns focused on the legitimacy of 2,500 provisional ballots (votes cast by a person who changes addresses before election day).<sup>446</sup> Other issues included allegations of

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<sup>441</sup>State of New Hampshire Elections Division State General Election-November 7, 2000 (visited on May 1, 2001) <http://webster.state.nh.us/sos/general2000/sumpres.html>.

<sup>442</sup>N.H. REV. STAT. ANN. §§ 660:1, 660:5 (2000).

<sup>443</sup>N.H. REV. STAT. ANN. § 659:64 (2000).

<sup>444</sup>N.H. REV. STAT. ANN. § 645:5, 654:6 (2000).

<sup>445</sup>Steve Giegerich, *Judges to Settle Voter Challenges*, ASBURY PARK PRESS, Nov. 11, 2000.

<sup>446</sup>*Id.*

individuals voting twice, altering paper ballots and voting outside of their district.<sup>447</sup> On November 22, 2000, Judge Robert E. Guterl granted the Republican request for a recount.<sup>448</sup> On November 29, 2000, Dick Zimmer conceded the election after the recount figures showed a greater margin of victory than in the original count.<sup>449</sup>

In addition, disabled voters found that the new polling sites were inaccessible in the city of Runnemede.<sup>450</sup> One voter claimed that he had to be held up to reach the lever in the voting booth, both an indignity and violation of privacy.<sup>451</sup>

New Jersey has a remarkably low rate of unrecorded ballots. Twelve counties in the state use DRE machines, eight counties use mechanical lever machines, and two counties use punch card machines.<sup>452</sup> Of the 3,228,687 ballots cast 3,219,650 registered as votes for presidential electors and 9,037 (or 0.3 percent) of the cast ballots were not recorded as votes for a presidential candidate.<sup>453</sup>

It is unclear how the Supreme Court would rule in a case involving New Jersey recount procedure. New Jersey permits recounts upon the application of a group of ten voters regarding a public question or upon the application of any candidate.<sup>454</sup> The application is made to a judge of the Superior Court, who is then authorized to order a recount “on whatever terms he deems proper,” to be conducted by the county board. The judge will be able to decide all questions

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<sup>447</sup>*Id.*

<sup>448</sup>Andrew Jacobs, *Zimmer is Granted Recount in House Race Against Holt*, NEW YORK TIMES, November 23, 2000 at B5.

<sup>449</sup>*Id.*

<sup>450</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000), at 18.

<sup>451</sup>*Id.*

<sup>452</sup>County Voter Registration Systems charts produce by the Division of Elections of the State of New Jersey, Department of Law and Public Safety (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>453</sup>2000 General Election Results Amended for New Jersey (visited April 30, 2001). [http://www.state.nj.us/lps/elections/elec2000/2000g\\_turnout\\_amended.html](http://www.state.nj.us/lps/elections/elec2000/2000g_turnout_amended.html).

<sup>454</sup>N.J. REV. STAT. § 19:28-1 (2001).



which the county board cannot decide by majority vote.<sup>455</sup> The power to decide these questions appears unrestricted, although the statutes do specify the conditions for counting votes in the general elections. Paper ballots are counted if proper marks are made in the squares to the left of any candidate, although voters may not select more candidates than are allowed; additional marks made to the right of the names will not disqualify a ballot, but if the ballot contains only a mark to the right of the candidate's name, it will not be counted. Marks must be “substantially” a cross, plus or check and “substantially” within the square.<sup>456</sup> Whether New Jersey recounts would meet the Supreme Court's standard is up to dispute; individual judges are given substantial latitude during a recount, and no description of what "substantially" means is provided.

A New Jersey voter may be removed from the voting rolls if he or she is currently serving a jail sentence for a felony,<sup>457</sup> changes residence to a location in another county,<sup>458</sup> or dies.<sup>459</sup> It appears that New Jersey does not have any statutory safeguards to protect wrongly purged voters, such as mail notification or provisional balloting.

## New Mexico

According to Denise Lamb, director of the state Bureau of Elections, the primary complaint during New Mexico's November elections was a lack of voting machines -- only one voting machine was available for every 400 voters, resulting in very long lines. In addition, the voting machines were mis-programmed, resulting in 67,000 uncounted votes on election day and a delay in the reporting of the election results.<sup>460</sup>

In Roosevelt County, New Mexico, election officials discovered a computer programming error in the scanning devices that read the ballots. On November 30, 2000 – after the election but prior to the certification of the State's election results – the scanning devices

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<sup>455</sup>N.J. REV. STAT. § 19:28-3 (2001).

<sup>456</sup>N.J. REV. STAT. § 19:16-3 (2001).

<sup>457</sup>The Sentencing Project, *Losing the Vote*, (1998).  
[www.hrw.org/reports98/vote/usvote.htm](http://www.hrw.org/reports98/vote/usvote.htm).

<sup>458</sup>N.J. REV. STAT. § 19:31-15 (2001).

<sup>459</sup>N.J. REV. STAT. § 19:31-26 (2001).

<sup>460</sup>Telephone Interview with Denise Lamb, Director, State board of Elections, New Mexico Secretary of State's Office (May 3, 2001).

were re-programmed and the new tally was sent to the Secretary of State.<sup>461</sup>

Prior to election day, the Republican Party of New Mexico was accused of attempting to intimidate voters. Lamb alleged that Republicans had created a flier sent to predominantly Hispanic communities offering a \$20,000 reward to those who reported incidents of fraud and a \$5,000 reward for information that led to the first conviction for engaging in false voting.<sup>462</sup> The Republican State Party later said that it had decided against offering the reward but had created the flier as part of an anti-fraud campaign.<sup>463</sup>

Along with the significant problems with the programming of its voting machines, New Mexico experienced a relatively high rate of unrecorded ballots. Electronic voting systems are used by 23 counties in New Mexico, and 13 counties use the optical scanning system.<sup>464</sup> The total number of ballots cast in the November elections was 614,928. Of those ballots, 598,605 registered as votes for presidential electors, meaning that 14,323 (or 2.3 percent) of the cast ballots were not recorded as votes for a presidential candidate.<sup>465</sup>

New Mexico provides that any unsuccessful candidate for office may contest an election.<sup>466</sup> If a recount is involved in the contest, precinct boards will recount and re-tally the paper ballots or recheck the votes cast on a voting machine.<sup>467</sup> However, no standards are given in statute to guide the boards in interpreting an unclear ballot, and the New Mexico system would therefore be likely to fail the *Bush v. Gore* test.

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<sup>461</sup>Press Release from the New Mexico GOP(Dec. 3, 2000) Reported in NATIONAL JOURNAL'S HOTLINE (Dec. 4, 2000).

<sup>462</sup>Hector Tobar, *Campaign 2000: New Mexico GOP Assailed for Vote Fraud Reward Plan Politics: An unreleased flier offering \$20,000 for information on tampering draws state officials' scrutiny*, THE LOS ANGELES TIMES, October 18, 2000, at A15.

<sup>463</sup>*Id.*

<sup>464</sup>Facsimile from Denise Lamb, Elections Division, New Mexico Secretary of State's office (on file with U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>465</sup>State of New Mexico Official 2000 General Election Results by Office (visited on April 30, 2001) <http://www.sos.state.nm.us/election/rsult000.html>.

<sup>466</sup>N.M. STAT. ANN. § 1-14-3 (2000).

<sup>467</sup>N.M. STAT. ANN. § 1-14-16 (2000).

New Mexico's registration laws focus on cancellation only. Registration can be canceled if a registered voter dies, is convicted of a felony, is legally insane, requests removal, or removal is directed by the board of registration.<sup>468</sup> There appears to be no regulation of the board of registration's action nor do there appear to be statutory safeguards, such as mail notification or provisional balloting, to protect wrongly purged voters.

## New York

Although modern-day New York is considered a progressive state, New York's history discloses several instances of voting discrimination. First, in 1826 property qualifications for voting were eliminated for all voters with the exception of African-Americans.<sup>469</sup> Until 1874, African-American citizens were not eligible to vote on the same terms as white citizens. Finally, in 1921, New York initiated requirements of literacy in English and English-conducted elections that continued far after 1966, denying Hispanic voters their rights under the Voting Right Act of 1965.

In last November's elections, according to the Asian American Legal Defense and Education Fund, New York City was very unprepared for the heavy turnout citywide. Asian-language voters faced such barriers as inaccurate or illegible translations on the ballots, a shortage of interpreters, difficulty processing voter registration forms, and poor conduct by election staff.<sup>470</sup> There were also reports of ballot shortages, broken machines and names missing from voter registration lists.<sup>471</sup>

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<sup>468</sup>N.M. STAT. ANN. § 1-24-25 (2000).

<sup>469</sup>Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, BROOK. L. REV. (1996).

<sup>470</sup>Letter from Margaret Fung, Executive Director, AALDEF, and Glenn D. Magpantay, Democracy Project Director, AALDEF to Daniel DeFrancosco, Executive Director, New York City Board of Elections (December 22, 2000)(on file with the U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>471</sup>Deborah Hastings, *Broken Machines, Long Lines, Not allowed to Vote: No, Not Florida*, ASSOCIATED PRESS, Nov. 10, 2000.

Advocacy groups for the disabled argue that the state has not been adequately addressing the needs of those voters.<sup>472</sup> Complaints surrounding the process for the disabled include a lack of signs indicating the location of a ramp to those who are wheelchair-bound, voting booths too narrow to fit wheelchairs, levers too high to reach, and a lack of privacy for blind persons, along with the uncertainty of not knowing whether an election official has filled in a blind voter's ballot correctly.<sup>473</sup> A voter in North Tonawanda stated that while there was a visible ramp at the polling site, it was locked and unavailable on election day,<sup>474</sup> and disabled voters were forced to vote absentee.<sup>475</sup> In New York City, many disabled voters were forced to endure an obstacle course to reach the voting booths, only to find that the levers in the booth are too high for individuals in wheelchairs and that there were no designated booths for disabled individuals.<sup>476</sup>

During the Clinton-Lazio battle for the United States Senate, the New York Post reported that the New York Republican State Committee was mounting a "massive ballot security program" to deter voter fraud.<sup>477</sup> The program, used by the GOP in 1993 and 1994, puts off-duty police officers and prison guards at chosen polling places and dispatches lawyers and other party operatives to alleged "trouble areas in the state."<sup>478</sup> While Republican Mayor Rudy Giuliani and Governor George Pataki credit the program with reducing fraud, Democrats have repeatedly complained that the tactics amount to voter intimidation to keep minorities away from polling places.<sup>479</sup>

State Majority Leader Joseph Bruno (R) is establishing a task force to investigate ballot fraud voting irregularities. In particular, the task force will look at improper voting by non-

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<sup>472</sup>Elizabeth Benjamin, *Advocate tells Senate voting panel that handicapped are denied basic rights*, THE TIMES-UNION (Albany, New York), March 6, 2001, at B2.

<sup>473</sup>*Id.*

<sup>474</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000), at 17.

<sup>475</sup>*Id.*

<sup>476</sup>*Id.* at 18.

<sup>477</sup>Gregg Birnbaum, *Both Campaigns in Drive to Get Out the Vote*, THE NEW YORK POST, November 3, 2000, at 4.

