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Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy

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> The most abject traitor to democratic institutions is the one who buys or intimidates the electorate for personal gain and next to him is the voter who habitually goes into the open market and pawns his vote to anyone who will purchase it. They are the termites and screw worms of democracy and if not exterminated, they will as surely wreck the ship of state as the latter will destroy the house or the dumb creature on which they feed.[1]

I. INTRODUCTION

By all accounts, the 1997 Miami mayoral election was a sleazy affair. Absentee ballots were doctored, unsigned, or signed by people who did not live in the city. Other ballots were witnessed by a person not known to the voter. Still others were submitted by voters who did not live at the address given on the ballot request. One vote even came from a man who had been dead for years. A Miami-Dade County trial court called sixty witnesses, and nearly half of them exercised their right under the Fifth Amendment of the United States Constitution to remain silent.[2] The whole mess led one federal judge reviewing the case to characterize the election and ensuing trials as creating an "almost circus atmosphere."[3]

Notwithstanding the chaos associated with this election, this Comment analyzes several serious issues arising from the two divergent judicial remedies applied to this case of election fraud: the trial court's remedy of ordering a new election and the appellate court's remedy, which reversed the trial court's decision and invalidated all absentee ballots, declaring the winner based solely on the machine vote.

Part II of this Comment briefly reviews this case's judicial journey. It begins with the trial court's decision ordering a new election and concludes with the Supreme Court of Florida's refusal to grant review of the appellate court's invalidation of all absentee ballots, including the challenger's failed attempt to involve the federal courts. Part III places the statutory right of absentee voting in Florida into perspective by discuss-

1. State *ex rel.* Whitley v. Rinehart, 140 Fla. 645, 651 (1939).

2. *See In re* Matter of Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997, Elections for the City of Miami, Dade County, Fla., No. 97-25596 CA 09, at 1 (Fla. Dade County Ct. Mar. 4, 1998) [hereinafter *Matter of Protest*, No. 97-25596 CA 09].

3. Scheer v. City of Miami, 15 F. Supp. 2d 1338, 1334 (S.D. Fla. 1998).

ing its constitutional connections and statutory framework. Parts IV and V examine the two principal remedies applied in this case: invalidation of tainted ballots and new election. Part VI then looks more critically at the decisions rendered by the trial and appellate courts and illustrates a dilemma requiring much more flexibility than the controlling precedent has allowed. Part VII offers a proposal that responds to the dilemma by providing courts with a more flexible approach to absentee voter fraud cases. Finally, Part VIII suggests the appellate court's decision in this case, notwithstanding its tortured reasoning, may have responded properly to the circumstances. Yet, given some plausible factual changes and this Comment's more flexible approach, the court could have just as reasonably affirmed the trial court's order for a new election.

II. 1997 MIAMI MAYORAL ELECTION: JUDICIAL RESPONSES TO ABSENTEE VOTER FRAUD

On November 4, 1997, the voters of the City of Miami went to the polls to elect an "executive mayor."[4] The two principal contenders for this strengthened mayoral position were Joe Carollo, who the voters had elected as the Mayor of the City of Miami the preceding July, and Xavier Suarez, who previously served as the City's Mayor and now sought the newly enhanced mayoral position. When all the ballots were counted, Carollo received a slim majority of the machine-counted, precinct votes (51.41%), while Suarez received a significantly higher percentage (61.48%) of the absentee votes.[5] However, neither candidate received a majority of the total votes cast, and the city held a run-off election on November 13, 1997.[6] In the run-off, Suarez won a majority of both the machine votes and the absentee votes, and he assumed the position of Mayor shortly thereafter.[7]

Immediately after the City announced the results of the November 4 election, Carollo challenged the absentee votes. Investigators working for him began to examine the absentee ballots for possible fraud on the part of the Suarez campaign. Within a week, the Florida Department of Law Enforcement arrested two Suarez supporters for buying absentee votes and fraudulently witnessing absentee ballots.[8] The day after losing the run-off election, Carollo petitioned the Circuit Court for the Eleventh

4. *See* David Lyons & Maria A. Morales, *Carollo Back as Miami Mayor; Suarez Says He'll Keep on Fighting*, MIAMI HERALD, March 12, 1998, at 14A.

5. *See In re* The Matter of Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami, Fla., 707 So. 2d 1170, 1171 (Fla. 3d DCA 1998), *cert. denied*, 725 So. 2d 1108 (Fla. 1998) [hereinafter *Matter of Protest*, 707 So. 2d 1170].

6. *See id.* at 1172.

7. *See id.*

8. *See Chronology*, MIAMI HERALD, March 12, 1998, at 14A.

Judicial Circuit of Florida ("trial court"), seeking to overturn the November 4 election on the grounds of absentee ballot fraud.[9]

A. *Trial Court*

On February 9, 1998, the state trial court began to hear arguments and testimony. In the ensuing two and one-half weeks, the court heard testimony from sixty witnesses, read depositions from twenty-seven more, and examined 195 exhibits.[10] The court considered layperson as well as expert testimony. Testimony included experts in handwriting, research methodology and statistical analysis.[11] In the process, the court honored the request of twenty-seven witnesses to remain silent as guaranteed by the Fifth Amendment of the United States Constitution.[12] The trial court entered its final judgment on March 3, 1998.[13]

Finding evidence of massive fraud, the trial court voided the November 4 mayoral election and ordered a new election within sixty days.[14] In its final judgment, the court stated:

> Viewed in its entirety, the evidence shows a pattern of fraudulent, intentional and criminal conduct that resulted in such an extensive abuse of the absentee ballot laws that it can fairly be said that the intent of these laws was totally frustrated. . . . [T]his scheme to defraud, literally and figuratively, stole the ballot from the hands of every honest voter in the City of Miami.[15]

The court concluded that "the integrity of the election was adversely affected,"[16] but there was no indication that "Mr. Suarez knew about or participated in this fraud."[17] The trial court ordered a new election as "the only appropriate remedy under the circumstances of this case."[18] Subsequently, Joe Carollo appealed the trial court's decision to the Third District Court of Appeal of Florida ("appellate court"), arguing that the trial court's remedy was inappropriate.[19]

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9. *See Matter of Protest*, No. 97-25596 CA 09, *supra* note 2.

10. *See id.* at 1.

11. *See id.* at 2-3.

12. *See id.* at 1.

13. *See id.* at 4.

14. *See id.*

15. *Id.* at 3-4.

16. *Id.* at 4.

17. *Id.*

18. *Id.*

19. *See Matter of Protest*, 707 So. 2d 1170, *supra* note 5. Although Suarez filed a cross-appeal, he failed to file an initial brief as required by the court, and therefore the court dismissed his cross-appeal. *See id.* at 1175.

B. *Appellate Court*

The appellate court affirmed the part of the trial court's opinion relating to the finding of fraud, stating that "substantial competent evidence existed to support the trial court's findings of massive fraud in the absentee ballots."[20] However, it did not agree with the trial court's remedy in ordering a new election. The appellate court explained, "[O]ur consideration of the relevant case law and strong public policy considerations lead us to the inescapable conclusion that the only appropriate remedy for this absentee voter fraud is the invalidation of all absentee ballots."[21] The court reversed the trial court's order, which voided the entire election, and remanded the case with directions to enter a final judgment that "voids and vacates the absentee ballots only and . . . provides that the outcome of the November 4, 1997, City of Miami Mayoral election shall be determined solely upon the machine ballots cast at the polls, resulting in the election of Joe Carollo as Mayor of the City of Miami."[22]

Ignominiously turned out of office after having served only four months, Xavier Suarez unsuccessfully sought relief from both the Florida Supreme Court and the federal district court.[23]

C. *Federal District Court*

Absentee voters and supporters of Suarez who were disenfranchised with the appellate court's opinion invalidating all absentee ballots petitioned the United States District Court for the Southern District of Florida for a new election.[24] The federal court, however, had little desire to ignore the abstention doctrine and become involved in what it surely saw as an unseemly affair.[25]

Concluding as a matter of law that the irregularities in this election were episodic rather than endemic, the federal court was unwilling to overturn a state election.[26] In particular, the court said that "Florida courts for the past sixty years have constructed a means of dealing with absentee voter fraud"[27] and that it should not "upset this remedy as it has been well thought out by the state courts."[28]

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20. *Id.* at 1171.
21. *Id.* at 1174.
22. *Id.* at 1175.
23. *See generally* Scheer v. City of Miami, 15 F. Supp. 2d 1338 (S.D. Fla. 1998); *see also* Arnold Markowitz, *Court Rejects Suarez's Latest Appeal*, MIAMI HERALD, Sep. 29, 1998, at 2B.
24. *See Scheer*, 15 F. Supp. 2d at 1340.
25. *See id.* at 1341.
26. *See id.* at 1342.
27. *Id.* at 1344.
28. *Id.* As argued in this Comment, it is misleading to assert, as did the federal district court,

As a matter of equity, the federal district court was less circumspect and decidedly more emotional than the appellate court. The court stated that, even if Mr. Suarez could establish a constitutional violation, it would "stay on the sideline of this state dispute"[29] because of "such countervailing equitable factors as the extremely disruptive effect of election invalidation and the havoc it wreaks upon [the] local political community."[30] The court continued, "The City of Miami has been scarred by the events that took place during and after the 1997 Mayoral election. The City and its citizens are finally starting to heal. Equity necessitates that the Court not re-open these wounds."[31] Accordingly, the district court denied the Suarez supporters' petition.[32]

D. *State Supreme Court*

The Supreme Court of Florida declined to review the decision of the appellate court, ending the judicial journey of this election battle.[33] Following this decision, the Miami Herald quoted Mr. Suarez as saying, "I don't know of any other judicial remedy that can be sought."[34] The appellate court's decision stands today.[35]

Before examining in detail the appellate court's decision and the alternative remedy proposed by the trial court, this Comment discusses the privilege of voting by absentee ballot.

III. THE STATUTORY RIGHT TO CAST AN ABSENTEE VOTE

It is axiomatic that all citizens have the right to vote.[36] As the

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that Florida's invalidation remedy is a long-standing, well-thought-out means of dealing with absentee fraud. As discussed in Part VI, the invalidation remedy has been applied only recently to absentee fraud cases. Likewise, as suggested in Part VII, it is arguably limited in application.

29. *Id.* at 1345.

30. *Id.* at 1344 (quoting Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176, 1180 (9th Cir. 1988)).

31. *Id.*

32. *See id.* at 1345.

33. *See* In re The Matter of Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami, Fla., 725 So. 2d 1108 (Fla. 1998); *see also* Markowitz, *supra* note 23, at 9B.

34. *See* Markowitz, *supra* note 23, at B2.

35. Florida maintains a two-tier appellate court system that includes the district courts of appeal, which are in most cases the appellate court of last resort, and the Supreme Court of Florida. The Supreme Court of Florida exercises only discretionary jurisdiction in the majority of non-criminal appeals. Florida intermediate appellate court decisions, therefore, are generally binding precedent throughout the state. *See* Karlin v. City of Miami Beach, 113 So. 2d 551, 552 (Fla. 1959); *see generally* Gerald B. Cope, *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21 (1993) (describing Florida's two-tier appellate court system and the criteria for the Supreme Court of Florida's discretionary review).

36. *See generally* Roe v. Alabama, 676 So. 2d 1206 (Ala. 1995) (discussing the right to vote

United States Supreme Court has said, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[37]

Despite this statement, the right to vote is not absolute. Voters must meet certain legal qualifications before casting their ballots.[38] Provided a citizen is legally qualified to vote, the Supreme Court has held that "the right to have one's vote counted is as open to protection . . . as the right to put a ballot in the box.[39] There is, however, no federal or state constitutional right to vote by absentee ballot. Instead, states statutorily provide their residents with the right of voting by mail.[40]

Absentee voting first appeared during the Civil War, when several states passed laws allowing soldiers far from the polls to vote.[41] Following the war, many of the states repealed their absentee voting laws.[42] Beginning in 1896, with the passage of an absentee voting law in Vermont, states began passing new absentee voting laws. These laws expanded the privilege to non-military members of the community who were away from their voting precinct. More recently, the privilege has included citizens who, though present in their voting district, are unable or, perhaps, unwilling to go to the polls.[43]

Today, all states provide for some form of absentee voting. Thirty-five states and the District of Columbia allow absentee voting in all elections, while the other fifteen states authorize absentee voting in most

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generally as background for an answer to a federal district court's certified question concerning the state's absentee voting laws).

37. *Id.* at 1220 (quoting Wesberry v. Sanders, 376 U.S. 1 (1964)).

38. The United States Constitution expressly grants to the states the authority to establish qualifications to vote. *See* U.S. CONST. Art. I § 2, cl. 1, § 4, cl. 1. This grant of authority, however, was made subject to congressional review. See U.S. CONST. Art. I § 4, cl. 1. Additionally, several amendments to the Constitution have restricted the manner in which the states may qualify the right to vote. *See* U.S. CONST. amends. XIV, § 2, XV, § 2, XVII, § 1, XIX, § 1, XXIV, § 1, and XXVI, § 1.

39. Griffin v. Burns, 570 F.2d 1065, 1074 (1st Cir. 1978) (quoting United States v. Mosley, 238 U.S. 383, 386 (1915)).

40. *See generally* Edward B. Moreton, Jr., *Voting by Mail*, 58 S. CAL L. REV. 1261, n.6 (1985) (presenting a comprehensive discussion of California's absentee voting statutes and a proposal to improve those laws).

41. *See id.* at 1261.

42. *See id.* at 1264 (mentioning California's repeal of its Civil War absentee voting statute); *see also* Thompson v. Scheier, 57 P.2d 293, 296 (N.M. 1936) (stating that the New Mexico legislature probably repealed its absentee voting law in 1889); Jenkins v. State Bd. of Elections, 104 S.E. 346, 348 (N.C. 1920) (discussing the early history of North Carolina's absentee ballot statute).

43. *See* Moreton, *supra* note 40, at 1261-62.

elections.[44] Although four states permit all registered voters to vote by absentee ballot in any election, the majority restrict absentee voting to those voters who meet specific criteria, usually specified in the state statutes implementing absentee voting.[45]

Florida first enacted its absentee voting law in 1917.[46] This law allowed voters to cast their ballots outside their county, but it required that they vote in person at some recognized voting precinct within the state.[47] The obvious limitations of this law led to a 1927 amendment that authorized voters who would be outside their county on election day, or who were unable to go to the polling place, to cast their ballots in advance, either by hand-delivering or mailing them to an appropriate election official.[48] Over the next seventy years, the legislature periodically amended this law, expanding the class of voters allowed to vote in this manner, while at the same time looking for ways to ensure the integrity of the absentee voting process.[49]

From the beginning, ambivalence about this method of enfranchisement was evident. On the one hand, officials believed that it served a useful purpose because it permitted a greater number of people to vote.[50] Supporters hoped that this method of enfranchisement would encourage higher voter participation, which in turn would lend added legitimacy to elected government.[51] Because of this belief, Florida courts, like courts in other jurisdictions, have largely supported the validity of the statutory right to vote by absentee ballot.[52]

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44. *See id.* at 1262-63.

45. *See id.* at 1263.

46. *See* FLA. STAT. ch. 7380 (1917).

47. *See id.* § 2.

48. *See* FLA. STAT. ch. 11824 (1927).

49. The Florida legislature has frequently modified the absentee voter statutes. After 1927, the next significant change occurred in 1949, when the law was amended to allow (1) those who were physically disabled and unable without assistance of another to attend the polls on election day and (2) those who expect to be absent from the county during the entire period polls are open because of compelling business reasons and who cannot without manifest inconvenience vote in person. *See* FLA. STAT. ch. 25385 § 1 (1949); FLA. STAT. §101.02 (1949). In 1959, the legislature allowed citizens who were unable to attend the polls because of the tenets of their religion to vote by absentee ballot. *See* FLA. STAT. ch. 59213 § 2 (1959). In 1965, the legislature added those volunteering to work at the polls to the list of persons allowed to vote by absentee ballot. *See* FLA. STAT. ch. 65380 § 32 (1965). Finally, in 1975 the legislature removed the requirement to have the absentee ballot notarized. *See* FLA. STAT. ch. 75174 § 2 (1975).

50. *See* Moreton, *supra* note 40, at 1265-66; *see also* Jolley v. Whatley, 60 So. 2d 762, 764 (Fla. 1952).

51. *See* Moreton, *supra* note 40, at 1265-66.

52. The constitutionality of Florida's absentee voting laws was first tested in 1932. In that year, in *State* ex rel. *Hutchins v. Tucker*, 143 So. 754, 756 (Fla. 1932), the Supreme Court of Florida joined a growing number of other states that had reviewed and held their absentee voting statute valid. A few years later, however, in *State* ex rel. *Whitley v. Rinehart*, 192 So. 819, 823 (1939), the Supreme Court of Florida held that parts of the absentee voting statutes enacted in

On the other hand, this statutory right has always concerned those interested in maintaining honest elections.[53] As one federal judge lamented about voter fraud in the early 1990s, "nothing undermines democratic government more quickly than fraudulent elections."[54] The widely held view is that absentee voting is much more susceptible to illegal activity than voting in person at the polling place.[55] Nearly twenty years ago, Florida's First District Court of Appeal stated, "The challenge to an elector at the polls involves a face-to-face confrontation between the elector and the election officials. Obviously, no such opportunity is available with absentee voters."[56]

Thus, while the Florida legislature has consistently expanded the statutory right to vote by absentee ballot over the years, Florida courts have steadfastly limited the right of absentee voters to have their vote counted as compared to those who cast their ballots in person.[57] For the

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1935 were invalid because those provisions allowed electors outside Florida to cast absentee ballots without proper assurance that they were qualified to vote in Florida. Since *Whitley*, the Supreme Court of Florida has supported the validity of the absentee voting statutes.

53. *See, e.g.*, *Whitley*, 192 So. at 823; Frink v. State *ex rel.* Turk, 35 So. 2d 10, 12 (Fla. 1948); Parra v. Harvey, 89 So. 2d 870, 872 (Fla. 1956); Spradley v. Bailey, 292 So. 2d 27, 29 (Fla. 1st DCA 1974); Anderson v. Canvassing Bd., 399 So. 2d 1021, 1023 (Fla. 1st DCA 1981).

54. Ortiz v. City of Philadelphia, 28 F.3d 306, 318 (3d Cir. 1994).

55. *See, e.g.*, *Whitley*, 192 So. at 819. In this early case, Judge Terrell alluded to the vulnerability of absentee voting to corruption when he stated that the "purity of the ballot is more difficult to preserve when voting absent than when voting in person." *Id.* at 823. *See also* Moreton, *supra* note 40, at 1261.

56. *Anderson*, 399 So. 2d at 1023. For a further discussion of the issue of maintaining honest elections while at the same time seeking to minimize, if not altogether avoid, the disenfranchisement of absentee voters, see Part VI, below.

57. The right of absentee voters to have their legally cast votes counted has, of course, been litigated in the federal courts. Voters seeking a federal court remedy must first overcome the abstention doctrine hurdle, which in effect serves to restrict federal court involvement in strictly state matters. In *Matter of Protest*, for example, the federal district court refused to become involved in the Miami election. *See* discussion *supra* Part II.C. Arguably, the most influential decision where absentee voters succeeded in overcoming the abstention doctrine and in establishing the right to have their legally cast ballots counted is *Griffin*, decided in 1978. *See* Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978). There, the Rhode Island Supreme Court invalidated all absentee votes cast in a primary election not because of any wrongdoing but because absentee voting was not expressly provided for in the controlling state statute. *See id.* at 1068. The First Circuit Court of Appeals held that the state supreme court's invalidation of absentee votes violated the voters' due process and warranted a federal remedy. *See id.* at 1078-79. The court, therefore, ordered a new election. *See id.* at 1080. Several years later, in *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), a case where there was wrongdoing, the Court of Appeals for the Third Circuit upheld a federal district court's decision that several absentee voters, among others, had a federal claim where the winning candidate, William Stinson, was party to substantial absentee ballot fraud that led to his victory. *See id.* at 885. The Third Circuit, however, followed neither Griffin, ordering a new election, nor the district court's remedy, invalidating all the absentee ballots and declaring Marks, who won a plurality of the machine vote, the winner. *See id.* at 887. The invalidation remedy would have had the effect of disenfranchising absentee voters who had cast their votes legally. *See id.* Instead, it authorized the district court to determine, if it could, whether, but for the wrongdoing of Stinson and his supporters, Marks would have won the

most part, early violations of the absentee voting laws involved failures to comply with what may be categorized as the technical requirements of the statutes.[58] In these instances, the courts initially took the view that voters, candidates, and election officials must strictly comply with the statutes for an absentee vote to be valid.[59] Beginning in 1975, in *Boardman v. Esteva*,[60] the Supreme Court of Florida joined a growing number of states in adopting the position that, notwithstanding technical irregularities in the absentee ballot, a vote could stand so long as it substantially complied with the absentee voting statutes.[61]

At the same time, neither Florida nor any other state has tolerated fraud. As the Florida Supreme Court put it several years ago, "Courts cannot ignore fraudulent conduct [that] is purposefully done to foul or corrupt a ballot."[62] Therefore, where a party alleges and a Florida court finds evidence of a fraudulently cast ballot affecting the election's outcome, courts do not allow the results of the election to stand.[63]

Given the uncontroverted finding of absentee voter fraud in the Miami mayoral election, the issue becomes one of fashioning an appro-

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election outright. *See id.* at 889. If the district court could make that determination, in effect filtering out the illegal absentee votes, it was authorized to declare Marks the winner. *See id.* If not, it was authorized to order a new election. *See id.* On remand, the district court determined that, but for the fraudulent acts of Stinson and his supporters, Marks would have won the election; it therefore declared him the winner and avoided a new election. *See* Michelle L. Robertson, *Election Fraud – Winning at All Costs: Election Fraud in the Third Circuit*, 40 VILL. L. REV. 869, 919 (1995). On appeal, the Third Circuit affirmed this decision. *See id.* Thus, in the federal courts, there is a discernible pattern of avoiding, if at all possible, the disenfranchisement of absentee voters who cast their ballots legally.

58. *See, e.g.*, Frink v. State *ex rel.* Turk, 35 So.2d 10, 12 (Fla. 1948) (reviewing the validity of affidavits that said the elector would be absent from his or her city instead of the county, as prescribed by the state statute); Jolley v. Whatley, 60 So. 2d 762, 767 (Fla. 1952) (ruling on whether requests for absentee ballots need to be in writing or to specifically contain a statutory reason for requesting the ballot); Griffin v. Knoth, 67 So. 2d 431, 432 (Fla. 1953) (reviewing validity of absentee ballots that contained statements that the voter would be away from a municipality instead of the county); Wood v. Diefenbach, 81 So. 2d 777, 777 (Fla. 1955) (ruling on absentee ballot applications that were made out incorrectly or not at all); Parra v. Harvey, 89 So. 2d 870, 871-72 (Fla. 1956) (reviewing absentee ballots not returned in person or by mail, ballots cast by electors who stated they would be absent from a city and not the county, and ballots not filled out properly).

59. *See, e.g.*, *Frink*, 35 So. 2d at 12 (holding that "[t]he statute . . . must have a strict interpretation"); *Parra*, 89 So. 2d at 872 (concluding that "the statute with reference to absentee voting must be strictly applied").

60. 323 So. 2d 259 (Fla. 1975).

61. *See id.* at 264; *see generally Roe*, 676 So. 2d at 1226 (providing a state-by-state survey of states that have adopted the substantial compliance doctrine (App. A) and those that have retained a form of the strict compliance doctrine (App. B)).