<sup>478</sup>*Id.*

<sup>479</sup>*Id.*

citizens and persons who voted more than once.<sup>480</sup> The New York Public Interest Research Group (NYPIRG) has asked legislators to consider ways to improve the election system, including upgrades to the state's outdated voting machines, increased salaries and training for election inspectors, investigations of the implementation of "motor voter" laws, and improved maintenance of old voting machines.<sup>481</sup> The NYPIRG feels that many of these proposals could be implemented almost immediately, long before the state is able to replace all existing voting machines.<sup>482</sup> The group's recommendations were based on voter complaints that election inspectors were not knowledgeable and that voters who registered through the "motor voter" program were unable to vote on election day because they were not on the voter roll.<sup>483</sup>

New York's voting machines contributed to a moderate level of unrecorded ballots in the 2000 elections. In 1889, New York became the first state to adopt the paper ballot for statewide elections.<sup>484</sup> This was followed by the first official use of lever-type voting machines, installed in Rochester in 1892. Currently, 62 New York counties use lever machines, and 32 counties use electronic machines.<sup>485</sup> Of the 6,960,215 ballots cast in New York, 138,216 (or 2.0 percent) were either undervotes, void votes, or votes for invalid write-in candidates, and these ballots were not recorded as votes for a presidential candidate.<sup>486</sup>

Whether a recount in New York would be challenged by the courts is unclear. The state has relatively flexible proceedings as to election contests -- challenges to a canvass of ballots are to be heard and decided by the state's Supreme Court.<sup>487</sup> Furthermore, although the provisions for the interpretation of ballots appear relatively strict (voters may not make any erasure on their

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<sup>480</sup>James M. Odato, *Bruno Orders Study of Statewide Voting Fraud*, THE TIMES UNION, Nov. 29, 2000 at B2.

<sup>481</sup>Elizabeth Benjamin, *Albany NYPIRG Official asks lawmakers to provide funds to train inspectors, repair older machines*, THE TIMES UNION(Albany, New York), January 23, 2001, at B2.

<sup>482</sup>*Id.*

<sup>483</sup>*Id.*

<sup>484</sup>History of Voting Machines (visited April 2000).  
<http://inventors.about.com/library/weekly/aa111300b.htm?once=true&>

<sup>485</sup>*Id.*

<sup>486</sup>Telephone Interview with Anna Svizzero, Director of Election Operation with the State Board of Elections (May 3, 2001).

<sup>487</sup>N.Y. ELEC. LAW § 16-106 (2001).

ballot or any mark other than a cross or check in the proper square; if the voting is by machine, the voter must punch a hole in the proper square), New York law also states that votes will not be counted “if it is impossible to determine the voter’s choice,” implying that the votes may be counted if the voter’s choice can be discerned, a standard rejected by the U.S. Supreme Court.<sup>488</sup>

New York registration laws focus primarily on reasons for cancellations but contain no measures to protect against wrongful purges, such as mail notification. Registration can be canceled if a voter dies, requests cancellation, is adjudged as incompetent, is convicted of a felony, refuses to take a challenge oath, or has not voted in two consecutive general elections.<sup>489</sup>

## North Carolina

The North Carolina Board of Elections received numerous complaints with regard to the 2000 elections.<sup>490</sup> Though specific cases were not widely reported, Congressman Mel Watt noted that he received complaints from people who registered under the “motor voter” program but were left off of voter registration lists.<sup>491</sup> In Duplin County, some voter names were missing or listed as inactive in poll books. The errors resulted in delays and confusion at the Wallace precinct polling place.<sup>492</sup> Moreover, the Board of Elections sought to update voter registration information by sending out a countywide mailing, but the mailing was sent only to street addresses, leaving out more than 4,400 people who receive their mail at post office boxes.<sup>493</sup>

The state of North Carolina uses a wide range of voting machines. Optical scanning machines are used in 49 counties, 34 counties use DRE systems, eight counties use punch card machines, six counties use lever machines, and three counties use paper ballots.<sup>494</sup> No

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<sup>488</sup>N.Y. ELEC. LAW § 9-112 (2001).

<sup>489</sup>N.Y. ELEC. LAW § 5-400 (2001)

<sup>490</sup>Telephone Interview with Don Wright, General Counsel of State Board of Elections (May 1, 2001).

<sup>491</sup>Cory Reiss, *Groups Say Voter Complaints Soared*, SUNDAY STAR-NEWS, Nov. 19, 2000, at B1-B2.

<sup>492</sup>Victoria Rouch, *Duplin County; Voters Unhappy with Precinct*, MORNING STAR, Nov. 18, 2000, at 4B.

<sup>493</sup>*Id.*

<sup>494</sup>Telephone Interview with Don Wright, General Counsel of State Board of Elections on May 1, 2000.

information is centrally available to calculate the number of unrecorded ballots.<sup>495</sup>

The Office of Election Administration reported that two state recounts took place in local races;<sup>496</sup> however, a North Carolina recount that affected a federal election would likely encounter significant judicial scrutiny. North Carolina offers candidates the opportunity to petition for recounts, and also provides for certain mandatory recounts that will be conducted under the supervision of the state board of elections.<sup>497</sup> In counting the returns, each county board of elections will “canvass and judicially determine” the results of the elections, with power and authority to pass judicially upon all facts, to make or order such recounts as it deems necessary (except where the state board has denied a recount pursuant to its own regulations), and to determine judicially the result of the election. The county board will be allowed access to the ballot boxes to conduct a recount whenever the results of an election cannot be accurately known due to errors in tabulating returns and filling out abstracts,<sup>498</sup> as will the state board.<sup>499</sup> The latitude granted to the county and state election boards seems too wide to be accepted under *Bush v. Gore*; the same is true of North Carolina’s ballot interpretation provisions, which require that a ballot be counted unless it is impossible to determine the voter’s choice.<sup>500</sup>

Registration can be canceled if a registered voter dies, requests cancellation, or moves to a residence in another jurisdiction.<sup>501</sup> While North Carolina does not purge the voter from the rolls unless the voter does not reply to a mailing and does not vote in two consecutive general elections,<sup>502</sup> it appears to lack a provisional balloting safeguard for wrongfully purged voters.

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<sup>495</sup>*Id.*

<sup>496</sup>*Id.*

<sup>497</sup>N.C. GEN. STAT. § 163-192.1 (2000).

<sup>498</sup>N.C. GEN. STAT. § 163-175 (2000).

<sup>499</sup>N.C. GEN. STAT. § 163-190 (2000).

<sup>500</sup>N.C. GEN. STAT. § 163-169 (2000).

<sup>501</sup>N.C. GEN. STAT. § 163-82.14.

<sup>502</sup>*Id.*

## **North Dakota**

According to Deputy Secretary of State Cori Fong, there were no reports of significant complaints in North Dakota regarding the November 2000 elections.<sup>503</sup> North Dakota has very modern voting equipment: 46 counties in North Dakota use optical scanning machines, six counties use paper ballot systems, and one county uses a punch card system.<sup>504</sup> As a result, of the 292,249 ballots cast, only 1,255 (or 0.4 percent) were unrecorded.<sup>505</sup>

Despite the smooth functioning of the 2000 elections, North Dakota would encounter substantial judicial difficulties in the event of a recount. North Dakota statutes require that recounts be held when the margin of victory is less than one-half of one percent, and offer the right to a recount to candidates defeated by less than two percent,<sup>506</sup> these recounts are conducted by county auditors and recount boards, which can rule by majority vote on the disposition of unclear ballots. The state employs a “voter’s intent” standard for interpreting ballots, counting all ballots or parts of a ballot for which the elector’s choice can be determined.<sup>507</sup> As a result, a court challenge would likely find North Dakota in violation of the equal protection standards of *Bush v. Gore*.

To make voting more accessible to its citizens, North Dakota does not require voter registration.<sup>508</sup>

## **Ohio**

Some disabled voters in Ohio were very frustrated with the voting process during the November 2000 Presidential election. One individual found that there was no accessible path to

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<sup>503</sup>Telephone Interview with Cori Fong, Deputy Secretary of State, Election Division (May 2, 2001).

<sup>504</sup>*Id.*

<sup>505</sup>Telephone Interview with Lee Ann Oliver, Election Specialist, Elections Division, North Dakota Secretary of State’s Office (May 3, 2001).

<sup>506</sup>N.D. CENT. CODE § 16.1-16-01 (2000).

<sup>507</sup>N.D. CENT. CODE § 16.1-15-01 (2000).

<sup>508</sup>Voter Registration in North Dakota (visited May 23, 2001).  
<http://www.state.nd.us/sec/voterregistrationhistory.htm>.



the polling place.<sup>509</sup> In order to vote, he was forced to park his wheelchair in the pathway leading to the polling place and force poll workers to bring a ballot outside.<sup>510</sup> Blind individuals also were unable to vote in Mansfield, Ohio. They were turned away at the polls because there were no individuals at the polling sites willing to help them.<sup>511</sup>

Voters in Montgomery, Greene and Warren counties all use the punch card ballot system. Other counties use paper ballot and lever machines. A certain number of ballots were rejected by automatic counters in Montgomery County. According to unofficial results, there is a gap of 2.8 percent (6,500 votes) between the number of ballots cast and the number of votes counted for presidential candidates.<sup>512</sup> The discrepancy may be due in part to voters who did not vote for a presidential candidate, voted for a write-in candidate or because the machine rejected the ballots for a technical error.<sup>513</sup> In Cuyahoga County, approximately 3,500 ballots may have gone uncounted due to human error in counting principally absentee ballots.<sup>514</sup>

Ohio provides for both automatic and privately initiated recounts.<sup>515</sup> The exact manner of tallying the votes is in most respects left to the board of elections. If there is any disagreement as to how a ballot should be counted, it is submitted to the members of the board of elections; any part of the ballot on which three of the members agree will then be counted.<sup>516</sup> The Secretary of State is charged with providing rules and instructions regarding the use of voting machines and tabulating equipment, including how the votes are to be tallied and other matters regarding the accurate counting of the votes.<sup>517</sup> Given the significant deference these statutes give to the decisions of election officials, it is unlikely that they are sufficiently specific to pass the test imposed by *Bush v. Gore*.

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<sup>509</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000), at 13.

<sup>510</sup>*Id.*

<sup>511</sup>*Id.*

<sup>512</sup>Jim Bebbington, *County Election Officials Review Ballots*, DAYTON DAILY NEWS, Nov. 14, 2000, at B1.

<sup>513</sup>*Id.*

<sup>514</sup>*Cuyahoga County Uncovers Ballot Problems*, ASSOCIATED PRESS, Dec. 16, 2000.

<sup>515</sup>OHIO REV. CODE ANN. §§ 3515.011, 35.15.01 (2001).

<sup>516</sup>OHIO REV. CODE ANN. § 3505.27 (2001).

<sup>517</sup>OHIO REV. CODE ANN. § 3506.15 (2001).