62. Bolden v. Potter, 452 So. 2d 564, 567 (Fla. 1984) (citing Wilson v. Revels, 61 So. 2d 491, 492 (Fla. 1952)).

63. *See id.*; Juri v. Canvassing Bd., No. 93-21848 (04) and No. 94-04341 (04) 1, 6 (Fla. Dade County Ct. Nov. 7, 1994).

priate remedy that best balances what are at times opposing interests: enfranchising absentee voters and deterring future fraudulent conduct.

IV. THE APPELLATE COURT'S REMEDY: INVALIDATE ALL ABSENTEE BALLOTS

A. *Historical Perspective*

Had the appellate court wanted to punish Suarez for the fraudulent conduct of his supporters, it certainly had the weight of Florida precedent behind it. Beginning in 1939 with *State ex rel. Whitley v. Rinehart*[64] and continuing with subsequent cases, Florida courts have invalidated absentee votes in a variety of situations. For the most part, however, they have applied this remedy to cases involving technical deficiencies and not fraud.

1. INVALIDATION IN RESPONSE TO TECHNICAL DEFICIENCIES IN ABSENTEE BALLOTS

In *Whitley*, the winning candidate for a four-year city commission position had only one more vote than his opponent.[65] Of the 206 absentee ballots cast, the Supreme Court of Florida found a substantial number submitted under an ambiguous provision in the state absentee voting law.[66] The court, concerned that this ambiguity might make it possible to corrupt rather than preserve the "purity of the ballot,"[67] remanded the case to the trial judge with specific instructions. If the lower court determined that any of the absentee ballots had been cast under that ambiguous provision of the law, it was to order the election held "illegal as to the absentee votes and order the appropriate City officials to declare the result [of the election] on the basis of the machine vote [only]."[68]

In the 1950's, the Supreme Court of Florida applied this remedy several times. *Griffin v. Knoth*[69] involved a 1953 general municipal election. There, the court concluded that twenty-seven absentee votes in this election were invalid because they did not technically comply with the absentee voting statute.[70] The court held that "none of the absentee ballots cast in the election . . . can be accepted and counted. The elec-

64. 140 Fla. 645 (1939).
65. *See id.* at 646.
66. *See id.* at 654-55.
67. *Id.* at 655.
68. *Id.*
69. 67 So. 2d 431 (Fla. 1953).
70. *See id.* at 432.

tion must be determined upon the machine vote."[71]

In a factually similar case just two years later, *Wood v. Diefenbach*,[72] the Supreme Court of Florida reviewed a disputed election for the Mayor of the City of North Miami Beach. The trial judge had ruled "that a sufficient number of absentee ballots . . . were illegal and null and void in that the applications for such absentee ballots either were not made at all or were not executed in the manner required by law."[73] The Supreme Court of Florida affirmed this ruling, as well as the trial court's order decreeing the party with the most machine votes as the winner.[74]

The following year, in *Parra v. Harvey*,[75] the Supreme Court of Florida took up the appeal of a candidate for city commissioner who registered more total votes but far fewer absentee votes than did his opponent.[76] The trial judge determined that more than 250 absentee ballots were defective because of technicalities. These deficiencies included the fact that over half of the absentee voters "swore they expected to be absent from the city instead of the county as the law provides."[77] Consequently, the trial court rejected all absentee ballots.[78] The Supreme Court of Florida affirmed this ruling, concluding that, "[s]ince the illegal absentee ballots were sufficient in number to alter the result, the election should be determined by the votes registered on the machines."[79]

In the 1970s, Florida courts applied this rule again. In 1974, the First District Court of Appeal reviewed the results of a primary election for county sheriff.[80] One candidate won thirty-six more machine votes than did his opponent but, after including the absentee ballots, his opponent had fifty more total votes.[81] The trial court found that 456 absentee ballots were cast illegally and therefore were invalid.[82] Although it was not convinced that 456 ballots were invalid, the appellate court nonetheless concluded that at least fifty-one were, an amount sufficient to trigger the invalidation remedy.[83] Although most of these irregularities were the result of technical violations to the absentee voting statute,[84]

71. *Id.*
72. 81 So. 2d 777 (Fla. 1955).
73. *Id.* at 777.
74. *See id.* at 777-78.
75. 89 So. 2d 870 (Fla. 1956).
76. *Id.* at 871.
77. *Id.* at 872.
78. *See id.* at 874.
79. *Id.*
80. *See* Spradley v. Bailey, 292 So. 2d 27, 28 (Fla. 1st DCA 1974).
81. *See id.*
82. *See id.*
83. *See id.* at 28-29.
84. *See id.* at 28.

one group of fifty ballots was more troublesome. One campaign worker contacted fifty different voters regarding voting by absentee ballot and delivered their ballots to the election officials herself, in violation of the voting statute.[85] The court's opinion, though, was devoid of any explicit reference to fraud.

In all of these cases, the Florida courts affirmed decisions overturning elections by invalidating absentee votes primarily because the ballots did not comply with the specific, technical provisions of the absentee voting statutes.

The issue of technical violations to the absentee voting law was again raised, and a resolution of sorts reached, in the seminal *Boardman v. Esteva*[86] decision. The case involved an election for a seat on the Second District Court of Appeal during which Mr. Boardman received 249 more votes overall than did his opponent Mr. Esteva.[87] Esteva had 404 more machine votes than did Boardman; Boardman 653 more absentee votes.[88] After reviewing the long line of cases adopting a strict construction of the absentee voting statutes, the Florida Supreme Court concluded that "we now recede from that rule and hereby reaffirm the rule . . . that substantial compliance with the absentee voting laws is all that is required to give legality to the ballot."[89]

In the immediate wake of *Boardman*, five absentee voter cases reached the district court level.[90] In two instances, the appellate courts concluded that technical irregularities in the conduct of the voting were not in substantial compliance with the absentee voting laws, and they affirmed judgments declaring the winner of the elections solely on the basis of the machine votes.[91] In two others, the appellate courts concluded either that the irregularities complained of were in substantial compliance with the absentee voting laws[92] or that the number of irregularities failing to substantially comply with those laws was insufficient to effect a change in the election.[93] As a result, these courts affirmed the judgments sustaining the election results. In the fifth, the appellate court

85. *See id.* at 28-29.

86. 323 So. 2d 259 (Fla. 1975).

87. *See id.* at 261.

88. *See id.*

89. *Id.* at 264.

90. *See* Peacock v. Wise, 351 So. 2d 1134 (Fla. 1st DCA 1977); Anderson v. Canvassing & Election Bd. of Gadsen County, Fla., 399 So. 2d 1021 (Fla. 1st DCA 1981); Potter v. Bolden, 416 So. 2d 6 (Fla. 1st DCA 1982); Wakulla County v. Flack, 419 So. 2d 1124 (Fla. 1st DCA 1982); and McLean v. Bellamy, 437 So. 2d 737 (Fla. 1st DCA 1983).

91. *See Peacock*, 351 So. 2d at 1135; *see also Flack*, 419 So. 2d at 1127.

92. *See McLean*, 437 So. 2d at 750.

93. *See Anderson*, 399 So. 2d at 1022-23.

addressed the issue of substantial absentee voter fraud.[94]

2. INVALIDATION REMEDY IN RESPONSE TO FRAUDULENT ABSENTEE VOTING

Since the state first adopted an absentee voting law in 1917, Florida appellate courts have infrequently reviewed cases involving absentee voting fraud. One of the first cases where fraud was an explicit, though not dispositive, consideration was *McDonald v. Miller*,[95] decided in 1956. In that case, the Supreme Court of Florida rejected a request to invalidate absentee votes and declare a winner based solely on the machine vote.[96]

McDonald involved a primary election to determine the Democratic candidate for county sheriff.[97] McDonald received twenty-eight more machine votes than Miller, but, after counting the absentee votes, Miller had seven more votes overall than McDonald.[98] Recognizing that seven was the magic number, McDonald contended that at least seventy-four absentee votes were illegal and sought the invalidation of all 271 absentee votes.[99] Although having no difficulty rejecting three votes cast by non-residents of the county,[100] the Florida Supreme Court was nonetheless unable to find at least four more "illegal" absentee votes to trigger the invalidation remedy, which would have allowed McDonald to win the election. The court found three ballots were valid because they were delivered to a duly-appointed election official.[101] The court determined that of the remaining seventy-one challenged absentee ballots, four were not applied for or delivered to the supervisor of registration as required by law, thirty-two were evidently marked in the presence of three different third parties, and another thirty-two involved applications that were allegedly received after the submission deadline.[102] Under the strict compliance rule then in existence, the court could easily have invalidated these votes. The court, however, concluded that they were valid. Why?

The election smelled. The appellate record showed that the trial judge heard testimony "that votes were bartered and sold."[103] The judge

94. *See Potter*, 416 So. 2d at 6.
95. 90 So. 2d 124 (Fla. 1956).
96. *See id.* at 129.
97. *See id.* at 126.
98. *See id.*
99. *See id.* The challenged votes were those discussed in paragraphs (a) through (f), which, when added together equal seventy-four.
100. *See id.* at 127.
101. *See id.*
102. *See id.* at 127-28.
103. *Id.* at 127.

concluded that "there is certainly strong evidence to suggest that in numerous instances workers for the candidates completely ignored the constitutional provisions preserving secrecy of the ballot."[104] Many of these workers found it necessary to assert their Fifth Amendment rights.[105] Even more problematic, McDonald, the incumbent sheriff and a candidate in this election, seemingly witnessed all or a part of this misconduct.[106] Because of his personal involvement, the trial judge held that McDonald was "estopped to claim the illegality" and dismissed the complaint.[107] In affirming the trial court's decision, the Supreme Court of Florida, referring to *McDonald*, said "[o]ne cannot stand by with full knowledge and acquiesce in this type of conduct prior to an election and then, after being disappointed by the results, successfully overturn the election."[108]

The next case that substantively addressed the issue of fraud was the 1975 *Boardman* decision.[109] Like *McDonald*, fraud was not an expressed consideration in the disposition of this case; unlike McDonald, there was a complete absence of fraud in the election being challenged. Indeed, as discussed earlier, the primary holding in this case addressed the adoption of the substantial compliance doctrine. Nonetheless, the Supreme Court of Florida appeared concerned that a more liberal interpretation of the absentee voting laws might lead to increased fraud, adversely affecting the integrity of future elections. After noting that "accommodation of the public has become the primary basis for the privilege of voting absentee,"[110] the court established that the test to determine when an irregularity in absentee voting would lead to invalidation was, simply, "whether or not the irregularity complained of has prevented a full, fair and free expression of the public will."[111] With respect to what a court should do when absentee voting irregularities have frustrated the public will, the Florida Supreme Court affirmed the general rule of *Frink v. State ex rel. Turk*:[112] "[W]here the number of invalid absentee ballots is more than enough to change the result of the election, then the election shall be determined solely upon the basis of the machine vote."[113]

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104. *Id.*

105. *See id.*

106. *See id.* at 128-29. Sheriff McDonald was witness to the improper conduct of John Dobbs and a person identified only as "the man Beardon." *Id.* at 128.

107. *Id.* at 127.

108. *Id.* at 129.

109. *See* Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975).

110. *Id.* at 264.

111. *Id.* at 265.

112. 160 Fla. 394 (1948).

113. *Boardman*, 323 So. 2d. at 268.

In summarizing its decision, the court announced what have become known as the "*Boardman* factors," all three of which must be considered when determining whether irregularities in the absentee ballots cause all absentee votes to be invalidated.[114] These factors are: "(a) the presence or absence of fraud, gross negligence, or intentional wrongdoing; (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election."[115]

In announcing these factors, the *Boardman* court seemed to suggest that the "general rule" first announced in *Frink* might not apply where there is evidence of absentee ballot fraud. That is, even if the number of illegal absentee ballots was insufficient to change the results of the election, a court could invalidate all absentee votes when it found substantial fraud.

That view, however, was left undecided. In the absence of fraud, the *Boardman* court applied the substantial compliance doctrine, found only eighty-eight of the 1,450 absentee votes at issue to be invalid and declared the petitioner, who had earned 249 more votes overall than his opponent, to be the winner.[116] Less than one decade later, however, the Supreme Court of Florida would have to face the issue of absentee voter fraud head-on.

The 1984 *Bolden v. Potter*[117] decision was the first case after the enactment of Florida's original absentee voting statute in 1917 in which a Florida appellate court expressly found election fraud and, by reinstating the trial court's judgment, supported the application of the invalidation remedy.[118]

At the trial court level, the *Bolden* case involved a challenge to a 1978 county school board election.[119] Potter received ninety-nine more total votes than his opponent, Bolden, although Bolden had eighteen more votes on the voting machines.[120] Bolden therefore contested the validity of the absentee ballots. In the ensuing trial:

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114. *See id.* at 269.

115. *Id.*

116. *See id.* at 270. In his suit, Esteva alleged that "some 1450 irregularities or errors in the absentee ballots" existed. *Id.* at 261. In the end, the court determined that eighty-eight were illegally cast and therefore invalid. *See id.* at 270.

117. 452 So. 2d 564 (Fla. 1984).

118. *See id.* at 567. As discussed in the text, *infra*, the court did not expressly apply the invalidation remedy itself; it simply quashed the intermediate appellate court's order allowing the election results to stand and reinstated the trial court's judgment invalidating all absentee ballots and declaring the winner based solely on the machine vote.

119. *See* Potter v. Bolden, 416 So. 2d 6 (Fla. 1st DCA 1982).

120. *See id.*

> approximately 75 witness . . . testified about corrupt election practices including the sale of votes. The record reflects that 46 electors admitted that their ballots had been bought and that 70 additional ballots were witnessed by the same persons who had witnessed the bought ballots and conducted the organized vote-buying operation. In addition, 10 other ballots were witnessed by individuals who had no contact with the respective voters and no independent knowledge of such voters or the nature of their signatures. The individual candidates were not charged with being personally responsible for the fraudulent practices and there was no evidence suggesting that they were involved.[121]

Concluding that "the fraud and illegal activities . . . were so conspicuously corrupt and pervasive that it ha[d] tainted the entire absentee voting procedure,"[122] the trial court invalidated all absentee votes cast in the election.

The appeal of this decision eventually led to a significant shift in opinion concerning when courts should apply the invalidation remedy. At the intermediate appellate court level, the First District Court of Appeal based its opinion on the "general rule" first announced in *Frink* and reiterated in *Boardman* that, before invalidating all absentee ballots, the trial court must first find that the number of illegal ballots could, if considered as a group, change the results of the election.[123] The appellate court noted that the trial judge invalidated only forty-seven of 361 absentee ballots[124] and then observed that, despite the "malodorous election activities described in [its] final judgment,"[125] the trial court did not make a finding of a sufficient number of illegal absentee ballots [ninety-nine] to invalidate all the absentee votes.[126] The appellate court then concluded: "[W]e think that neither intuition nor suspicion is a valid basis upon which to disenfranchise the voters who cast the other 314 absentee ballots."[127]

The Florida Supreme Court was far more concerned about the fraud issue. At the outset, the court noted that it had jurisdiction because the intermediate appellate court's decision conflicted with its decision in *Boardman*.[128] After recounting the details of the organized vote-buying that occurred in this election, the court then addressed its disagreement with the intermediate appellate court's decision. Essentially, the court

121. Bolden v. Potter, 452 So. 2d 564, 565 (Fla. 1984).
122. *Potter*, 416 So. 2d at 7.
123. *See id.*
124. *See id.*
125. *Id.* at 7-8.
126. *See id.* at 8.
127. *Id.*
128. *See Bolden*, 452 So. 2d at 565.

concluded that *Frink's* so-called "general rule" does not apply in cases where "there is present fraud and intentional wrongdoing [that] clearly affect the sanctity of the ballot and the integrity of the election process."[129] The court clearly disagreed with the intermediate appellate court's ruling that a trial court must establish that a sufficient number of ballots are tainted before invalidating all absentee ballots.[130]

Instead, the Supreme Court of Florida held in *Bolden* that "[o]nce substantial fraud or corruption has been established to the extent that it permeated the election process, it is unnecessary to demonstrate with mathematical certainty that the number of fraudulently cast ballots actually affected the outcome of the election."[131] The court then determined that the record reflected that over thirty percent of the absentee ballots were tainted, and that over ten percent of the absentee voters admitted they had sold their vote.[132] Consequently, the court concluded that "[w]hen substantial fraudulent vote-buying practices are clearly shown to have been involved, the election must be declared void."[133] Without expressly addressing the appropriate remedy, however, the court remanded the case to the intermediate appellate court with instructions to reinstate the trial court's judgment that ordered the invalidation of all absentee ballots.[134]

Thus, the *Boardman* court (apparently to help deter any corruption that might accompany the adoption of the substantial compliance doctrine) suggested that, where there was evidence of substantial absentee voter fraud, a court might apply the invalidation remedy even when the number of tainted ballots would not have changed the result of the election.[135] Later, the *Bolden* court eliminated any doubt on this issue, explicitly holding that, where there is evidence of substantial fraud, the trial court may void an election even though the number of infected absentee ballots was less than the number needed to change the results of the election.[136]

B. *The Appellate Court's Invalidation Remedy*

A decade later, the appellate court in *Matter of Protest* relied heavily on the weight of the precedent discussed above.[137] It found the argu-

129. *Id.* at 566.
130. *Id.*
131. *Id.* at 567.
132. *Id.*
133. *Id.*
134. *Id.*
135. *See supra* text accompanying notes 109-116.
136. *See supra* text accompanying notes 117-134.
137. *See infra* text accompanying notes 138-140.

ment in *Bolden* especially relevant, as the only case where the Florida Supreme Court has explicitly addressed substantial absentee ballot fraud.[138] The appellate court noted that the *Bolden* court "expressly approve[d] the trial court's remedy, which was to invalidate all of the absentee ballots."[139] Although the appellate court correctly recognized that neither *Boardman* nor *Bolden* categorically state that invalidation is the exclusive remedy for massive absentee ballot fraud, it was comfortable, after viewing the matter from a historical perspective, in concluding that courts have applied the invalidation remedy consistently since the 1930s.[140]

Not satisfied with only one line of reasoning, the appellate court offered two additional arguments supporting the invalidation of all absentee ballots in the Miami election. The first argument suggested that the trial court's remedy was simply unprecedented in Florida case law.[141] The appellate court, however, subtly qualified this argument in two ways. First, it limited its scope to previous cases where there was massive absentee voter fraud.[142] Historically, this would limit the possibilities in Florida to one case: *Bolden*. Second, the appellate court excluded consideration of any similar case not reaching the appellate level.[143] Consequently, it would not need to expressly consider a trial judge's opinion in a strikingly similar case where the judge ordered a new election, and neither candidate appealed the order. This happened in the contested 1993 Hialeah mayoral election, discussed in more detail below.

The second argument the appellate court made to support its invalidation remedy was that strong public policy considerations required the court to discourage fraud.[144] Citing testimony of Miami-Dade County Supervisor of Elections David Leahy, the court agreed that the trial court's order for a new election sent the wrong message.[145] Leahy's

138. *See Matter of Protest*, 707 So. 2d 1170, *supra* note 5, at 1172-73. The court recognized *Bolden* as "[a]n important decision concerning the issue of the appropriate remedy to be provided upon a finding that absentee ballot fraud has affected the electorial process".

139. *Id.* at 1173.

140. *See id.* The Third District Court stated "that form of remedy [*i.e.*, using the machine vote only] has, historically, been consistently approved since the 1930's."

141. *See id.* at 1173-75. The court stated at one point, "[W]e note a complete absence of any Florida Appellate Court decision upholding the ordering of a new election in the face of such fraudulent conduct relating to absentee ballots. . . .[C]onsistent with the fact that there is no legal precedent in Florida to support the action of the trial court in ordering a new election as the proper remedy upon finding of massive absentee voter fraud." The appellate court concluded, "[W]e find that such a remedy is not warranted by Florida legal precedent."

142. *See id.* at 1174.

143. *See id.* at 1173.

144. *See id.* at 1174.

145. *See id.*

concern was that candidates would recognize that the worst that could happen to them in an election marred by fraud is that they would get another chance to win,[146] assuming of course that the candidates were cleared of any personal criminal involvement.[147]

Bolstered by precedent and fearful of the message that the trial court's remedy might send, the appellate court invalidated all absentee votes in the Miami mayoral election. This comment now addresses the remedy rejected by the appellate court.

V. THE ALTERNATIVE REMEDY: NEW ELECTION

Although rejected by the appellate court in *Matter* of *Protest*, the remedy applied by the trial court ordering a new election within a specified time frame was a legitimate remedy based on previous cases both in Florida and in other jurisdictions.

A. *Trial Court's Statutory Discretion*

It is important to note at the outset that when a candidate or an elector in Florida protests an election based on fraud, the trial judge hearing the protest has wide discretion in providing a remedy. According to the controlling Florida statute,[148] a judge has authority to "fashion such orders as he or she may deem necessary to ensure that such allegation is investigated, examined, or checked; to prevent or correct such fraud; or to provide *any relief appropriate* under such circumstances."[149]

What, then, was the trial judge thinking when he ordered a new election for Miami Mayor. Did he properly consider the weight of Florida precedent supporting the invalidation of the absentee votes in a case like this? Arguably, circuit courts are the most overworked courts in the state system. A single judge hears each case. This judge is most likely without a law clerk to assist in formulating opinions, and he or she may have only limited support staff.[150] Consequently, the court may not give complete consideration to the available range of options to be found both inside and outside the court's jurisdiction. This is especially true if

146. *See id.*

147. Neither Leahy nor the Third District Court raises this issue. Any candidate found to be a party to voter fraud would be liable under Fla. Stat. § 104.041 for a third degree felony, which in theory could make "the worst that could happen" a prison sentence. *See* FLA. STAT. § 104.41 (West 1977).

148. *See generally* FLA. STAT. § 102.166(11)(b) (1995).

149. *Id.* (emphasis added).

150. Information in this paragraph was distilled from informal discussions with Judge Gerald T. Wetherington, formerly of the Eleventh Circuit Court, Miami-Dade County, and Judge William P. Dimitrouleas, presently sitting on the United States District Court for the Southern District of Florida.

counsel for the respective parties fail to bring all relevant cases to the judge's attention.[151]

In the Miami mayoral-election case, however, the trial judge received some dedicated legal support[152] and, considering the legal memoranda submitted to him,[153] was apparently aware of the relevant case law. In fact, the trial record indicates that Carollo argued forcefully for the invalidation remedy later applied by the appellate court.[154] Carollo's argument discussed the historical development of this remedy (albeit superficially) and invoked the power of both *Boardman* and *Bolden*, stating that "[t]he evidence presented in this case conclusively demonstrates that all of the three inquiries [or "factors"] in *Bolden* and *Boardman* are both satisfied and dispositive."[155] He then made an even more important legal point: "[A] distinct legal standard applies to absentee ballot challenges where . . . the election is marked by the presence of fraud, gross negligence, or intentional wrongdoing."[156] He next restated the *Bolden* holding that "once substantial fraud is established, it is unnecessary to demonstrate with mathematical certainty that the number of fraudulently cast ballots actually affected the outcome of the election."[157] Finally, he concluded that "when viewed through the appropriate legal standard, the overwhelming evidence of such irregularities compels that this court reject the absentee ballots in their entirety."[158]

B. *The "New Election" Remedy*

When one looks at the record in some detail, it is clear that the trial judge based his decision to order a new election on a set of factors and relevant case law that, in his view, made a new election more appropriate than invalidating all of the absentee ballots. Although the record is not completely clear, the judge may have chosen this remedy for at least three possible reasons: (1) invalidation would disenfranchise a significant number of absentee voters; (2) it would punish Suarez where there was no evidence to suggest he was personally involved in the fraudulent activity; and (3) it would reward Carollo with a judicial victory that may not have reflected the will of the people. Point one is the most powerful

151. *Id.*

152. Interview with Judge Thomas S. Wilson, Jr., Circuit Judge, Eleventh Judicial Circuit (Dec. 20, 1998). In *Matter of Protest*, Judge Wilson had the dedicated support of one lawyer from a group of lawyers assigned to support the Eleventh Judicial Circuit.