According to Ohio law Revised Code 3503.21, registration can be canceled by a voter's written request, notice of death, the felony conviction, finding of incompetency, or change of residency.<sup>518</sup> Additionally, if a voter fails to respond to a mailed confirmation notice or does not update his registration at least once during four consecutive years, his or her registration is canceled.<sup>519</sup> The Secretary of State must prescribe procedures to identify and cancel the registration of a voter who changes residency, but these procedures are not specified in statute.<sup>520</sup>

## **Oklahoma**

The Oklahoma elections were plagued by long lines and a shortage of poll workers.<sup>521</sup> State agencies collecting registration forms, such as Human Services Operations and the Department of Motor Vehicles, did not always forward the information to the Board of Elections.<sup>522</sup> As a result, many registered voters' names were not on the voting rolls.<sup>523</sup>

Oklahoma has a very low rate of unrecorded ballots; according to Carol Slater of the Secretary of State's office, Oklahoma uses the optical scanning system statewide.<sup>524</sup> Of the 1,234,229 ballots cast, 3,094 were overvotes (0.25 percent) and 6,930 were undervotes (0.56 percent), for a total of 10,024 unrecorded ballots (or 0.81 percent).<sup>525</sup>

Oklahoma gives any candidate standing to obtain a recount of a federal election.<sup>526</sup> All ballots are recounted, and electronic devices are tested for accuracy.<sup>527</sup> The rules as to the interpretation of ballots are determined by the Secretary of the State Election Board, who issues a

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<sup>518</sup>OHIO REV. CODE ANN. § 3503.21(A).

<sup>519</sup>*Id.*

<sup>520</sup>*Id.*

<sup>521</sup>Telephone Interview with Carol Slater of the Secretary of State's office (April 24, 2001).

<sup>522</sup>*Id.*

<sup>523</sup>*Id.*

<sup>524</sup>*Id.*

<sup>525</sup>Telephone Interview with Carol Slater of the Secretary of State's office (May 3, 2001).

<sup>526</sup>OKLA. STAT. tit. 26, § 8-111 (2001).

<sup>527</sup>*Id.*

determination as to which markings are to be considered valid for indicating a voter's choice. Other markings are not counted, even if they may designate the intention of the voter; any part of a ballot on which it is impossible to determine the voter's choice is considered void.<sup>528</sup> The ability of this system to pass the *Bush v. Gore* test depends at least in part on the specificity of the standards as promulgated by the Secretary of the State Election Board. However, the power to choose electors was designated by the Constitution to state legislatures; the majority in *Bush v. Gore* declined to decide whether such legislatures were able to delegate the power further to other bodies or officials (though this was at issue in the concurring opinion of Justices Rehnquist, Scalia and Thomas),<sup>529</sup> and it is therefore not clear whether this system would survive the Court's scrutiny even were the standards thus promulgated sufficiently specific.

It is unclear whether Oklahoma has adequate safeguards to protect against faulty purges. If voter mail was returned unopened, a voter is a potential duplicate, a voter changes residency, or an active voter did not vote in the second previous general election, the voter is sent an address confirmation. If the voter does not respond or the mailing is returned, the voter will be considered inactive.<sup>530</sup> If the inactive voter does not vote in any election between the date of the address confirmation mailing and the day after the date of the second successive general election for federal office, he or she will be removed as a registered voter and all information on that voter will be destroyed. The county election board secretary maintains a list of names and addresses of voters sent the confirmation mailing for two years. In addition, the county election board secretary maintains a list of names and addresses of canceled duplicate voter registrations for two years. It is not clear from the statute what measures are taken to reinstate a voter once the voter is removed from the voting rolls.

Despite these procedures, some counties still have problems with their voting rolls. An investigation by the *Tulsa World* revealed that 2,365 people who have died are allegedly still on the voter rolls in Oklahoma.<sup>531</sup> Additionally, thousands of people who are allegedly ineligible to vote due to felony convictions also remain on voter rolls.<sup>532</sup>

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<sup>528</sup>OKLA. STAT. tit. 26, § 7-127 (2001).

<sup>529</sup>See *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 530; *Id.*, at 534 (J. Rehnquist, concurring).

<sup>530</sup>OKLA. STAT. tit. 26 § 4-120.2 (2001).

<sup>531</sup>*Death and Prison Fail to Knock Hundreds of People off Voter Registration Lists*, ASSOCIATED PRESS, Nov. 19, 2000.

<sup>532</sup>*Dead, Felons Still on Rolls*, TULSA WORLD, Nov. 20, 2000.

## Oregon

Despite the hopes of some that the widespread use of a vote by mail system would be a step forward, some barriers to voting still remain. In the 2000 elections, the visually disabled community found that the vote-by-mail system was not accessible to all voters; furthermore, because the ballots were not printed in braille, these voters were denied the ability to vote privately and independently.<sup>533</sup>

Many other problems with the election process arose from the vote-by-mail system. According to Scott Tigie, Operations Manager for the Elections Division of the Secretary of State's office, the slow ballot return from voters resulted in a mail jam at the end of the voting period, which delayed the counting of ballots.<sup>534</sup> Voters also complained that there were no instructions on how to use the mail-in ballot.<sup>535</sup>

A total of 1,559,215 ballots were cast in Oregon's November elections. Of those, 1,533,968 ballots registered as votes for presidential electors, meaning that 25,247 ballots (or 1.6 percent) were not recorded as votes for a presidential candidate. A study recently completed by Oregon Secretary of State Bill Bradbury found that 2 percent of ballots were discarded as undervotes in Oregon's seven counties using punch cards, as opposed to 1 percent in counties using optical scanning machines.<sup>536</sup> Secretary Bradbury recommended that punch card ballots in Oregon should be eliminated prior to the 2004 elections.

The close presidential election in Oregon caused an automatic recount.<sup>537</sup> Oregon provides for automatic recounts when the margin of victory is less than one-fifth of one percent, and it allows any candidate or officer of a political party to request a recount.<sup>538</sup> Ballots are to be disregarded if it is impossible to determine the voter's choice for the office or question; counting board clerks are specifically instructed to disregard misspellings or abbreviations of candidates'

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<sup>533</sup>Telephone Interview with Scott Tigie, Manager, Elections Division, Oregon Secretary of State's Office (May 2001).

<sup>534</sup>*Id.*

<sup>535</sup>*Id.*

<sup>536</sup>Press Release, Secretary of State Bill Bradbury, Secretary Bradbury Touts Successes of Vote-by-Mail Highlights Problems with Punch Cards in National Hearing on Election Reform, (April 12, 2001).

<sup>537</sup>Telephone Interview with Scott Tigie, Manager, Elections Division, Oregon Secretary of State's Office (May 2001).

<sup>538</sup>OR. REV. STAT. §§ 258.280, 258.161 (1999).

names if the intent of the voter can be ascertained.<sup>539</sup> This intent-of-the-voter standard seems unlikely to be accepted by the courts after *Bush v. Gore*.

Oregon allows a voter's name to be purged from the voting rolls if the voter is currently serving a felony sentence,<sup>540</sup> at a voter's request, if the voter is deceased, if the county clerk receives written evidence that a voter is registered in another county or state, or if the voter has failed to respond to a written notice indicating he or she will be removed as inactive from the rolls and has not voted in two consecutive general elections following such a notice.<sup>541</sup> However, it appears that Oregon has no safeguards, such as provisional voting or mail notification, to protect wrongfully purged voters.

## **Pennsylvania**

The Pennsylvania Department of State received approximately 80 complaints from voters, most concerning the fact that people who had registered to vote through the "motor voter" program were not on voter lists on election day.<sup>542</sup> In Allegheny County, an antiquated system of compiling registration cards caused hundreds of people to find their names missing at polling places.<sup>543</sup> The cards are kept in binders and are moved from one binder to another when a voter changes residence; errors in refileing the cards could have been responsible for the confusion.<sup>544</sup> Similar problems arose in Northampton County due to a record turnout, with confusion erupting over registrations filed through the "motor voter" program and a recent update of voter lists.<sup>545</sup> The most frequent complaint concerned the inability of poll workers to contact the county's voter

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<sup>539</sup>OR. REV. STAT. § 254.505 (1999).

<sup>540</sup>The Sentencing Project, *Losing the Vote*, (1998).  
[www.hvr.org/reports98/vote/usvot98.htm](http://www.hvr.org/reports98/vote/usvot98.htm).

<sup>541</sup>OR. REV. STAT. § 247.555 (1999).

<sup>542</sup>Timothy D. May, *State to Review Reported 'Motor Voter' Registration Problems*, ASSOCIATED PRESS, Nov. 10, 2000.

<sup>543</sup>Cindi Lash, *Punch Cards Used here Without Incident*, PITTSBURGH POST-GAZETTE, Nov. 10, 2000 at A11.

<sup>544</sup>*Id.*

<sup>545</sup>Scott Kraus, *Registration Glitches Cause Poll Confusion; Northampton County Recently Updated Voter Rolls*, THE MORNING CALL, Nov. 9, 2000 at B1.

registration office regarding voters' eligibility.<sup>546</sup>

Other election irregularities occurred around the state. In Allentown, sight-impaired voters were required, despite numerous requests for accessible facilities, to have a polling worker accompany them in the voting booth, depriving them of both privacy and dignity.<sup>547</sup> In the 137<sup>th</sup> State Legislative District, election judges allegedly opened absentee ballots before the polls closed.<sup>548</sup> Furthermore, malfunctions in election machines in Lincoln-Lemington, Homewood and East Hills led Pittsburgh City Councilwoman Valerie McDonald to call for a state investigation, claiming that the malfunctioning of machines was more frequent in these predominantly African-American neighborhoods.<sup>549</sup> In a letter to Elections Director Mark Wolosik, Councilwoman McDonald alleged that poll workers "strongly felt that the machines were intentionally programmed incorrectly . . . and were sabotaged."<sup>550</sup> Mr. Wolosik agreed to look into the complaints but stated that malfunctions are routine and occur throughout the state.<sup>551</sup>

The extent of the problems with Pennsylvania's voting machines cannot be easily assessed, since the state does not maintain centralized information on unrecorded ballots.<sup>552</sup> Across the state, 26 counties use lever machines, 24 counties use optical scanning systems, 11 counties use punch card systems, and six counties use DRE's.<sup>553</sup> Electronic voting systems in Pennsylvania are required to indicate to voters whether they have improperly selected more

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<sup>546</sup>*Id.*

<sup>547</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000), at 14.

<sup>548</sup>Scott Kraus, *County Had Vote Irregularities of its Own, Registrar Reports*, THE MORNING CALL, Dec. 19, 2000, at B1.

<sup>549</sup>Timothy McNulty, *Councilwoman Charges Voting Irregularities in Black Precincts*; Cindi Lash, *Punch Cards Used here Without Incident*, PITTSBURGH POST-GAZETTE, Nov. 14, 2000, at C5.

<sup>550</sup>*Id.*

<sup>551</sup>*Id.*

<sup>552</sup>Telephone Interview with the Secretary of State's Office, Election Division (May 2, 2001).

<sup>553</sup>Department of State Bureau of Commission, Elections, and Legislation on file with the U.S. House of Representatives Judiciary Committee, Democratic Staff.  
<http://www.dos.state.pa.us/bcel/vwv/vwv.html>

candidates for office than are allowed and permit them to correct the error.<sup>554</sup>

Pennsylvania law seems to address the questions of recounts and ballot interpretation with the specificity required by *Bush v. Gore*. In Pennsylvania, three qualified electors may petition the court of common pleas for a recount of paper ballots or to recanvass a voting machine.<sup>555</sup> Ballots, including those for presidential electors, are to be marked with an “X” or a checkmark in the spaces provided; ballots with other marks will be rejected, but votes will not be declared void because the cross or checkmark is irregular in form. Votes can also be made by a stamp or sticker in the proper space. If it is impossible to determine a voter’s choice, the vote will not be counted.<sup>556</sup> Decisions regarding questionable marks on ballots are to be made by the inspectors of election and resolved by the judge of election if the inspectors disagree; if the judge cannot resolve the question, then it falls to the overseers of election.<sup>557</sup>

In Pennsylvania, a voter’s registration is canceled if the voter dies,<sup>558</sup> is currently serving a jail sentence for a felony conviction,<sup>559</sup> or moves.<sup>560</sup> However, it does not appear the Pennsylvania has any statutory safeguards, such as mail notification or provisional balloting to protect wrongfully purged voters.

## **Rhode Island**

Some minor difficulties attended Rhode Island’s November elections. Several residents asserted that they were not listed on the voter rolls despite having previously registered with the Division of Motor Vehicles.<sup>561</sup> Robert J. Fontaine, the Executive Director of the Rhode Island Board of Elections, is examining whether some ballots in the Wawaloam School voting precinct

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<sup>554</sup>25 PA. CONS. STAT. § 3031.7 (2000).

<sup>555</sup>25 PA. CONS. STAT. § 3261 (2000).

<sup>556</sup>25 PA. CONS. STAT. § 3063 (2000).

<sup>557</sup>25 PA. CONS. STAT. §§ 3064, 3053 (2000).

<sup>558</sup>25 PA. CONS. STAT. § 961.905 (2000).

<sup>559</sup>The Sentencing Project, *Losing the Vote*, (1998).  
[www.hvr.org/reports98/vote/usvot98.htm](http://www.hvr.org/reports98/vote/usvot98.htm).

<sup>560</sup>25 PA. CONS. STAT. § 961.502 (2000).

<sup>561</sup>Joseph R. LaPlante, *Possible Scanning Glitches*, THE PROVIDENCE JOURNAL-BULLETIN, January 23, 2001, at 2C.

and three precincts in Cranston were not counted because the optical scanning machines were unable to read the bar code at the top of the ballots.<sup>562</sup> Additionally, in a letter to the Secretary of State, a local official indicated that overvoting was a persistent problem at the Wawaloam School precinct.

Due to reforms pushed by former Secretary of State Jim Langevin, Rhode Island has a low rate of unrecorded ballots, as the optical scanning system is used statewide. In the state of Rhode Island there were 412,074 ballots cast with 434 overvotes and 2,492 undervotes, for a total of 2926 unrecorded ballots (or 0.7 percent of ballots cast).<sup>563</sup>

This low rate of error is complemented by Rhode Island's clear standards for recounts. Rhode Island allows candidates to request recounts if they were defeated by less than five percent of the votes. The recount will be conducted by re-reading the counting devices and comparing the totals to those obtained on election night; any discrepancy in the results will require the original ballots to be re-fed into newly programmed counting equipment. If these recounts leave a candidate trailing by less than three percent, he or she may request a manual recount.<sup>564</sup> Although no guidelines are provided for the interpretation of unclear ballots, the optical scanning devices are designed to return a ballot to a voter in case of overvote or improper marking, which would tend to reduce the need for any such interpretation.<sup>565</sup>

Under Rhode Island law, the local board of elections maintains registration cards and purges the cards of voters who are no longer qualified to vote.<sup>566</sup> After a confirmation card has been mailed, the recipient must return the card or appear to vote in one of the next two general elections or he or she will be taken off of the voting list.<sup>567</sup> The voter will be notified of the cancellation and must register again in accordance with the provisions of this law. However, the cancellation is in effect whether or not the voter received the notice.

Rhode Island is considering legislation to become the first state to provide Braille ballots

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<sup>562</sup>*Id.*

<sup>563</sup>Telephone Interview with Bob Fontaine, Executive Director of the Rhode Island Board of Elections (May 3, 2001).

<sup>564</sup>R.I. GEN. LAWS § 17-19-37.1 (2001).

<sup>565</sup>R.I. GEN. LAWS § 17-19-24 (2001).

<sup>566</sup>R.I. GEN. LAWS § 17-10-1 (2001).

<sup>567</sup>R.I. GEN. LAWS § 17-10-1(b) (2001).



statewide.<sup>568</sup> Some advocates for individuals with disabilities, including Congressman Jim Langevin, the former Rhode Island Secretary of State, argue that braille ballots will protect the privacy of voting, because visually impaired individuals will no longer need to have someone assist them in casting their votes. Other advocates for the disabled, including the National Federation of the Blind in Baltimore, Maryland, believe that even when braille paper ballots are used, visually impaired voters still make errors as often as 33% of the time that result in ballots being discarded and, therefore, it would be better to try to develop new technologies instead of trying to modify paper ballots.<sup>569</sup>

### South Carolina

A variety of irregularities were observed in the South Carolina elections. According to Dwight James, executive director of the state chapter of the NAACP, the group has received hundreds of complaints of voting irregularities across South Carolina, including allegations that some voters were turned away from the polls while others were intimidated by poll workers.<sup>570</sup> Counties from which complaints were received include Aiken, Calhou, Charleston, Georgetown, Greenville, Laurens, Marion, Richland, Saluda, Sumter and York.<sup>571</sup> Based on these allegations of voter intimidation at the polls, State Democratic Party Chairman Dick Harpootlian filed a complaint with the Justice Department,<sup>572</sup> claiming that some Republican poll workers who challenged African-American voters in Charleston and Sumter Counties wore poll watcher badges that looked like police shields. Though the complaint is being investigated, state election officials have said that the badges were legal. Robert C. Jendron, Chief of the U.S. Attorney's criminal division in South Carolina, has been assigned to investigate all voting irregularities.<sup>573</sup>

There also are questions concerning the procedures by which approximately 150 absentee

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<sup>568</sup>Gillian Flynn, *Rhode Island Considers Braille Ballots*, ASSOCIATED PRESS, Jan. 27, 2000.

<sup>569</sup>*Id.*

<sup>570</sup>Chasiti Kirkland, *NAACP looks at voter fraud, state chapter says it has received complaints from 11 South Carolina counties about Tuesday's election*, THE AUGUSTA CHRONICLE, November 11, 2000,.

<sup>571</sup>*Id.*

<sup>572</sup>*Id.*

<sup>573</sup>*Id.*

ballots were requested.<sup>574</sup> According to State Elections Commission Executive Director Jim Hendrix, some of the documents requesting absentee ballots were improperly shredded. One employee in the voter registration office was suspended pending the outcome of the investigation.<sup>575</sup>

Additionally, a Harvard University research team believes that there were voting problems in Jasper County due to unusually strong showings by presidential candidates Patrick Buchanan and Ralph Nader, who received 239 votes and 111 votes respectively.<sup>576</sup> The county is traditionally a Democratic county. George Bush and Al Gore each received only one vote, though the research team has collected approximately 40 affidavits from residents who said they voted for Bush or Gore. Problems encountered in Jasper County allegedly include non-operational voting machines at several polling places, an inadequate number of paper ballots, a lack of privacy for voters, and ballots that were not stored in locked boxes.

In South Carolina, 21 counties use electronic voting systems, 12 counties use optical scanning machines, 12 counties use punch card systems, and one county uses a paper ballot system.<sup>577</sup> Information is not centrally available to calculate the number of unrecorded ballots.<sup>578</sup>

South Carolina's recount system would likely be found unacceptable by the courts. Contests of federal elections are to be decided by the State Board of Elections.<sup>579</sup> The Board will hear the contest, receive testimony, and then determine issues by majority vote and certify the election results. Appeals can be made to the state Supreme Court.<sup>580</sup> Mandatory recounts will be held (unless waived by the candidates) whenever the margin of victory is less than one percent.<sup>581</sup>

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<sup>574</sup>*Election Worries Investigated by State, Federal Officials*, ASSOCIATED PRESS, Nov. 8, 2000.

<sup>575</sup> *Id.*

<sup>576</sup>*Research team says Jasper election results way off base*, ASSOCIATED PRESS, Dec. 27, 2000.

<sup>577</sup>Voting System Used Chart (visited on May 2, 2001).  
<http://www.state.sc.us/scsec/sysused.htm>.

<sup>578</sup>Telephone interview the Hannah King, Public Information Officer, South Carolina State Election Commission (May 3, 2001).

<sup>579</sup>S.C. CODE ANN. § 7-17-260 (2000).

<sup>580</sup>S.C. CODE ANN. § 7-17-270 (2000).

<sup>581</sup>S.C. CODE ANN. § 7-17-260 (2000).

Although no new standards are provided for ballot interpretation during a recount, in the original count the county election managers are to employ a “voter’s intent” standard, recording a ballot unless it is “impossible to determine the voter’s choice.”<sup>582</sup> These standards do not appear to be sufficiently specific as to withstand *Bush v. Gore* scrutiny.

South Carolina law protects against the wrongful purging of voter rolls. The statutes prohibit the removal of a voter’s name from the rolls unless he or she: (1) confirms in writing a change of residence to a different county, (2) fails to respond to a notice of cancellation within 30 days, or (3) fails to vote for two general elections after the notice is sent.<sup>583</sup>

### **South Dakota**

Chris Nelson, Secretary of State of South Dakota, reported that there were minimal problems during the November general election.<sup>584</sup> According to Secretary Nelson, the state uses three different types of voting machinery: one-half of the counties use the optical scanning machine, one-third of counties use the paper ballot, and one-sixth of the counties use punch card systems.<sup>585</sup> No information is centrally available to calculate the number of unrecorded ballots.<sup>586</sup>

South Dakota provides for automatic recounts in the case of tie votes, and defeated candidates may petition for recount if the margin of victory is less than one-quarter of one percent.<sup>587</sup> Paper ballots must be marked with an “X” or a check mark to be counted, but ballots from which it is impossible to determine the voter’s choice will not be counted.<sup>588</sup> In recounting an election counted by an automatic tabulation system, the appointed recount board is given the discretion to review ballots for proper marking procedure; votes for which the voter’s intent can be determined will be counted.<sup>589</sup> Punch card ballots in South Dakota have been counted where

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<sup>582</sup>S.C. CODE ANN. § 7-13-1120 (2000).

<sup>583</sup>S.C. CODE ANN. § 7-5-330 (2000).

<sup>584</sup>Telephone Interview with Chris Nelson, South Dakota Secretary of State (May 1, 2001).

<sup>585</sup>*Id.*

<sup>586</sup>*Id.*

<sup>587</sup>S.D. CODIFIED LAWS §§ 12-21-16, 12-21-12 (2000).

<sup>588</sup>S.D. CODIFIED LAWS §§ 12-18-16, 12-20-7 (2000).

<sup>589</sup>S.D. ADMIN. R. 5:02:09:05 (2001).

two of the four corners of the chad were broken and where light passes through the chad.<sup>590</sup> While the punch card standard appears to be sufficiently objective to comply with *Bush v. Gore*, the standards used for other ballots appear to give more discretion in counting to canvassing boards than is permitted under the ruling.