153. *See* Petitioner's Trial Mem. of Law at 11, *Matter of Protest*, No. 97-25596 CA 09.

154. *See id.* at 22-24.

155. *Id.* at 11.

156. *Id.* (citation omitted).

157. *Id.* at 11-12 (quoting Bolden v. Potter, 452 So. 2d 565, 566 (Fla. 1984)).

158. *Id.* at 22 (citation omitted).

of the three and will require an analysis in some detail, including a review of the relevant Florida case law. It will therefore be addressed last.

With respect to the trial court's unwillingness to punish Suarez, the court, in its final judgment, concluded that it was "very mindful that no evidence was presented that Mr. Suarez knew about or participated in this fraud."[159] The court therefore did not think it appropriate to invalidate all of the absentee votes and declare Carollo the winner.[160] Thus, it implicitly connected any lack of Suarez's involvement in the fraud to its remedy of ordering a new election. It made this statement despite the fact that Carollo had argued that, under *Bolden*, "it makes no difference whether the fraud is committed by candidates, election officials, or third parties . . . . As long as the fraud, from whatever source, is such that the true result of the election cannot be ascertained with reasonable certainty, the ballots affected should be invalidated."[161]

Second, although not expressly stated in its final judgment, the trial court may have been concerned that invalidating all of the absentee votes and declaring Carollo the winner would possibly thwart the will of the people of the City of Miami. The court, of course, knew that Suarez had won a runoff election just nine days after the November 4 election.[162] Moreover, in the second election, Suarez received more votes than did Carollo, both at the polls and in the absentee voting.[163] Even if the absentee ballots were infected with fraud in this later election, as Carollo alleged in two separate suits,[164] a clear majority of voters at the polls now preferred Suarez to Carollo. The results of the runoff showed that the citizens did not unequivocally support Carollo. Thus, in the absence of finding Suarez personally involved in the fraud, the trial court might reasonably have looked beyond the facts in *Bolden* and considered ordering a new election for a final determination. This would be especially true if the court had been reluctant to disenfranchise honest voters.

The third and perhaps most significant point in the argument in opposition to the invalidation remedy is that it disenfranchises honest absentee voters. The trial court's final judgment explicitly, if not force-

159. *Matter of Protest*, No. 97-25596 CA 09, *supra* note 2, at 4.

160. *See id.*

161. Petitioner's Trial Mem. of Law at 11-12, *Matter of Protest*, No. 97-25596 CA 09.

162. *See* Respondent's Trial Mem. of Law, *Matter of Protest*, No 97-25596 CA 09.

163. *See Matter of Protest*, 707 So. 2d 1170, *supra* note 5, at 1172.

164. *See* Reply Brief of Appellants at 3, *Matter of Protest*, 707 So. 2d 1170. Following the November 13 run-off election, Carollo filed two separate suits alleging substantial absentee voter fraud in the November 13 election, both of which were consolidated for discovery purposes only with the action litigated under Matter of Protest.

fully, made this concern an integral part of its decision. Quoting *Boardman*, the court first emphasized where its priority would lie, stating that "the real parties in interest . . . are the voters."[165] Then, after noting that the federal and state constitutions guarantee citizens the right to vote, the court stressed that "[w]e must tread carefully on that right or we risk unnecessary and unjustified muting of the public voice."[166] Finally, following an analysis showing that fraud had adversely affected the election, and after determining that Suarez was not personally involved in this fraud, the court concluded that it was not appropriate "to disenfranchise the honest absentee voters"[167] by invalidating the absentee ballots in their entirety.

As discussed in an earlier part of this Comment, Florida courts have been concerned with disenfranchisement over the years, even as they have applied the invalidation remedy. The concern over disenfranchisement was first expressly raised in 1936 in *Titus v. Peacock*.[168] In that case, the Supreme Court of Florida refused to invalidate a relatively large number of absentee ballots because the absentee voters had done everything they were required by law to do.[169] The problem was with the election officials and the state's absentee voting laws, a portion of which were later found to be unconstitutional.[170] The court concluded that "an erroneous or even unlawful handling of the ballots by the election officers . . . will not be held to have disfranchised such voters by throwing out their votes."[171]

A little more than a decade later in *Frink*, the court was less understanding. After applying the strict compliance doctrine to a set of absentee ballots because the supporting affidavits were technically flawed in only minor ways, the court defended its action by stating that absentee voting was not a right but a privilege granted by the state legislature.[172] Further, it said that to protect the "purity of elections and the sanctity of the ballot,"[173] courts must strictly interpret these laws.[174] It concluded that, in the end, when voters fail to follow these laws (even through no fault of their own), "It is not a case of disfranchising . . . voter[s]; [they] failed to comply with the law and for that reason [their] ballot[s] [were]

165. *Matter of Protest*, No. 97-25596 CA 09, *supra* note 2, at 2.
166. *Id.*
167. *Id.* at 4.
168. 170 So. 309 (Fla. 1936).
169. *See id.* at 310.
170. *See id.*; *see also* discussion, *supra* note 52.
171. *Id.*
172. *See* Frink v. State *ex rel.* Turk, 35 So. 2d 10, 12 (Fla. 1948).
173. *Id.*
174. *See id.*

properly rejected."[175]

Later, in *Parra v. Harvey*,[176] decided in the mid-1950s, an unsuccessful candidate for City Commissioner sought to invoke the reasoning in *Titus*, making him the winner of the election.[177] He contended that:

> the absentee voters did all the law required of them and . . . the irregularities held by the [trial court] to have rendered the ballots void should be charged to the default of the election officials and should not be held to have deprived the persons who cast the absentee ballots of the right to express a choice at a "fair election."[178]

The Florida Supreme Court, however, was moved more by its reasoning in *Frink*, reiterating that absentee voting is not a right but a privilege granted by statute.[179] Reciting a familiar argument, it reasoned that to avoid the possibility of dishonest elections the absentee voting statutes must be strictly applied "because they are not designed to insure a vote but rather to permit a vote in a manner not provided by common law."[180]

In *Boardman*, the Florida Supreme Court addressed the disenfranchisement problem by expanding the number of questionable ballots that might be held to be valid. Consistent with *Boardman*, therefore, election officials could count challenged ballots so long as there was substantial compliance with the absentee voting statute. As a measure of *Boardman's* significance, one need only look at the earlier cases where courts overturned an election as a result of requiring strict compliance with the absentee voting laws. Had the courts followed the substantial compliance rule in those cases, they probably would not have overturned the elections because most of the challenged ballots would have technically passed the "substantial compliance" test.[181]

A decade later, in *Bolden*, the Florida Supreme Court unaccountably did not address the issue of disenfranchisement, despite noting that the intermediate appellate court had found it to be an important consid-

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175. *Id.*

176. 89 So. 2d 870 (Fla. 1956).

177. *See id.* at 872.

178. *Id.*

179. *Id.*

180. *Id.* (citation omitted).

181. *See, e.g.*, *Frink*, 35 So. 2d at 12 (holding 698 absentee ballots were void because the supporting affidavits, pre-printed by the city, were not in compliance with the voting statute); *see also* Griffin v. Knoth, 67 So. 2d at 431, 432 (Fla. 1953) (invalidating all absentee ballots because a sufficient number of applications contained a statement that the voter would be away from the municipality rather than the county as prescribed by the voting statute); Wood v. Diefenbach, 81 So. 2d 777 (Fla. 1955) (concluding all 100 absentee ballots were void since the supporting applications were not made out correctly or at all); *Parra*, 89 So. 2d at 872 (invalidating all absentee ballots because the court found a sufficient number that were not returned in person or by mail, were cast by electors who stated they would be absent from the city and not the county, or were simply not filled out properly).

eration in its decision.[182] The court was apparently more concerned with refining its holding in *Boardman* in instances where there is a finding of substantial fraud than with addressing the issue of disenfranchisement, which invariably follows invalidation.

The issue of disenfranchisement, however, was a controlling factor in the more recent case of *Juri v. Canvassing Board of Hialeah.*[183] The Circuit Court for the Eleventh Circuit Court of Appeals, sitting in Miami, reviewed the unseemly 1993 election for the Mayor of the City of Hialeah – an election scandal strikingly similar to the mayoral election that is the focus of this Comment.

C. *The 1993 Hialeah Election: Relevant?*

Even discounting the overzealous and unscrupulous manner in which the opposing camps conducted their campaigns, the results of the Hialeah election seemed to beg for a protest. Of the 28,807 votes cast at the polling places, challenger Nilo Juri received only 105 more votes than did his opponent, longtime political rival and incumbent Mayor, Raul Martinez.[184] Martinez, however, received 826 absentee votes and Mr. Juri only 448. As a result Martinez was victorious, receiving 273 more total votes.[185] Ten days later, Juri protested the election, contending that fraud, intentional wrongdoing, and gross negligence permeated the absentee ballot process and tainted the entire election.[186] Juri asked the court to discard all the absentee ballots and declare him the winner based solely on the machine vote.[187] Thus, Juri sought the court's application of the invalidation remedy which, as previously discussed, had been widely applied by Florida courts since the 1939 *Whitley* decision.

As in all recent cases involving absentee voter fraud, the trial court grounded its opinion on the Florida Supreme Court's holdings in *Boardman* and *Bolden*. Relying on *Boardman*, it first noted that "[t]he primary consideration in an election contest is whether the will of the people has been [a]ffected"[188] and then laid out the three "*Boardman* factors,"[189] establishing when a court may invalidate an election because of misconduct involving the absentee vote. Citing *Bolden* the court concluded that where there is evidence of substantial fraud, "[s]o long as the fraud, from whatever source, is such that the true result of the election

182. *See* Bolden v. Potter, 452 So. 2d 565, 566 (Fla. 1984).
183. No. 93-21848 (04) and No. 94-04341 (04) (Fla. Dade County Ct. Nov. 7, 1994).
184. *See id.* at 1-2.
185. *See id.* at 2. The arithmetic is as follows: 14,540 minus 14,267 equals 273.
186. *See id.*
187. *See id.* at 4.
188. *Id.* at 2.
189. *See id.* The court paraphrases but does not quote *Boardman*.

cannot be ascertained with reasonable certainty, the ballots affected must be invalidated."[190]

With respect to fraud, the trial court in *Juri* made three important findings. First, after hearing testimony from thirty-two witnesses and considering 120 depositions and over 170 exhibits, the court concluded that fraudulent activity infected the absentee voting and the integrity of the election as a whole, but that it could not determine the exact number of ballots affected.[191] Second, the evidence suggested that supporters for both candidates acted fraudulently.[192] Third, there was no evidence presented "to establish that either Raul Martinez or Nilo Juri directly participated in or had knowledge of any improprieties in the absentee ballot process."[193]

Given that both parties participated in the absentee ballot fraud found to have occurred in *Juri*, the trial court determined that it was inappropriate to invalidate all the absentee votes because "[t]his would invariably invite similar [fraudulent] conduct in the future, a situation which must be avoided."[194] Ironically, this is the same argument the Supreme Court of Florida made in *Bolden* to invalidate all absentee votes. There, the court said failure to invalidate will "cause the electorate to lose confidence in the electoral process, destroy the willingness of individuals to participate, and thereby allow our government to be controlled by corrupt influences."[195]

Despite finding that fraud substantially affected the absentee ballot process, the *Juri* court could not determine exactly how many of the 1,274 absentee ballots cast were invalid. It was therefore reluctant to disenfranchise those who voted legally, which in this case the court thought could be well over a 1,000 voters.[196] The court concluded, "We would be telling a large number of electors their votes did not count. That result would be as unfair and unacceptable as the requirement of the payment of a poll tax or an election limited to a certain gender or race."[197] Again, this view conflicted with *Bolden*, where the Florida Supreme Court said, "Once substantial fraud or corruption has been established . . . it is unnecessary to demonstrate with mathematical certainty that the number of fraudulently cast ballots actually affected the

190. *Id.* at 5.
191. *See id.* at 3-4.
192. *See id.*
193. *Id.* at 3.
194. *Id.* at 5.
195. Bolden v. Potter, 452 So. 2d 565, 567 (Fla. 1984).
196. *See Juri*, No. 93-21848 (04) & No. 94-04341 (04) at 5.
197. *Id.* at 5-6.

outcome of the election."[198] Notwithstanding the *Bolden* precedent, the *Juri* court declared the election invalid and ordered a new mayoral election within thirty days.[199] Neither party appealed this decision.