South Dakota law requires that if a voter who is placed on the inactive registration list does not vote by the second general election following the confirmation mailing, the registration shall be canceled. This determination shall be made between January 1 and November 15 of every odd-numbered year.<sup>591</sup>

## Tennessee

Last November, approximately 2,345 Tennessee voters went to the polls thinking they had registered and found themselves left off the voting rolls. The problem was partially caused by miscommunication in the “motor voter” registration process. The driver’s license registration form directed residents to an examiner to receive a separate form for voter registration. However, many residents assumed that they had completed the registration process after checking a box on the initial form indicating their intent to register.<sup>592</sup> Brook Thompson, Election Coordinator for the Secretary of State, also indicated that people were left off the voter rolls when the Department of Safety (which processes driver’s licenses) failed to transfer voter registration information to election officials.<sup>593</sup>

The state and local NAACP reported a number of complaints with regard to the November elections, including names missing from voting rosters, hours and locations of polling places changing without notice, and even an allegation that an election worker placed several white voters before an African-American voter with the statement, “You know what it means to sit at the back of the bus.” These complaints are among many collected by the NAACP. Justice Department officials are examining the complaints on the list, but none of the incidents have been substantiated. NAACP officials in the state are encouraging those who may have information to come forward, as allegations must be specific in order to execute a full and

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<sup>590</sup>*Duffy v. Mortenson*, 493 N.W.2d 437 (1993).

<sup>591</sup>S.D. CODIFIED LAWS § 12-4-19.4 (2000).

<sup>592</sup>Rick Locker, *Tennessee Election Results Certified with Ease, Yet Sundquist Invites Review*, KNOXVILLE NEWS-SENTINEL, A7 (Nov. 29, 2000).

<sup>593</sup>*Id.*

competent investigation.<sup>594</sup>

The Tennessee AFL-CIO reported that one representative of the organization escorted several African-Americans, who were recipients of public assistance, to vote.<sup>595</sup> As part of the filing for public assistance, you are required by law to register to vote.<sup>596</sup> However, when the individuals arrived at the polling place, there were informed they were not on the voting list and escorted to the 'fail safe room'.<sup>597</sup> This room was filled with other African-Americans. According to the AFL-CIO representative, all of the individuals he escorted were denied their right to vote.<sup>598</sup> It was reported that when told they were not allowed to vote, one resident cried and expressed that she had hoped to vote for the first time.<sup>599</sup>

In the state of Tennessee, 35 counties use DREs systems, 24 counties use Micro-vote systems, 21 counties use punch card systems, 13 counties use optical scanning systems, one county uses touch screens, and one county uses paper ballots.<sup>600</sup> No information is centrally available to calculate the number of unrecorded ballots.<sup>601</sup> Many of the counties using punch cards are located in West Tennessee, and state officials have determined that counties using punch card ballots registered more undervotes in the presidential election than counties using other voting systems.<sup>602</sup>

It is unclear whether Tennessee's procedure for resolving contests in presidential elections would be accepted by the courts. Contests in such elections are resolved unreviewably

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<sup>594</sup>Monica Whitaker, *US Justice Officials examine complaints about unfair treatment at Tennessee polls*, THE NASHVILLE TENNESSEAN, April 6, 2001.

<sup>595</sup>Telephone Interview with A.J. Starling of the Tennessee AFL-CIO (April 25, 2001).

<sup>596</sup>*Id.*

<sup>597</sup>*Id.*

<sup>598</sup>*Id.*

<sup>599</sup>*Id.*

<sup>600</sup> Voting Systems Chart produced by the Tennessee Elections Division (on file with the U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>601</sup>Telephone Interview with Staff member of the office of the Tennessee Secretary of State, Election Division ( May 2, 2001).

<sup>602</sup>Bonna de la Cruz, *Vote Officials Say Punch Card Ballot Systems are Chad-Free in Tennessee*, THE NASHVILLE TENNESSEAN, Feb. 7, 2001, at 4B.

by a tribunal of the governor, the secretary of state, and the attorney general. No standards are provided to guide their decisions, and the tribunal is not bound by the rules of evidence as applied in courts, which may raise issues of due process.<sup>603</sup> The initial count provides no additional guidance: election judges are to count ballots insofar as the ballot is “properly marked” or insofar as “it is possible to determine the voter’s choice.”<sup>604</sup>

Tennessee law purges registrations for the following reasons: (1) if the voter requests to be purged, (2) 90 days after a change of name for any reason, except by marriage, (3) if the voter dies, (4) if the voter has been convicted of an infamous crime and notice has been received from the state coordinator of elections, district attorney general, United States attorney, clerk of the court that entered the conviction, or other source upon verification by the clerk of the convicting court, and (5) if the voter provides written confirmation of a change of address or voter registration outside of the county.<sup>605</sup>

## **Texas**

Due to the problems experienced in Florida, the Office of the Secretary of State in Texas reviewed the election process in Texas to determine whether similar problems arose in Texas. In testimony before the Texas House Elections Committee, Secretary of State Henry Cuellar reported the following:

(1) Fourteen counties use punch card systems similar to those used in Florida. Of the 1,678,614 votes cast on punch card systems, on average 1.53 percent of the ballots (approximately 25,682 votes) were undervotes and 0.54 percent of the ballots (approximately 9,064 votes) were overvotes. Of the 4,008,835 votes cast on optical scan systems, on average 0.51 percent of the ballots (approximately 20,445 votes) were undervotes and 0.12 percent of the ballots (approximately 4,810 votes) were overvotes. Of the 320,901 ballots cast on DRE (touch screen) systems, on average 0.89% of the ballots (approximately 2,868 votes) were undervotes while no overvotes were possible on this system. Programming changes to the optical scanning and touch screen systems might remedy the undervote problem.<sup>606</sup>

(2) The Secretary of State is “not aware that any evidence exists in Texas that older

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<sup>603</sup>TENN. CODE ANN. § 2-17-103 (2001).

<sup>604</sup>TENN. CODE ANN. § 2-7-133 (2001).

<sup>605</sup>TENN. CODE ANN. § 2-2-106 (2001).

<sup>606</sup>Testimony of Texas Secretary of State Henry Cuellar reported in the website (visited Jan. 31, 2001). [www.sos.state.tx.us/elections/testimony.shtml](http://www.sos.state.tx.us/elections/testimony.shtml)

technology was used in minority communities.”<sup>607</sup> However, different voting technologies are utilized within counties as well as within precincts.<sup>608</sup>

(3) Texas covers more than one time zone, meaning that election results may be released by the media when the polls close in Dallas, despite the fact that the polls are still open in El Paso. As a result, the results of the election can be announced by the media even before all polls close statewide.<sup>609</sup>

(4) Campaign staff issued voter applications which were defective under Texas law.<sup>610</sup>

Fort Worth was the site of several complaints of voter intimidation. One of the major complaints centered around a leaflet distributed in African-American communities in which seven African-Americans who were actively involved in elections were accused of voter fraud and “selling votes to the highest bidder.”<sup>611</sup> The flyers also accused the precinct workers of coercing the elderly and shut-in voters into allowing the workers to cast their ballots for them.<sup>612</sup> City officials were joined by Congress members Martin Frost, Eddie Bernice Johnson, Sheila Jackson Lee and Jim Clyburn in denouncing the flyer, which also claimed the named individuals would be videotaped while they were working Election Day.<sup>613</sup> The Tarrant County district attorney’s office has long received complaints of ballot tampering in past elections: no charges have ever been filed.<sup>614</sup>

Further, the Justice Department is investigating allegations that elderly African American voters were intimidated from voting by being told that they may be violating the law if someone

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<sup>607</sup>*Id.*

<sup>608</sup>*Id.*

<sup>609</sup>*Id.*

<sup>610</sup>*Id.*

<sup>611</sup>Max B. Baker, *Officials monitoring voting after accusations; Democrats say GOP intimidating elderly blacks*, THE FORT WORTH STAR-TELEGRAM (Fort Worth, Texas), November 8, 2000, at 1B; Debra Dennis, *Newsletter Sparks Charge of FW voter intimidation*, THE DALLAS MORNING NEWS, September 7, 2000, at 22A.

<sup>612</sup>*Id.*

<sup>613</sup>*Id.*

<sup>614</sup>*Id.*

helps them complete their mail-in ballots.<sup>615</sup> Mail-in ballots are permitted in Texas if a person is over the age of 65, disabled, plans to be traveling on Election Day and during the early voting period or is in jail pending a trial or an appeal.

The disabled community also complained of problems. In Round Rock, disabled voters were told that they could honk from their cars and ballots would be taken out to them.<sup>616</sup> No booths were accessible for voters with disabilities.<sup>617</sup>

Texas allows recounts if the margin of victory is less than ten percent of the winner's total, if candidates are tied, if the secretary of state certifies that counting errors occurred, or if the total number of votes is less than 1,000.<sup>618</sup> No grounds are required for the recount of electronic voting system results.<sup>619</sup> Votes on paper ballots must be indicated by an "X" or other mark that clearly shows the voter's intent in the square beside the name of the intended candidate.<sup>620</sup> Failure to mark the paper ballot in strict conformity with the requirement will not void the ballot, and a vote will be counted as long as the voter's intent is clearly ascertainable.<sup>621</sup> No procedures are given for unclearly marked automatic-tabulation ballots, and a "clear intent" standard may fail the scrutiny applied by *Bush v. Gore*.

While Texas appears to have adequate safeguards to protect voters from being wrongfully purged because of a mistaken belief that the voter has moved by giving such voters a written notice and the opportunity to correct the purge in two consecutive general elections, it does not appear to have adequate safeguards to protect voters mistakenly purged for other reasons such as a flawed felony voter purge. A Texas voter may be purged if a registrar is: notified by another county's registrar or the voter that the voter has moved, receives a death certificate, a final judgement of incompetence or felony conviction, a notice that the voter has applied for a ballot

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<sup>615</sup>*Officials Monitoring Voting After Democrats Say GOP Intimidating Elderly Blacks*, THE FORT WORTH TELEGRAM, Nov. 8, 2000, at 4.

<sup>616</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 18.

<sup>617</sup>*Id* at 33.

<sup>618</sup>TEX. ELEC. CODE ANN. § 212.022 (1999).

<sup>619</sup>TEX. ELEC. CODE ANN. § 212.0241 (1999).

<sup>620</sup>TEX. ELEC. CODE ANN. § 64.003 (1999).

<sup>621</sup>TEX. ELEC. CODE ANN. § 65.009 (1999).



in another county, or a notice that the voter has registered in another state.<sup>622</sup> If the registrar has reason to believe a voter has moved, a written confirmation is sent to the voter's last known address.<sup>623</sup> If the voter does not respond within 30 days, he or she is placed on the suspense list.<sup>624</sup> If on November 30 after the second general election for state and county officers the voter is still on the suspense list, the voter's registration is canceled.<sup>625</sup>

## Utah

The Justice Department is required to observe the Utah elections to preserve the integrity of the process and prevent the intimidation of minority voters, with a specific focus on Native American and Chinese-language voters.<sup>626</sup> Although no significant instances of harassment were alleged in the November elections, the Salt Lake Tribune reported that due to a voting machine mix-up, the votes of some Salt Lake residents were recorded for the wrong Utah House of Representatives candidate.<sup>627</sup> Officials also reported there were problems involving voter registration forms never being sent from the Department of Motor Vehicles to the Board of Elections.<sup>628</sup>

Utah has a moderate rate of unrecorded ballots. In Utah, 23 counties use punch card systems, with four counties using paper ballots and only two counties using optical scanning machines.<sup>629</sup> According to *The Salt Lake Tribune*, of 784,582 ballots cast, 13,828 votes (or 1.8

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<sup>622</sup>TEX. ELEC. CODE ANN. § 16.031 (1999).