In retrospect, the trial court in *Juri* introduced an element that Florida courts had not previously expressed, but probably considered when fashioning a remedy to a finding of absentee voter fraud: the relative culpability of parties in the improper conduct. The court underscored the fact that both sides (though apparently not their principals) were found to have taken part in the fraudulent conduct.[200] Because it could not find that one side was more blameworthy than the other, the court decided neither should benefit directly from its decision. The court may have also considered that Juri, despite having won a majority at the polling place, lacked a clear mandate.[201] Consequently, the court could more comfortably disregard the weight of Florida precedent (particularly *Bolden*) suggesting that all absentee votes be invalidated, and therefore refuse to declare Juri the winner based solely on the machine vote. Aside from *Juri*, plenty of out-of-state case law supported the trial court's new election remedy in *Matter of Protest.*

D. *Other State Jurisdictions: Persuasive Support*

While precedent for a new election where there is a finding of massive fraud in absentee voting is admittedly absent in Florida appellate case law, ample support can be found in other jurisdictions. Indeed, conducting a new election is the remedy of choice both at the federal level[202] and in other states,[203] while the invalidation remedy remains almost entirely a Florida remedy.[204]

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198. *Bolden*, 452 So. 2d at 567.

199. *See Juri*, No. 93-21848(04) & 94-04341(04) at 6.

200. *See id.* at 5.

201. *See id.* at 1-2. Juri received 13,819 machine votes, while Martinez received 13,714. This is a difference of 105 votes or less than four-tenths of one percent of the total machine votes cast.

202. *See* Robertson, *supra* note 57, at 898. The author supports her conclusion that ordering a new election is the most popular remedy for election fraud by citing several federal cases from the United States Supreme Court to the federal district court level. *See id.* at 898 n.158.

203. *See infra* notes 206-230 and accompanying text, discussing new election remedy used in Massachusetts, California, Mississippi, Georgia, and Louisiana.

204. *See* Robertson, *supra* note 57, at 921. Footnote 328 lists cases that support "the remedy of counting the machine vote only." *Id.* Of the cases listed, all but two are from Florida. In the two non-Florida cases, the author misread, in each case, the court's holding. In one, *Gooch v. Hendrix*, 851 P.2d 1321 (Cal. 1993), the California Supreme Court affirmed the trial court's decision ordering new school board elections because there was sufficient evidence that the winners in each of the elections won handily primarily because of illegal voting. *See id.* at 1332-33. In the other, *Byron v. Tyler*, 398 A.2d 599 (N.J. 1978), the Superior Court of New Jersey in fact did not invalidate all the absentee votes; because it was possible to identify and suppress the illegal absentee votes, the court invalidated only those that were improperly cast. Consequently, the court allowed twenty-eight of the seventy-nine absentee ballots in the Fieldsboro election to be

Other states have applied the new election remedy to elections free of fraud as well as those involving substantial fraud. For example, in *McCavitt v. Registrars of Voters of Brockton*,[205] a non-fraud case, the Supreme Judicial Court of Massachusetts responded to a petition challenging the results of a state mayoral election. The losing candidate in that case, McCavitt, contested several absentee ballots not because of voter fraud, but because they did not comply with the state's absentee voting statute.[206] The court, citing *Boardman* among other cases, concluded that a sufficient number of the absentee ballots were not in substantial compliance with the voting statute, thus casting doubt on the election results.[207] Consequently, the court vacated the trial court's decision declaring McCavitt the winner and ordered a new election.[208]

Fifteen years later, in *Penta v. City of Revere*,[209] a Massachusetts appellate court relied heavily on *McCavitt* to overturn the results of a municipal election decided by four votes. In that case, the losing candidate alleged but did not prove fraud by a preponderance of the evidence.[210] The court did find, however, that at least eleven absentee votes were not in substantial compliance with the voting statute.[211] Perhaps more importantly, the court noted that "the facts [surrounding this election], taken together, convey a strong appearance of impropriety."[212] After discussing the improper actions of a precinct official and workers in his office, the court concluded, "Not to require a new election under these circumstances would undermine public confidence in the election laws."[213]

The new election remedy has also been applied in cases involving absentee ballot fraud, or similar illegal conduct. In *Gooch v. Hendrix*,[214] for example, the Supreme Court of California found that a political association's illegal involvement in the absentee voting process substantially undermined the results of five different school board elections.[215] On

counted. *See id.* at 603-4. Thus, the invalidation remedy, evidently, has only been applied in Florida, assuming Robertson's listing is complete.

205. 434 N.E.2d 620 (Mass. 1982). Courts in Alaska, Arizona, Colorado, Kansas, and Illinois have cited this case. The Supreme Court of Arizona, in *Huggins v. County of Navajo*, 788 P.2d 81 (Ariz. 1990), rejected the new election remedy and instead chose to prorate the illegal absentee votes among the candidates in each precinct as best it could.

206. *See McCavitt*, 434 N.E. 2d at 623.

207. *See id.* at 628, 631.

208. *See id.* at 631.

209. 1997 WL 799478 (Mass. Super. Dec 23, 1997).

210. *See id.* at 4.

211. *See id.* at 12.

212. *Id.* at 12 n.20.

213. *Id.*

214. 851 P.2d 1321 (Cal. 1993).

215. *See id.* at 1332-33.

appeal, that court concluded that the trial court was correct in setting aside the election results and ordering new elections,[216] "where clear and convincing evidence established pervasive illegalities that permeated the election process."[217]

In *Rogers v. Holder*,[218] the Supreme Court of Mississippi ordered a new election for sheriff even though only sixteen one-hundredths of one percent (0.16) of the absentee votes were found to have been fraudulently cast.[219] The court determined that, despite the low number of votes where fraud could be proven beyond a reasonable certainty, it was nonetheless impossible to discern the will of the voters.[220] Faced as it was with a "reasonable inference" of fraud by the supporters of the winning candidate, the court ordered a special election.[221]

A few years after *Rogers*, the Supreme Court of Georgia addressed the issue of absentee voter irregularities in *McCranie v. Mullis*.[222] The trial court documented a sufficient number of illegal absentee ballots to cast doubt on the election results.[223] For example, several electors voted twice, and one vote was cast in the name of a dead person.[224] Further, in the Office of the Registrar of Elections, "one individual alone assisted 142 . . . absentee voters. The record shows that this individual was married to the secretary of a candidate."[225] The court voided the election and ordered a new one.[226]

Finally, in *Valence v. Rosiere*,[227] a Louisiana intermediate appellate court reversed a trial court's decision to dismiss a challenge to a mayoral election that was won by seventeen votes.[228] The appellate court found that the losing candidate's allegations – that up to twenty absentee ballots had been forged – provided an adequate basis challenging the election.[229] The court also noted that if, upon remand, the allegations were substantiated, the trial judge was to order either a totally new election or a restricted election, specifying the candidates and indicating which vot-

216. *See id.* at 1333.
217. *Id.* at 1331.
218. 636 So. 2d 645 (Miss. 1994).
219. *See id.* at 651.
220. *See id.* at 650-51. The court applied the second of a two-prong test. It had determined that no new election was required under the first prong because of the insufficient number of tainted absentee ballots. *See id.* at 650.
221. *See id.* at 651-52.
222. 478 S.E.2d 377 (Ga. 1996).
223. *See id.* at 379.
224. *See id.* at n.6.
225. *Id.* at 329.
226. *See id.*
227. 675 So. 2d 1138 (La. App. 1996).
228. *See id.* at 1139.
229. *See id.* at 1141.

ers were eligible to vote.[230]

Perhaps influenced by the weight of the out-of-state precedent supporting a new election and bolstered by the *Juri* decision,[231] the trial court in *Matter of Protest* ordered a new election within sixty days.[232]

VI. ANALYSIS

To a certain degree, the divergent decisions in this case reflect the unsatisfactory nature of the controlling precedent.[233] *Boardman*, a widely respected, watershed decision, sustained the practice of invalidating elections when the number of illegal absentee ballots is sufficiently large to change the results of the election. At the same time, it suggested that, where evidence of substantial fraud affecting the integrity of the election exists, a smaller number of illegally cast votes would support the invalidation of all absentee ballots. The *Bolden* court sought to eliminate this ambiguity in the *Boardman* opinion by holding that, irrespective of the number of affected absentee votes, where there has been enough fraud or corruption that the true results of the election could not be determined with reasonable certainty, the remedy should be invalidation of all absentee votes. Yet the invalidation remedy adopted by *Bolden* may not be appropriate for all circumstances where a court finds massive absentee voter fraud. This section begins with a critical look at both of the *Matter of Protest* decisions, starting with the appellate court's opinion, and then suggests a way to get out of the box created by *Bolden*.

A. *Appellate Court's Decision*

The appellate court's decision in *Matter of Protest* disenfranchised a large bloc of honest absentee voters, arguably unnecessarily, to prevent Suarez from getting another chance to win the election. The court's reasoning, however, was flawed: First, the court inadequately analyzed Florida precedent and other relevant case law. Second, and closely

230. *See id.* at 1139-40 n.1.

231. It is impossible to tell by looking at the trial court's final judgment whether it was influenced in any way by *Juri*, since it did not cite or in any way refer to *Juri* or the Hialeah election. After being assigned this case, though, Judge Wilson did confer with Judge Shapiro, who presided over the *Juri* trial. Interview with the Honorable Judge Thomas S. Wilson, Jr. (Dec. 20, 1998).

232. *Matter of Protest*, No. 97-25596 CA 09, *supra* note 2, at 4.

233. Indeed, as Justice Overton remarked in his concurring opinion in *Boardman*, "A reading of the election contest cases concerning absentee ballots reveals a maze of confusing doctrines and rules. There are cases to sustain the position of both sides." Boardman v. Esteva, 323 So. 2d 259, 270 (Fla. 1975) (Overton, J., concurring). This Comment's view is that subsequent decisions have, if anything, only further confused matters.

related, it overzealously applied *Bolden*. Third, it attempted to reinforce its reliance on precedent with a facile public policy argument.

With respect to Florida precedent and other case law, the appellate court's analysis fell short in three significant ways. First, the appellate court exaggerated the extent to which Florida case law demanded the invalidation remedy applied in the *Matter of Protest* case. Although Florida courts have applied the invalidation remedy for more than sixty years, the cases decided before *Boardman* dealt with an entirely different context, one dominated by the doctrine of strict compliance to the absentee voting statutes.[234] With *Boardman*, the Supreme Court of Florida adopted the substantial compliance doctrine, significantly affecting the application of any remedy for absentee voter irregularities.[235] But the seminal case on absentee voter fraud is neither *Whitley* nor *Boardman*, but the 1984 *Bolden* decision.[236] Before *Bolden*, neither the Florida Supreme Court, nor any intermediate appellate court, had expressly addressed absentee voter fraud.[237] Moreover, the appellate court's opinion admitted that earlier Florida cases "[did] not explicitly state that the exclusive remedy for massive absentee voter fraud is to determine the election solely based on machine vote."[238] Thus, its later insistence that any remedy for absentee voter fraud other than invalidation would violate a longstanding precedent is not persuasive.