<sup>623</sup>TEX. ELEC. CODE ANN. § 15.051 (1999).

<sup>624</sup>TEX. ELEC. CODE ANN. § 15.053; 15.081 (1999).

<sup>625</sup>TEX. ELEC. CODE ANN. § 16.032; 15.023 (1999).

<sup>626</sup>*The Right to Vote in Lawrence*, THE BOSTON GLOBE, November 12, 1998, at A24.

<sup>627</sup>*Salt Lake Voting Mix-Up Adds Snafu to House Race*, THE SALT LAKE TRIBUNE, November 23, 2000, at A8.

<sup>628</sup>*Id.*

<sup>629</sup>Facsimile from Todd Taylor, Executive Director, Utah State Democratic Committee (May 2, 2001)(on file with the U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

percent) were not recorded as a vote for any presidential candidate.<sup>630</sup>

Utah provides for a full recount upon the request of any candidate who loses by a margin of less than one vote per voting precinct.<sup>631</sup> If it is impossible to determine the voter's choice, the ballot will not be counted. A defective or incomplete mark will be accepted so long as there is no other mark or cross on the paper ballot indicating an intent to vote otherwise. In general, the counters are to give full consideration to the intent of the voter, and may not invalidate a ballot because of mechanical and technical effects in voting (although the exact ramifications of this position with regard to punch-card ballots are unclear), and misspelled names will be accepted if the voter's intent is apparent.<sup>632</sup> This focus on intent, with no additional guidelines, would likely fail to be considered sufficiently specific under *Bush v. Gore*.

Utah appears to have no safeguards to prevent the wrongful purging of voters. However, Utah also only appears to require the removal from voting rolls of convicted felons who are currently incarcerated.<sup>633</sup>

## **Vermont**

The Vermont Secretary of State's Office reported that the names of voters who registered with the Department of Motor Vehicles were never reported to the Secretary of State's office or recorded into the voting roll before the November elections.<sup>634</sup>

In the early 1990s, Vermont discontinued the use of the Vote-a-matic machines (punch-card machines) and began using optical scanning systems. Currently, 186 of Vermont's 246 towns still hand-count ballots with the remaining towns using optical scanning systems.<sup>635</sup> The failure rate of these machines is less than one percent, and every rejected ballot is hand-

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<sup>630</sup>Dan Harrie, *Utah Found Voting Easier This Election*, THE SALT LAKE TRIBUNE, November 29, 2000, at A8.

<sup>631</sup>UTAH CODE ANN. § 20A-4-401 (2001).

<sup>632</sup>UTAH CODE ANN. § 20A-4-105 (2001).

<sup>633</sup>UTAH CODE ANN. § 20A-2-101.5 (2000).

<sup>634</sup>Telephone Interview with staff member of the Vermont Secretary of State's Office (May 2, 2001).

<sup>635</sup>*Id.*

counted.<sup>636</sup> In the November election, the total number of ballots counted was 297,146. Of those ballots, 294,300 registered as votes for presidential electors and 2,838 of the cast ballots were not recorded as votes for a presidential candidate.<sup>637</sup>

Vermont grants the right to a recount to any candidate who has lost by a margin of less than five percent.<sup>638</sup> In counting ballots that are unclearly marked, election officials will attempt to ascertain the intent of the voter; if it is impossible to determine the voter's intent, the ballot will be counted as blank. If there is doubt regarding the interpretation of a ballot, the election officials involved in the count will decide the question by majority vote.<sup>639</sup> The procedure for recounts involving punch card or electronic ballots is left to the superior court with whom the recount petition is filed and is not dictated by statute.<sup>640</sup> Given the latitude extended to courts and election officials in interpreting ballots, it is unlikely this system would be acceptable under the *Bush v. Gore* standard.

Vermont appears to have one of the most extensive set of safeguards to prevent wrongful voting purges in the United States. A Vermont voter may be purged if he or she changes his residence or dies.<sup>641</sup> To verify that a voter has moved or died, a board conducts an investigation. If, following that investigation, a voter's eligibility is still not known, the voter is sent a written notice.<sup>642</sup> A voter who fails to respond to that notice is only purged if he or she fails to vote in two consecutive general elections after the notice was sent.<sup>643</sup>

## **Virginia**

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<sup>636</sup>Memorandum from the State of Vermont, Office of Secretary of State, to Senate Government Operations/House Government Committees (January 12, 2001) (on file with the U.S. House of Representatives Committee on the Judiciary, Democratic Staff).

<sup>637</sup>Vermont Secretary of State Database General Election Results '00 (visited on May 1, 2001). <http://vermont-elections.org/2000rita.htm>

<sup>638</sup>V.T. STAT. ANN., tit. 17, § 2601 (2000).

<sup>639</sup>V.T. STAT. ANN., tit. 17, § 2587 (2000).

<sup>640</sup>V.T. STAT. ANN., tit. 17, § 2602(1) (2000).

<sup>641</sup>V.T. STAT. ANN., tit. 17, § 2150 (2000).

<sup>642</sup>*Id.*

<sup>643</sup>*Id.*

Virginia has a history of racial discrimination and reducing African-American voters' political influence in the redistricting process. As a result, any redistricting in Virginia must be approved by the U.S. Justice Department.<sup>644</sup>

A variety of complaints were registered with the NAACP regarding problems faced by Virginia residents attempting to vote. In one case, approximately 200 students at Norfolk State University were unable to vote when they were not listed on voter rolls.<sup>645</sup> According to the Norfolk Chief Registrar, many of the students' applicants were incomplete.<sup>646</sup> Similarly, some people who registered at social services offices were reportedly not on the voter rolls.<sup>647</sup>

Concerns regarding voter intimidation also have been raised. Anita Hodgkiss, formerly a senior attorney at The Advancement Project and now at the Lawyer's Committee for Civil Rights Under Law, received reports that police in Newport News, VA were stopping people at checkpoints.<sup>648</sup>

Also being investigated are numerous complaints by Virginians who registered to vote through the motor-voter program but were not on voter rolls.<sup>649</sup> According to Board of Election officials, many of the problems resulted from residents failing to properly sign the registration form. When voter registrations are accepted by the Department of Motor Vehicles, the form is reviewed but motor vehicles personnel do not advise the voter of errors the voter may have made in filling out the form. Instead, registration forms with problems, such as forms that lack a signature, are simply identified later and not sent to the Board of Elections.<sup>650</sup>

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<sup>644</sup>Christina Nuckols, *Court Ruling May Help Preserve Virginia's Black Majority District Justices Said Race Can Be Factor In Redistricting, But Not Decisive Point*, THE VIRGINIAN PILOT, April 20, 2001, at B7.

<sup>645</sup>Leonard E. Colvin, "Virginia Black Voters Report Voting Irregularities," reported in *New Journal and Guide* at [www.njournalg.com/news/2000/11/black\\_voters\\_report.html](http://www.njournalg.com/news/2000/11/black_voters_report.html).

<sup>646</sup>*Id.*

<sup>647</sup>Betty Winston Baye, *Denial of Voting Rights, Not Dimpled Chads, Is the Real Election Scandal*, THE COURIER JOURNAL (Louisville, KY), Nov. 23, 2000, at A12.

<sup>648</sup>*Irregularities, Harassment Reported by Black Voters*, reported in the website [www.thepioneer.com/international/nov18\\_black.htm](http://www.thepioneer.com/international/nov18_black.htm).

<sup>649</sup>*Id.* See Judith Malveaux, *Some Learn They Weren't Registered, Lack of Signature on Form From DMV Disqualified Them*, DAILY PRESS, Nov. 8, 2000, at C2.

<sup>650</sup>*Id.*

In Alexandria there were several problems of inaccessibility for disabled voters. The entrance to the general polling place had many steps and was difficult for an individual in a wheelchair to enter. Additionally, the entrance that is accessible to disabled voters was very far and was locked on the day of the primary.<sup>651</sup> There was no one stationed outside to provide curbside voting assistance, and a voter was forced to ask a candidate to go inside and find a poll worker to assist with voting.<sup>652</sup> Although there had been an effort to resolve many of the problems found in polling places around the area, a survey of 23 polling facilities found that the problems had not been resolved by election day and in many cases there were new problems.<sup>653</sup>

In Virginia, 39 precincts use Automatic Voting systems, 37 precincts use DRE systems, and one precinct uses paper ballots.<sup>654</sup> No information is centrally available to calculate the number of unrecorded ballots.<sup>655</sup>

Virginia allows candidates defeated by a margin of less than one percent to demand a recount.<sup>656</sup> All paper ballots marked so that the intent of the voter is clear are to be counted,<sup>657</sup> no similar provisions exist for mechanical votes, but voting machines are required to prevent overvotes.<sup>658</sup> Given these loose standards, it is probable that the Virginia statute would fail scrutiny under *Bush v. Gore*.

Virginia appears to have some safeguards to protect against wrongful voting purges, but could use some additional measures. A voter may be purged from Virginia's voting rolls if the

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<sup>651</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 16.

<sup>652</sup>*Id.*

<sup>653</sup>*Id.*

<sup>654</sup>Voting Systems Used in Virginia published by the Virginia State Board of Elections (visited May 2, 2001)  
[http://www.sbe.state.va.us/Election/Voting\\_In\\_Va/virginia\\_voting\\_systems.htm](http://www.sbe.state.va.us/Election/Voting_In_Va/virginia_voting_systems.htm).

<sup>655</sup>Telephone interview with Lorraine Thompson, Manager of Election Services for the Virginia State Board of Elections (May 3, 2001).

<sup>656</sup>VA. CODE ANN. § 24.2-800 (2000).

<sup>657</sup>VA. CODE ANN. § 24.2-644 (2000).

<sup>658</sup>VA. CODE ANN. § 24.2-628(B)(1) (2000).

person is deceased or convicted of a felony or adjudicated incapacitated.<sup>659</sup> A Virginia voter may also be purged if he or she has moved. However, such a purge for change in residence may only take place if the voter has signed a notice or if a notice has been received from an election registration official of another jurisdiction.

## **Washington**

Washington experienced some minor problems in the November elections. In Clallam County, a voting machine allegedly malfunctioned, resulting in the machine either partially reading the ballots or not reading the ballots at all.<sup>660</sup> The Secretary of State's office identified the problem because the number of ballots with only one race marked was twice the state average.<sup>661</sup> The county recounted the 15,795 ballots cast on election day.<sup>662</sup>

In Kenmore, Washington, there were no poll workers available to aid voters with special needs.<sup>663</sup> One voter with impaired vision complained that she was made to wait 20 minutes to receive assistance; after waiting, she was read aloud the candidates names by a "put out" worker who had difficulty reading the information on the ballot and was unable to pronounce some of the names of the candidates.<sup>664</sup>

Washington had a relatively low rate of unrecorded ballots. Prior to 1972, Washington used only punch card systems.<sup>665</sup> Currently, 23 Washington counties use an optical scanning system and 16 counties use a punch card system.<sup>666</sup> The first DRE was certified in 1990 but has

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<sup>659</sup>VA. CODE ANN. § 24.2-427 (2000).

<sup>660</sup>*Ballot recount doesn't alter race results*, THE SEATTLE TIMES, Nov. 9, 2000, at B2.

<sup>661</sup>*Id.*

<sup>662</sup>*Id.*

<sup>663</sup>The National Voter Independence Project, *Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States* (April 2000) at 15.

<sup>664</sup>*Id.*

<sup>665</sup>Interview with Paul Miller, Elections Division, Office of the Secretary of State of Washington (May 3, 2001).

<sup>666</sup>*Id.*

not been used in the state.<sup>667</sup> Of the 2,517,375 ballots cast in November, 29,942 ballots (or 1.2 percent) were not recorded as votes for a presidential candidate.<sup>668</sup>

Washington's procedures for recounts may be unable to meet the Supreme Court's tests. Although Washington provides automatic recounts where the margin of victory is less than one-half of one percent,<sup>669</sup> the rules and procedures of recounts are generally left to the determination of the Secretary of State.<sup>670</sup> The Secretary is also charged with adopting rules to test and certify voting systems, to establish 20 standards to assure the accurate tabulation of ballots, and to provide consistency in tabulation across counties.<sup>671</sup> Although these rules are intended by statute to produce consistency, the delegation of the responsibility for formulating them may endanger them under the *Bush v. Gore* standard.

Washington appears to have adequate safeguards to protect voters from wrongful purging. It is a two-tiered process. First, a voter is assigned inactive status in Washington if any of the following documents are returned by the postal service as undeliverable: a registration acknowledgment, an acknowledgment that the voter has moved, a mail-in ballot, a precinct reassignment, jury duty notice, or any other document mailed by the county auditor.<sup>672</sup> However, a voter may be returned to active status if within two general elections of being placed on inactive status the voter does any of the following: notifies the auditor of a change of address within the county, responds to a confirmation notice with information indicating the voter still lives at the registration address, votes or attempts to vote in a primary or special or general election and resides within the county, or signs any petition that is required by law to be verified by the county auditor.<sup>673</sup> Second, if the voter fails to take any of these actions, he or she shall be

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<sup>667</sup>*Id.*

<sup>668</sup>*Id.* The breakdown of spoiled ballots and types of voting machines is as follows: Datavote had 3,941 falloff votes, the Optical Scanning machines had 14,680 fall off votes and the punch-card systems had 722,945 fall off votes.

<sup>669</sup>WASH REV. CODE § 29.64.015 (2000).

<sup>670</sup>WASH REV. CODE § 29.64.070 (2000).

<sup>671</sup>WASH REV. CODE § 29.04.210 (2000).

<sup>672</sup>WASH REV. CODE § 29.10.071 (2000).

<sup>673</sup>WASH REV. CODE § 29.10.075 (2000).

purged.<sup>674</sup> Washington purges all convicted felons.<sup>675</sup>

## **West Virginia**

In West Virginia, a minor problem with the processing of voter registrations in the State's "motor voter" program may have resulted in some voters not being listed in the precinct voter books.<sup>676</sup> According to a Wood County official, if the registration was made with the Motor Vehicles Department at least 30 days prior to election day, the individual would still be eligible to vote.<sup>677</sup> Jan Casto, the Deputy Secretary of State, confirmed that the registration forms completed through the "motor voter" program were not received by the Election Board on time, but added that these votes were tracked down on election day and that all twelve affected voters were able to vote.<sup>678</sup>

In West Virginia, three counties use lever machines, 28 counties use optical scan systems, and 11 counties use punch card systems.<sup>679</sup> No other information is centrally available to calculate the number of unrecorded ballots.<sup>680</sup>

West Virginia offers any defeated candidate the right to request a recount,<sup>681</sup> in which case the ballots and ballot cards are reexamined under procedures partially specified in statute and partially established by the Secretary of State.<sup>682</sup> Automatic recounts will be held in precincts using voting machines if a manual count in a random sample of five percent of

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<sup>674</sup>*Id.*

<sup>675</sup>WASH REV. CODE § 29.10.097 (2000).

<sup>676</sup>*Motor-Voter Signees May Have Problems*, CHARLESTON DAILY MAIL, Nov. 7, 2000, at A12.

<sup>677</sup>*Id.*

<sup>678</sup>Telephone Interview with Jan Casto, Deputy Secretary of State for West Virginia (May 1, 2001).

<sup>679</sup>*Id.*

<sup>680</sup>Telephone Interview with Cindy Smith, Team Leader of Elections, Commission of Elections, West Virginia Secretary of State Office (May 4, 2001).

<sup>681</sup>W. VA. CODE § 3-6-9 (1999).

<sup>682</sup>W. VA. CODE §§ 3-4A-27, 3-4A-28 (1999).



precincts reveals a rate of error of one percent or more.<sup>683</sup> No guidelines are presented for the interpretation of unclear ballots except for a general rule stating that “no ballot will be rejected for any technical error which does not make it impossible to determine the voter’s choice.”<sup>684</sup> As a result, West Virginia’s procedures may not be sufficiently specific and uniform to pass muster under *Bush v. Gore*.

West Virginia’s purging procedures contain adequate safeguards against wrongful purges.<sup>685</sup> Each year, confirmation notices are sent to voters who haven’t updated their registrations since January 1.<sup>686</sup> The county clerk mails confirmation notices no later than December 31 to those individuals whose notices are returned as undeliverable. Those who do not respond to the confirmation notice by February are deemed inactive. The county clerk cancels the registration of those who respond to the mailing by confirming that they have moved outside the county.<sup>687</sup>

The clerk cancels the registration of inactive voters who do have not responded to the confirmation notice, otherwise updated their voter registrations or voted in any state, county or municipal primary, general or special election held within the county after the second general election for federal office which occurs after the date of the notice.<sup>688</sup>

## **Wisconsin**

According to Assembly Committee Chairman Steve Freese, Wisconsin has received more than 1,000 complaints of voting irregularities regarding the November elections.<sup>689</sup>

In particular, Milwaukee County District Attorney E. Michael McCann received numerous reports of irregularities that are being investigated by the District Attorney’s office. Many of these allegations, collected by the Wisconsin Republican party, include the following:

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<sup>683</sup>W. VA. CODE § 3-4A-28 (1999).

<sup>684</sup>W. VA. CODE § 3-6-5 (1999).

<sup>685</sup>W. VA. CODE § 3-2-24 (1999).

<sup>686</sup>*Id.* The notices are sent by October 1 of even numbered years and November 1 of odd numbered years.

<sup>687</sup>*Id.*

<sup>688</sup>W. VA. CODE § 3-2-27 (1999).

<sup>689</sup>*Panel to look at voting irregularities*, WISCONSIN STATE JOURNAL, Jan. 12, 2001.

(a) Marquette students taking more than one ballot at a time; (b) ballots taken out of polling places; (c) individuals presenting poll workers with more than one addressed envelope and asking which address would allow them to vote in that location; (d) a voter asking other individuals in the polling area to confirm her residence in the ward; (e) completed ballots left unattended on chairs; (f) students at the University of Milwaukee claiming they voted more than once; (g) malfunctioning ballot machines; and (h) a voter being given more than one ballot.<sup>690</sup>

After students at Marquette University said they voted more than once in the election, the Marquette Tribune surveyed 1,000 students.<sup>691</sup> A total of 174 students admitted voting more than once. Of those, 121 individuals admitted voting in Wisconsin as well as by absentee ballot in their home state. Students also claimed that they were rarely asked for identification and that they either picked up or were handed multiple ballots.

Later claims by the GOP included voters being given food stamps and cigarettes in exchange for votes. The District Attorney's office has said that it is investigating these allegations.<sup>692</sup>

Some disabled voters in Green Bay stated that polling places were entirely inaccessible and that voting booths were not large enough to accommodate individuals in wheelchairs.<sup>693</sup>

In reaction to past problems with voter disfranchisement, State Senator Gwendolynne Moore introduced legislation involving a comprehensive election reform package.<sup>694</sup> First, Moore has proposed allowing municipalities to set up voting stations where voters may register and workers would accept absentee ballots for one month before the election. This would perhaps ease the large numbers of new voters who turn out on election day. The second recommendation advanced by Moore proposes uniform polling hours across the state, leading to less confusion and greater convenience for those in rural areas. Third, Moore proposes educating

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<sup>690</sup>*GOP's List of Voter Irregularities, reported in the MILWAUKEE JOURNAL SENTINEL website [www.jsonline.com](http://www.jsonline.com), Nov. 10, 2000. See Wisconsin Republicans Allege Statewide Voter Irregularities, reported in [www.cnn.com](http://www.cnn.com), Nov. 10, 2000; Will Other States Catch the Recount Fever?, NATIONAL JOURNAL'S HOTLINE, Nov. 11, 2000.*

<sup>691</sup>*The Count Goes On, NATIONAL JOURNAL'S HOTLINE, Nov. 14, 2000.*

<sup>692</sup>*More Allegations Filed by GOP, Felons Turn Up on Voter List, ASSOCIATED PRESS, Nov. 29, 2000.*

<sup>693</sup>*The National Voter Independence Project, Voters Denied Equal Access at the Polls: A Report on the Status of Accessibility to Polling Places in the United States (April 2000) at 17.*

<sup>694</sup>*Joe Parisi, Sen. Moore's Plan for election reform makes sense, CAPITAL TIMES (Madison Wisconsin), March 17, 2001, at 9A.*

citizens about eligibility, facilitating the process to become an election worker, and the formation of a committee to examine multi-lingual voting. Wisconsin was one of the first states to give immigrants the right to vote -- in 1848, the Wisconsin Constitution allowed immigrants to vote as soon as they declared their intention for naturalization<sup>695</sup> – and these reforms seek to similarly make the polls as accessible as possible to new voters.

In Wisconsin, 956 counties use paper ballots, 863 counties use Marksense systems, 22 counties use punch card systems, sixteen counties use lever systems, and one county uses a DRE system.<sup>696</sup> No other information is centrally available to calculate the number of unrecorded ballots.<sup>697</sup>

Wisconsin's recount provisions would likely be upheld by the courts. The state allows defeated candidates to request recounts on the basis of mistakes or fraud in the return of the votes.<sup>698</sup> In interpreting ballots, Wisconsin relies on a "voter's intent" standard,<sup>699</sup> but has a number of specific provisions to outline what constitutes intent: a mark, symbol, sticker or punched hole may be taken as a sign of intent, and a ballot without such marks cannot be counted.<sup>700</sup> Misspellings, abbreviations or other errors in a write-in ballot will still be counted if the voter's intent can be ascertained.<sup>701</sup> These standards seem likely to reach the level of specificity that the *Bush v. Gore* decision demands.

Wisconsin appears to have inadequate safeguards against the purging of voters, providing for automatic purging of lapsed voters who do not respond to just one mailing. Within 90 days of each general election, the municipal clerk sends suspension of registration notices to those who have not voted in the previous four years. The clerk then cancels the registration of those who do

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<sup>695</sup>Xi Wang, *The Making of Federal Enforcement Laws*, 70 CHI-KENT. L. REV 1013, (1995).

<sup>696</sup>Wisconsin Voting System by County Chart (visited on May 3, 2001)  
<http://elections.state.wi.us/>.

<sup>697</sup>Telephone Interview with Diane Low, State Elections Board of Wisconsin (May 3, 2001).

<sup>698</sup>WIS. STAT. § 9.01 (2001).

<sup>699</sup>WIS. STAT. § 7.50(2) (2001).