Second, in distinguishing *Rogers v. Holder*,[239] the appellate court overlooked the important ways the two cases were similar. In *Rogers*, the Mississippi Supreme Court refused to invalidate all absentee votes when only twelve absentee ballots were fraudulently cast, instead ordering a special election that avoided the disenfranchisement of the large number of honest absentee voters.[240] The appellate court in *Matter of Protest* tried to distinguish *Rogers*: "In the instant case, the trial court expressly found that the appellant, Carollo, met his burden of demonstrating absentee ballot fraud to such a degree that 'the integrity of the election was adversely affected.'"[241] The extent of the absentee voter fraud was admittedly much greater in the Miami election, a fact the appellate court seemed to be driving at, but how the level of fraud determines which remedy applies is unclear. Nonetheless, both courts found

234. *See supra* notes 65-85 and accompanying text.

235. *See supra* notes 86-89 and accompanying text.

236. *See supra* notes 117-134 and accompanying text.

237. *See* discussion *supra* text, Part IV.A.2., and accompanying notes.

238. *Matter of Protest*, 707 So. 2d 1170, *supra* note 5, at 1173.

239. 636 So. 2d at 645 (Miss. 1994).

240. *See id.* at 651-52.

241. *Matter of Protest*, 707 So. 2d 1170, *supra* note 5, at 1174 (citation omitted).

fraud sufficient to affect the outcome of the election, a fact that connects, rather than distinguishes, these two cases.

Finally, the appellate court may have been technically correct when it concluded there were no Florida appellate cases "upholding the ordering of a new election in the face of . . . fraudulent conduct relating to absentee ballots"[242] and that "there is no legal precedent in Florida to support the action of the trial court in ordering a new election as the proper remedy upon a find of massive absentee voter fraud."[243] However, in reaching this conclusion, it ignored the trial court's decision in *Juri* (which neither party appealed) and, more importantly, the *Juri* court's reasoning.

The second major flaw in the appellate court's opinion is its overzealous application of *Bolden*. Although an obviously important case in the jurisprudence of absentee voter fraud in Florida and other jurisdictions,[244] *Bolden* is perhaps too categorical to be applied in the same manner to all absentee voter fraud cases. For example, the *Bolden* court said:

> It makes no difference whether the fraud is committed by candidates, election officials, or third parties. The evil to be avoided is the same, irrespective of the source. As long as the fraud, from whatever the source, is such that the true result of the election cannot be ascertained with reasonable certainty, the ballots affected should be invalidated.[245]

As a practical matter, the "evil" may not be the same. It may make a difference which party (or parties) perpetrated the fraudulent conduct. As mentioned above, the *McDonald* court obviously considered the nature and extent of Sheriff McDonald's and his supporters' fraudulent activities when fashioning its remedy, even though there was no explicit finding of fraud in that case.[246]

It is impossible to tell whether the various courts hearing the

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242. *Id.* at 1173.

243. *Id.* at 1174. As a matter of review, excluding the Third District Court in this case, the only Florida intermediate appellate court that has taken up a case expressly involving massive absentee voter fraud is the First District Court of Appeal in Potter v. Bolden, 416 So. 2d 6, 6 (Fla. 1st DCA 1982). It concluded that an insufficient number of absentee ballots were tainted so as to trigger the invalidation remedy suggested by Boardman v. Esteva, 323 So. 2d 259, 259 (Fla. 1975). On appeal the Supreme Court of Florida reversed the First District, upholding the trial court's application of the invalidation remedy. *See* Bolden v. Potter, 452 So. 2d 565, 567 (Fla. 1984). Thus, the case law in this particularly narrow area of jurisprudence is remarkably limited.

244. The case has been widely cited in Alabama case law as well as in federal cases. *See, e.g.*, Wells v. Ellis, 551 So. 2d 382 (Ala. 1989); Williams v. Lide, 628 So. 2d 531 (Ala. 1993); Roe v. Alabama, 676 So. 2d 1206 (Ala. 1995); Solomon v. Liberty County, 957 F. Supp. 1522 (N.D. Fla. 1997).

245. *Bolden*, 452 So. 2d at 567.

246. *See supra* notes 95-108 and accompanying text.

Bolden case were affected by which party or parties were responsible for the fraud.[247] None of the three *Bolden* opinions mentioned whether one side was more blameworthy than the other, perhaps suggesting that both sides contributed equally to the fraudulent activities. More importantly, none of these courts seemed to have considered involvement in the fraud as an expressed or implied basis for its decision. To these courts, the issue was the number of infected votes needed to trigger the invalidation remedy, and not much else.

In *Juri*, the circuit court expressly established that a party's involvement in the fraud was an important factor in deciding whether to order a new election.[248] After reviewing *Boardman* and *Bolden* and establishing that there had been substantial fraud adversely affecting the sanctity of the ballots, the *Juri* court concluded that it would be improper to invalidate all absentee votes when "that fraud [could] not be attributed to the supporters of only one candidate."[249] Thus, where both parties had been involved in the fraud, the *Juri* court found it preferable to order a new election.[250]

When viewed from the single perspective of fault, the appellate court's decision in *Matter of Protest* is logical. Because the Suarez supporters were largely responsible for the absentee voter fraud, the appellate court could rationally apply the invalidation remedy as a penalty, in effect punishing Suarez for the conduct of his supporters. However, the court did not expressly present this as its rationale. Unfortunately, the lack of express findings on involvement may produce undesirable results in the future because it perpetuates the application of *Bolden* irrespective of the circumstances surrounding the underlying finding of fraud.

The third flaw in the appellate court's opinion relates to the public policy argument it offered to support its invalidation of all absentee votes. The court suggested that ordering a new election would invite further fraud.[251] Because encouraging fraud is obviously not the public policy of Florida, the appellate court invalidated all absentee ballots in this election in an attempt to discourage fraud in future elections.[252] Were it that simple, many other states would have adopted the invalidation remedy; as noted earlier, however, it remains almost entirely a Flor-

247. *See supra* notes 117-134 and accompanying text.

248. *See Juri*, No. 93-21848 (04) & No. 94-04341 (04) at 5.

249. *Id.*

250. *See id.* at 6.

251. *See Matter of Protest*, 707 So. 2d at 1170, *supra* note 5, at 1174.

252. *See id.* The court noted the trial testimony of Mr. David Leahy, Supervisor of Elections for Miami-Dade County, which strongly implied that ordering a new election would encourage further fraud.

ida remedy.[253] One plausible explanation for this apparent paradox is that the vast majority of jurisdictions ordering new elections in the face of massive absentee voter fraud believe that the invalidation remedy's disenfranchisement of voters is more harmful than whatever value it has in deterring further corruption. Thus, these jurisdictions appear to place a greater premium on a voter's right to vote than does Florida.

The appellate court's public policy argument was superficial and simplistic. The court obviously recognized, as Suarez had forcefully contended, that invalidation would lead to disenfranchisement of honest absentee voters. To counter this argument, the appellate court merely turned it around, stating:

> we refuse to disenfranchise the more than 40,000 voters who . . . exercised their constitutionally guaranteed right to vote in the polling places of Miami. In the absence of any findings of impropriety relating to the machine vote in this election, public policy dictates that we not void those constitutionally protected votes, the majority of which were cast for Mr. Carollo.[254]

Yet, had Suarez prevailed in this litigation and had a new election been held, none of these voters nor any of the absentee voters who voted legally would have been disenfranchised. This is presuming of course that they all would have chosen to once again exercise their right to vote.

B. *Trial Court's Decision*

Of the two decisions, the trial court's is the more difficult to explain. As discussed above, the weight of state precedent clearly was against ordering a new election. The court, however, limited its discussion of precedent primarily to *Boardman*, emphasizing the view that the real parties in interest in both cases were the voters whose right to vote must be carefully guarded, and restating the three "*Boardman* factors."[255] It did not discuss *Bolden*, the more relevant and recent case, although counsel for Carollo had suggested in its memorandum of law that this later case established a "distinct legal standard" applicable to absentee voter fraud cases.[256] The trial court, possibly taking its lead from cases in a number of other jurisdictions as well as the decision in *Juri*, refused to disenfranchise the large number of absentee voters who had cast their ballots legally and therefore ordered a new election. Besides failing to explicitly address *Bolden*, the trial court's opinion had two additional drawbacks. It overlooked the practical problems that the

253. *See* discussion, *supra* note 204.

254. *Matter of Protest*, 707 So. 2d at 1170, *supra* note 25 at 1174.

255. *See Matter of Protest*, Case No. 97-25596 CA 09, *supra* note 2, at 1-2.

256. *See* Petitioners' Trial Mem. Law at 11-12 & 22, *Matter of Protest*, No. 97-25596 CA (09).

City of Miami faced in resolving the mayoral election, and it failed to adequately address the one-sided character of the fraudulent activity.

The trial court's opinion failed to resolve the practical problems facing the City of Miami as a result of this political stand-off. The implementation of its remedy, a new election, would have cost the taxpayers time and money. While Miami voters waited two months to return to the polls, they would have witnessed the two contenders waste further resources challenging decisions about who should sit as the interim Mayor. Also, the cost of another election would have resulted in additional financial demands on an already fiscally challenged City potentially affecting its other programs. The City had conducted a run-off election only nine days after the November 4 election.[257] In *Juri*, the trial court ordered an election after thirty days.[258] Even assuming a new election was the proper remedy in *Matter of Protest*, one could argue that it should have been held much sooner than sixty days following the court order, as directed by the trial court.

Perhaps even more troublesome, especially to Carollo, was that the trial court's remedy appeared to ignore whose supporters were primarily responsible for the wrongdoing. In his memorandum of law to the court, Carollo argued that a new election was simply a temporary solution to a more permanent problem.[259] Carollo recalled the testimony of two expert witnesses who had concluded that the court must avoid sending a message to political consultants and candidates that, "if they were caught committing fraud, the worst thing that would happen is that they would get a 'second bite at the apple.'"[260] To these witnesses a "change of incumbency" was necessary in this election, "to excise the disease rather than merely [treat] the symptoms."[261] They supported total invalidation of all of the absentee votes, which would have made Carollo the winner.

Given this reasoning, a court order to conduct a new election might better fit a set of circumstances where both sides participated in the fraud more or less evenly. As suggested, this appeared to be the rationale in *Juri*, where the court ordered a new election. In so doing, it neither directly rewarded nor punished either party. In this case, however, one side (Suarez's) participated in the fraud to a much greater extent then the other. The trial court, therefore, may have inappropri-

257. *See Chronology*, MIAMI HERALD, Mar. 12, 1998, at A1.

258. *See Juri*, No. 93-21848 (04) & No. 94-04341 (04) at 6.

259. *See* Petitioners' Trial Mem. of Law at 24, *Matter of Protest*, No. 97-25596 CA (09).

260. *Id.*

261. *Id.*

ately applied the new election remedy to the wrong set of facts, unfairly allowing Suarez another chance to win.

In critique of Carollo's reasoning, it is unclear what would happen if, under similar circumstances after the invalidation all absentee votes, the person whose supporters were responsible for the fraud won the election. That is, taking the Miami election and presuming that Suarez had won the machine vote (as he did in the run-off election), would Carollo have so fervently argued for invalidation or would he have sought to invoke the new election remedy?

In sum, the fundamental issue dividing the two opinions – and the remedies applied in each – is as follows: is the harm of invalidation (disenfranchising honest absentee voters) greater than the harm of enfranchisement via a new election (allowing a candidate whose supporters acted fraudulently to run again and possibly win)?

C. *The Dilemma: Enfranchise or Invalidate?*

Expansion of the franchise is supported by federal and state constitutions and by statutes enacted to increase the number of citizens who can vote in elections at all levels.[262] In support of this expansion, many states have passed voting laws limiting a judge's discretion to invalidate ballots once they are cast.[263] Consequently, the invalidation remedy undermines this growing and widespread trend toward expanding the franchise.

Beginning in 1936, when the Florida Supreme Court decided *Titus*,[264] Florida courts that have wrestled with absentee voting issues have frequently expressed the desire to not unnecessarily disenfranchise

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262. *See supra* notes 41-45 and accompanying text.

263. *See, e.g.*, ALA. CODE § 11-46-71 (1975) (preventing courts from annulling an election unless a court determines the winning candidate received a number of illegal votes sufficient to reduce his or her total below the number of votes needed to win); ARIZ. REV. STAT. § 16-676 (C) (1979) (stating in relevant part that "if it appears that a person other than the contestee has the highest number of *legal* votes, the court shall declare that person elected") (emphasis added); CAL. ELECT. CODE § 16720 (West 1994) (declaring that courts, after hearing the arguments in a contested election, shall immediately pronounce its judgment either setting aside the election or decreeing the contestant the winner); LA. REV. STAT. § 18:1432 (West 1976) (authorizing trial judges, where they find sufficient shifts in votes to change the results of the election as a result of adding legal votes not tallied or subtracting illegal votes counted, to order an entirely new election or a restricted election, specifying for the restricted election the date it will be held, the appropriate candidates, the office or position for which the election will be held, and the voters who are eligible to vote); MISS. CODE § 23-15-951 (West 1972) (stating in relevant part that "the verdict of the jury shall find the person with the greatest number of *legal* votes" the winner) (emphasis added); TENN. CODE § 2-17-112 (1972) (declaring that, after hearing the case, the court must confirm the election, declare it void, declare it a tie if two persons get the same number of legal votes, or declare a person elected if that person receives the highest number of legal votes).

264. *See* discussion *supra* Part V.B and accompanying notes.

absentee voters. At the same time, however, the courts have not hesitated to invalidate absentee votes to maintain "the purity of elections and the sanctity of the ballot."[265] In attempting to be consistent when faced with the dilemma to enfranchise or invalidate, Florida courts have unfortunately put themselves into a box of sorts. Where there is a finding of massive absentee voter fraud and the true result of the election cannot be determined with reasonable certainty, a court must, under *Bolden*, invalidate all the absentee votes irrespective of the source of the fraud and declare the winner based solely on the machine vote. Invalidation could, however, lead to some unintended and unexpected results, as illustrated in Figure 1 and explained further below.

By way of explanation, the left side of Figure 1 depicts six hypothetical outcomes of an election between two candidates, Candidate A and Candidate B, with the contest's overall winner highlighted. The right side indicates how, with each hypothetical, the election would be affected where a trial court finds substantial fraud in the campaign of one or both candidates and applies the *Bolden* invalidation remedy.

FIGURE 1: POTENTIAL EFFECT OF *BOLDEN* ON AN ELECTION

Election Results by Category				Outcome After Applying *Bolden* Where Substantial Fraud Found in Campaign of Following Candidate(s)		
Hypo #	Machine Vote	Absentee Vote	Overall Winner	Candidate A	Candidate B	Candidates A & B
1	A	B	**A**	**A**	A	**A**
2	A	B	**B**	**A**	A	**A**
3	B	A	**B**	B	**B**	**B**
4	B	A	**A**	B	**B**	**B**
5	A	A	**A**	**A**	A	**A**
6	B	B	**B**	B	**B**	**B**

In looking at this illustration, it is not surprising that under *Bolden*, the results of the election change in two out of six instances (see hypothetical 2 and 4). These results should be expected, given the intent of the Florida courts to root out illegality, even at the expense of losing honest votes. The matrix, simple as it may be, suggests the troublesome potential effects of applying *Bolden* inflexibly. Looking at the right side of Figure 1, for example, the candidate that wins the election remains the same irrespective of the source of fraud. Thus, in the two instances cited above where the results of the election change by applying *Bolden*, it is possible that the winning candidate's own campaign may have been

265. Frink v. State *ex rel.* Turk, 35 So. 2d 10, 12 (Fla. 1948).

responsible for the fraud.[266] Even more problematic, the winning candidate in twelve out of eighteen instances (all highlighted), or sixty-seven percent of the time, ran a campaign that benefited from its own fraudulent activity. Thus, the application of *Bolden* would in some instances reward illegal activity while at the same time, incredibly, disenfranchise honest absentee voters.

Besides the potentially pernicious effect of applying *Bolden* inflexibly, doing so conflicts with the black letter and, arguably, the spirit of the controlling Florida statute. The applicable Florida Statute expressly allows trial judges to apply any remedy appropriate to the circumstances.[267] This wide latitude given by the statute contrasts sharply with the holding of *Bolden*. Yet, the statute fits the circumstances much better than *Bolden*.

The competing goals of maintaining the integrity of elections while avoiding the disenfranchisement of honest absentee voters require courts to balance opposing interests in light of the facts of the case under review. In some cases, it may be imperative to invalidate all absentee votes – in the process disenfranchising some honest absentee voters – to keep from rewarding a candidate whose campaign was rife with fraud. In other cases, it may be necessary to order a new election to avoid disenfranchising voters, even though perpetrators of fraud would get another chance to win at the polls.

VII. Responding to Absentee Voter Fraud: A Proposal

To give Florida courts greater flexibility when facing the dilemma of whether to enfranchise or invalidate when fashioning a judicial response to absentee ballot fraud, the following proposal is made: Courts should explicitly determine where, by reasonable inference, the fault for the voter fraud lies and then connect the remedy to the results of that determination.

For example, if an election is held where Candidate A wins the machine vote while Candidate B is the overall winner, then the remedy

266. Judge Williams' concurring opinion in the *Boardman* decision expressly raised a related and equally unacceptable possibility. *See* Boardman v. Esteva, 323 So. 2d 259, 271 (Fla. 1975) (Williams, J., concurring specially). After describing how an election worker sympathetic to a candidate who appears to be winning the machine vote might intentionally alter the outer envelope of some of the absentee ballots, Judge Williams continued:

> without even knowing the contents of the ballots [inside the envelope] or caring, he immediately makes certain that his candidate has won the election. He has thus, personally and at very little risk, disenfranchised all persons who voted by absentee ballot and has thereby possibly himself decided the outcome of the election.

Id. at 272.

267. *See supra* notes 148-149 and accompanying text.

to a finding of fraud in that election would differ depending on which party or parties, by reasonable inference, were found blameworthy for the fraud. Assuming B's supporters were the perpetrators, it would then be proper to invalidate all the absentee votes and declare A the winner, as did the appellate court in *Matter of Protest*. Candidate B should be held accountable for the actions of his or her supporters where they have sought to subvert the political processes so important to a healthy democracy. If, on the other hand, A's supporters were involved in the fraud (and A was ignorant of this fact), then it might be more appropriate to let the election results stand (essentially, what happened in *McDonald*) rather than order a new election, which would give A another chance to defeat B. In this example, the court holds A accountable for the same reasons it would hold B accountable in the previous example. Finally, if both A's and B's supporters were engaged in the substantial fraudulent conduct, then the best remedy may be to order a new election altogether, as the *Juri* court did and as did the trial court in *Matter of Protest*. This way, the court does not directly reward or punish either candidate; instead, it allows the voters to decide the issue.

Applying this proposal to the six hypothetical outcomes illustrated in Figure 1, the results shown on the right side of Figure 2 are significantly different from those shown on the right side in Figure 1. The crucial distinction is as follows: In no instance is a candidate whose campaign was responsible for fraudulent activity rewarded directly by the judicial decision.

FIGURE 2: POTENTIAL AFFECT OF PROPOSAL ON AN ELECTION

Election Results by Category				Outcome After Applying Proposal Where Substantial Fraud Found in Campaign of Following Candidate(s)		
Hypo #	Machine Vote	Absentee Vote	Overall Winner	Candidate A	Candidate B	Candidates A & B
1	A	B	**A**	New Election	Let Stand; A Winner	New Election
2	A	B	**B**	New Election	Invalidate; A Winner	New Election
3	B	A	**B**	Let Stand; B Winner	New Election	New Election
4	B	A	**A**	Invalidate; B Winner	Let Stand; A Winner	New Election
5	A	A	**A**	New Election	Let Stand; A Winner	New Election
6	B	B	**B**	Let Stand; B Winner	New Election	New Election

This proposal is not without its drawbacks. As the appellate court in *Matter of Protest* pointed out, whenever a court orders a new election, it allows candidates whose campaign might have been fraudulent another chance to win.[268] When a court invokes invalidation, it unavoidably disenfranchises some, perhaps many, honest absentee voters—a result the trial court in *Matter of Protest* found inappropriate.[269] Yet courts applying this proposal in the future will presumably weigh these potentially adverse effects when fashioning their specific remedy and decide that, to maintain the integrity of the election process in the long run, these effects are a relatively small price to pay.[270]

VIII. CONCLUSION

There are no winners when a court finds that an election has been infected by substantial absentee voter fraud. We cannot, of course, exterminate the termites and screw-worms of democracy, as suggested by Justice Terrell in his colorful opinion cited at the beginning of this Comment.[271] Perhaps we can do more to hold those seeking public office accountable for their campaigns. As an important step in this direction, Florida courts should, consistent with the spirit of the controlling state law, seek to fashion a remedy for substantial absentee voter fraud that fits the particular circumstances of the election being challenged. One of the more important factors courts could consider when undertaking a review of a challenged election where there is evidence of substantial fraud in absentee voting is which party or parties were responsible for the fraud. The remedy fashioned in response to a finding of fraud, therefore, might be different depending on the extent of a party's involvement in the fraud.

When viewed in this light, the appellate court's decision in *Matter of Protest* reasonably responded to the circumstances of the case. Xavier Suarez's supporters were largely, but not entirely, responsible for the absentee voter fraud. Although he may not have been personally involved, or even aware of the fraudulent conduct, he should have been held accountable for the conduct of his campaign, at least insofar as fashioning a remedy in response to fraud is concerned. Thus, because

268. *See Matter of Protest*, 707 So. 2d 1170, *supra* note 5, at 1174.

269. *See Matter of Protest*, Case No. 97-25596 CA 09, *supra* note 2, at 4.

270. Judge Wilson, the trial judge in *Matter of Protest*, in ordering a new election within sixty days, was clearly more concerned with disenfranchising honest absentee voters by judicial fiat and maintaining the integrity of the election process than he was with who might win a new election, which, after all, would presumably reflect the will of the people. Interview with Judge Thomas S. Wilson, December 20, 1998.

271. Whitley v. Rinehart, 140 Fla. 645, 651 (1939).

Joe Carollo won the machine vote, the appellate court could rationally invalidate all absentee votes, declaring Carollo the winner.

Given some plausible changes to the circumstances and this Comment's more flexible approach to absentee voter fraud cases, the court could just as reasonably have applied the new election remedy. If, for example, Suarez had won the machine vote instead of Carollo, then invalidation of the absentee votes would not have changed the results of the election. Faced with this fact as well as the results of the run-off election, which Suarez won, the court could have either ignored the fraud (because Suarez's showing apparently reflected the will of the people irrespective of fraud) or ordered a new election to prevent his campaign from benefiting from it. Given the reasoning underlying this Comment, the clear preference would have been to order a new election, notwithstanding *Bolden*, to preserve the integrity of the election process.

Also, if both parties were found to have participated substantially in the fraud by reasonable inference such that the will of the people would have been impossible to discern, irrespective of which candidate received the greater number of votes in any particular category, a court could have reasonably ordered a new election to prevent either party from directly benefiting from the fraud, again despite *Bolden*. Thus, the remedy applied must reasonably reflect the specific circumstances it addresses, and not simply follow outdated or inflexible precedent.

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