<sup>700</sup>WIS. STAT. § 7.50(2)(a,b) (2001).

<sup>701</sup>WIS. STAT. § 7.50(2)(e) (2001).

not respond to the notices within 30 days.<sup>702</sup> Upon receipt of reliable information that a voter has moved, the clerk cancels that voter's registration if the voter does not respond to a notice within 30 days.<sup>703</sup> Wisconsin statutes also contain a provision that requires the investigation of voters whose addresses are buildings that have been condemned for human habitation. If the clerk or board of election commissioners can find no reason why the voter registration of these individuals should not be stricken, their registration is canceled.<sup>704</sup> The clerk also cancels registration upon the request of a voter and upon notices of death.<sup>705</sup>

## **Wyoming**

Wyoming generally does not have problems with voter registration because it has a same-day registration program.<sup>706</sup> However, Wyoming had a severe snow storm on election day, closing roads.<sup>707</sup> As a result, three polling places never opened, and because Wyoming residents may only vote in their own district, residents of those counties were unable to vote.<sup>708</sup> Despite the weather conditions, voting hours were not extended.<sup>709</sup>

There are three counties that use punch card systems in Wyoming. The remainder of the counties use a combination of optical scan systems, lever systems, and DRE and touch screen systems.<sup>710</sup> However, Wyoming still had a very high rate of unrecorded ballots: of the 221,685 ballots cast, 213,726 were registered as votes for presidential electors, meaning that 7959 ballots (or 3.6 percent) were not recorded as votes for a presidential candidate.<sup>711</sup>

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<sup>702</sup>WIS. STAT. § 6.50 (2001).

<sup>703</sup>*Id.*

<sup>704</sup>*Id.*

<sup>705</sup>*Id.*

<sup>706</sup>Telephone interview with Peggy Nighswonger, Elections Director for Wyoming (May 1, 2001).

<sup>707</sup>*Id.*

<sup>708</sup>*Id.*

<sup>709</sup>*Id.*

<sup>710</sup>*Id.*

<sup>711</sup>200 General Election Results (visited May 3, 2001).  
<http://sos.wy.state.wy.us/election/2000/results/00-grace.htm>.

It is unclear whether Wyoming's recount provisions would be accepted by the courts. The state allows county canvassing boards to initiate their own recounts upon evidence of irregularities, and also mandates recounts if the margin of victory is smaller than one percent. Candidates may also seek a recount by filing an affidavit that fraud or error occurred in counting, returning or canvassing the votes.<sup>712</sup> Counting boards are instructed to disregard ballots that are not clearly marked, "except when the intent of the voter is obvious to the counting board."<sup>713</sup> It is difficult to determine whether an "obviousness" standard would be sufficiently specific and uniform to meet the requirements of *Bush v. Gore*.

Wyoming appears to have no safeguards to protect against the wrongful purging of voters and county clerks are allowed to purge voters *sua sponte*. Wyoming statutes allow county clerks to investigate the qualifications of any voter registration when they have reasonable cause to believe that the voter may be unqualified. The clerks may find voters unqualified and cancel their registrations based on any of the following criteria: location of dwelling of registrant and family; occupation and location of employment; location of vehicle registration; driver's license; property owned; or any other residency qualifications either provided by law or deemed reasonable by the clerk.<sup>714</sup> Any person denied registration may appeal to a justice of the peace, circuit court within the county or district court within five days of notification of cancellation. The court must hear and decide the appeal within five days from the date it is received.<sup>715</sup>

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<sup>712</sup>WYO. STAT. ANN. §§ 22-16-109, 22-16-110 (2001).

<sup>713</sup>Id. § 22-14-104 (2001).

<sup>714</sup>Id. § 22-3-105 (2001).

<sup>715</sup>Id.

### III. CONCLUSIONS AND RECOMMENDATIONS

The preceding analysis clearly demonstrates that the nation's election machinery and administration are broken. When at least one million voters go to the polls and their votes are not registered for the most important race on the ballot, the office of President, it is simply not plausible to believe that defective and confusing machines and ballots are not disenfranchising hundreds of thousands of Americans. These defects in machines and ballots are exacerbated by undertrained and underpaid poll workers.

The machines are not the only problem. Haphazard purges of voter rolls and sluggish procedures for processing registration cards have clearly produced an election system where many voters jump through all the appropriate hoops only to be turned away from the polls on election day. The undeniable fact that individuals with disabilities are consistently denied the basic right to vote with privacy and independence should be troubling to all Americans. And, over 30 years after the Selma marches and bloodshed, there are still far too many instances of intimidation by police and other officials on election day.

The federal government has long deferred to states and localities with respect to election process and procedures and some argue that it must still be so. However, the election debacle in Florida clearly demonstrated that negligence and wrongdoing on the part of one state can grind an entire federal election to a screeching halt. Moreover, the Constitution specifically grants the federal government the authority to regulate federal elections, only allocating default status to the states. Article I, Section 4 of the United States Constitution provides that "(t)he Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations...*" (Emphasis added).

On the whole, states have made no effort to address the national problem of election reform. Despite Florida's passage of election reform legislation and the Georgia and Maryland proposals, there have been few actions by other states. Even if states begin to consider significant reform bills, it is doubtful that anything would be enacted this year.<sup>716</sup> Congress must take action to make certain millions of voters are not disenfranchised in the next elections.

Therefore, this report recommends that Congress take the following actions to remedy these irregularities:

- To address the problem of faulty election machinery and the consequent discarding of countless votes, the report recommends that Congress establish minimum national voting rights standards for election machinery in federal

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<sup>716</sup>*States Lag on Election Reform*, MSNBC (visited May 5, 2001)  
<http://www.msnbc.com/news/568693.asp>.

elections. At a minimum, these standards should include requirements that all voting machines used in federal elections notify voters of overvotes and undervotes and allow a voter to correct these mistakes before a ballot is cast.

- To address the problem of improper voter purges, this report recommends that Congress pass minimum national voting rights standards so that in every federal election every voter asserting that he or she has been improperly omitted from the voting rolls be permitted to cast a provisional ballot.
- To address the problem of voter error and confusing ballots, this report recommends that Congress pass minimum national voting rights standards so that, prior to every federal election, every registered voter should be mailed a sample ballot and instructions for casting a vote.
- To address the problem of intimidation at the polls, this report recommends that Congress pass minimum national voting rights standards so that, prior to every federal election, all registered voters should be mailed a notification of their voting rights and the appropriate agencies to contact if they believe those rights have been violated.

And for the sake of the right to vote of millions of citizens, Congress should act quickly. The 2002 elections are less than 15 months away.

#### IV. METHODOLOGY

While a number of local media outlets, election officials and activists have compiled counts of spoiled ballots and have logged allegations of election irregularities at the state level, to date there has been no comprehensive compilation and assessment of spoiled ballots and election irregularities.

To compile information about spoiled ballots, media accounts and self-reporting by states of spoiled ballot numbers, undervote and overvote totals in particular, were reviewed. However, in some cases, states had not performed these calculations or made them publicly available. In those cases, either through public information or staff interviews, the spoiled ballot rate was determined by taking the overall number of ballots cast in the state and subtracting from this number the overall number of ballots cast in the Presidential race to calculate the number of spoiled ballots. It should be noted that a small percentage of these may be write-in candidates.<sup>717</sup> Some may also argue that a significant number of voters simply did not want to vote for a Presidential candidate. Without examining the ballots themselves, it is difficult to conclusively refute this contention. The best response that can be made to this contention, however, was provided in a seminal election contest case:

“We find unpersuasive [the] contention that many voters started to express a preference in the congressional contest, made an impression on a punch card, but pulled the stylus back because they really did not want to express a choice on that contest. The large number of ballots with discernible impressions makes such an inference unwarranted, especially in a hotly contested election.”<sup>718</sup>

Other information about election irregularities was compiled from news sources, staff interviews with state and local elections officials and activists, and litigation materials. It should be noted that in a number of instances this report discusses alleged wrongdoing that has not yet been adjudicated in a court of law.

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<sup>717</sup>While some states provided a count of the number of write-in ballots, which was factored into this analysis, other states had no such information available.

<sup>718</sup>*Delahunt v. Johnston*, 423 Mass. 731, 733 (1996).



**SPOILED BALLOTS TABLE**

<b>STATE</b>	<b>SPOILED BALLOTS</b>	<b>PUNCH CARD MACHINES?</b>	<b>CERTIFIED VOTE DIFFERENCE</b>	<b>COULD SPOILED BALLOTS MAKE A DIFFERENCE</b>
Alabama	not available	No.	248,652	UNKNOWN
Alaska	2,265	No.	88,394	No.
Arizona	27,614	Yes.	96,311	No.
Arkansas	not available	Yes.	50,172	UNKNOWN
California	176,994	Yes.	1,293,774	No.
Colorado	not available	No.	145,521	UNKNOWN
Connecticut	14,578	No.	255,555	No.
Delaware	5,324	No.	42,780	No.
District of Columbia	3,748	Yes.	153,850	No.
Florida	174,328	Yes.	537	Yes.
Georgia	101,743	Yes.	303,490	No.
Hawaii	3,162	No.	67,441	No.
Idaho	15,038	Yes.	198,300	No.
Illinois	217,208	Yes.	569,605	No.
Indiana	not available	Yes.	343,856	UNKNOWN
Iowa	not available	Yes.	4,144	UNKNOWN
Kansas	20,498	No.	223,056	No.
Kentucky	not available	No.	233,597	UNKNOWN
Louisiana	not available	Yes. Only absentee ballots.	135,527	UNKNOWN
Maine	not available	No.	33,335	UNKNOWN
Maryland	10,553	No.	330,164	No.
Massachusetts	31,064	No.	737,985	No.
Michigan	96,798	Yes.	217,279	No.
Minnesota	5,973	No.	58,607	No.

Mississippi	not available	Yes.	168,230	UNKNOWN
Missouri	not available	Yes	78,786	UNKNOWN
Montana	not available	Yes.	103,052	UNKNOWN
Nebraska	32,204	No.	202,074	UNKNOWN
Nevada	3,315	Yes.	21,597	No.
New Hampshire	9,557	No.	7,211	Yes.
New Jersey	9,037	Yes.	504,677	No.
New Mexico	14,323	No.	366	Yes.
New York	138,216	No.	1,704,325	No.
North Carolina	not available	Yes.	379,471	UNKNOWN
North Dakota	1,255	Yes.	79,568	No.
Ohio	6,500	Yes.	166,735	No.
Oklahoma	10,024	No.	270,061	No.
Oregon	25,247	Yes.	6,765	Yes.
Pennsylvania	not available	Yes.	118,953	UNKNOWN
Rhode Island	2,926	No.	204,840	No.
South Carolina	not available	Yes.	220,855	UNKNOWN
South Dakota	not available	Yes.	71,896	UNKNOWN
Tennessee	not available	Yes.	80,229	UNKNOWN
Texas	62,857	Yes.	1,365,893	No.
Utah	13,828	Yes.	312,043	No.
Vermont	2,838	No.	29,247	No.
Virginia	not available	No.	220,200	UNKNOWN
Washington	29,942	Yes.	138,788	No.
West Virginia	not available	Yes.	40,976	UNKNOWN
Wisconsin	not available	Yes.	5,708	UNKNOWN
Wyoming	7,959	Yes.	87,466	No.