



---

2007

## Frying Pan or Fire: Legal Fallout From the Contested 2000 Presidential Election

Paul Charton

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [Election Law Commons](#)

---

### Recommended Citation

Paul Charton, *Frying Pan or Fire: Legal Fallout From the Contested 2000 Presidential Election*, 29 U. ARK. LITTLE ROCK L. REV. 669 (2007).

Available at: <https://lawrepository.ualr.edu/lawreview/vol29/iss4/2>

This Essay is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

## FRYING PAN OR FIRE: LEGAL FALLOUT FROM THE CONTESTED 2000 PRESIDENTIAL ELECTION

*Paul Charton\**

### I. INTRODUCTION

In America, we have come to expect our presidential elections to occur without much disruption or controversy. Those expectations occasionally conflict with the realities of modern election methods and technologies. This conflict was most evident in the presidential election of 2000, while the country waited more than a month to learn whether Vice President Al Gore or Texas Governor George W. Bush would become our next president. The controversial decision by the Supreme Court finally put an end to the election, but it certainly did not end the debate.

Following the 2000 election, significant federal and state government reforms have begun and even more are pending. One fundamental question remains: Have we corrected the problems that created the havoc in late 2000, or have we only set ourselves up for future maelstroms? I contend that if we do not institute a system by which a voter's ballot can be verified after the election day, we are only preparing for a repeat of the crisis faced by the United States Supreme Court in *Bush v. Gore*.<sup>1</sup>

---

\* Paul Charton is an attorney at Catlett & Stodola, PLC, in Little Rock, Arkansas, practicing immigration law. Mr. Charton previously worked in Washington, D.C., as a legislative assistant to United States Congressman Marion Berry and as the Manager of Political Affairs for the National Cattlemen's Beef Association. The author thanks those who provided their insight on the thesis and content of this essay: S. Graham Catlett; H. Bradley Walker; Penelope Sur; Michael Mosley; Christian Harris; and Erin Buford Vinett. The author also thanks the staff of Congressman Vic Snyder, particularly Leo Monterrey and Katie Hargis, who provided access to very useful reports from the Congressional Research Service and Government Accountability Office.

1. 531 U.S. 98 (2000). Although many scholars have analyzed the case of *Bush v. Gore* in extraordinary detail, this essay will not focus on the much-debated merits and shortcomings of that case. In order to provide context, this essay will give only a minimal explanation of *Bush v. Gore*. Instead, the essay will focus on a particular practical aspect of our current vote counting systems. For readers who seek additional information on the academic treatment of *Bush v. Gore*, there is a wealth of information available. See, e.g., *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman ed., Yale Univ. Press 2002); RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS*, (Princeton Univ. Press 2001). Erwin Chemerinsky, *How Should We Think About Bush v. Gore*, 34 *LOY. U. CHI. L.J.* 1 (Fall 2002); Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 *CARDOZO L. REV.* 1219 (2002); and Laurence H. Tribe, *Erog v. Hsub And Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 *HARV. L. REV.* 170 (2001).

## II. BACKGROUND ON THE 2000 ELECTION

On November 7, 2000,<sup>2</sup> Americans justifiably believed they would learn who was to be their first new president of the millennium—normally the results of the election are announced soon after the last polls close. Instead, the 2000 election day began a roller coaster ride that led to chaos<sup>3</sup> and numerous court battles.<sup>4</sup> The next few weeks did not yield much comfort or resolution. Eventually, the country learned that Gore received over a half-million more *popular* votes than Bush received,<sup>5</sup> but surprisingly this would not determine the outcome of the presidential election. America awoke on November 8 to learn that the election hinged on whether Gore or Bush had won Florida's pivotal *electoral* votes.<sup>6</sup> The tabulation from the electronic vote-counters showed Bush's lead in the State at a mere 1,784 votes<sup>7</sup>—a margin small enough to trigger an automatic recount.<sup>8</sup> After the legally mandated recount revealed that Bush's lead in Florida had diminished,<sup>9</sup> the fight moved from being exclusively political to an uncomfortable mixture of politics, spin, and legal challenges.<sup>10</sup>

---

2. See 3 U.S.C. § 1 (1997) (setting the Tuesday after the first Monday of November in every fourth year as the date on which presidential elections shall be held).

3. See David Von Drehle et al., *A Wild Ride Into Uncharted Territory; Two Candidates Caught a Whiff of Defeat—and Then Rapidly Mobilized for a Recount War*, WASH. POST, Jan. 28, 2001, at A1 (describing a presidential election between Vice President Al Gore and Texas Governor George W. Bush that was so tight that the decision would rest on who claimed Florida's electoral votes. During election evening, American television networks first proclaimed Gore the winner of Florida, then retracted the proclamation, then declared Bush the winner of Florida and hence the presidency, and then declared both Florida and the presidency too close to call.).

4. See *id.* "The election dispute in Florida went on for 36 days—a whirlwind of more than 50 lawsuits, and appeals to every possible court, news conferences, protests, speeches, public hearings, private strategies and televised ballot-counting sessions." *Id.*

5. National Archives and Records Administration, 2000 Presidential Election: Popular Vote Totals, <http://www.archives.gov/federal-register/electoralcollege/2000/popular-vote.html> (last visited July 31, 2007) (noting the result as Gore 50,996,582 to Bush 50,456,062).

6. See Drehle, *supra* note 3.

7. *Bush v. Palm Beach County Canvassing Bd.* ("*Bush I*"), 531 U.S. 70, 73 (2000) (*per curiam*).

8. See FLA. STAT. ANN. § 102.141(4) (West 1999).

9. *Bush I*, 531 U.S. at 73.

10. See Dan Balz et al., *What If?; The Election's Over, But Many Questions Remain about the Battle for Florida*, WASH. POST NAT'L WEEKLY ED., Feb. 12–18, 2001, at 7. In describing the Gore choice of seeking recounts only in certain Florida counties, the POST stated:

In practical terms, he had no alternative. There was no simple mechanism to trigger a statewide recount. State law required requests in 67 counties, with county canvassing boards given the power to determine whether to grant or reject a recount. Politically, Gore's team believed that such a move, which would have to come

Despite the increasingly narrowing margin from the ongoing vote recounts, on November 26, Florida Secretary of State Katherine Harris certified that George W. Bush had won the State: 2,912,790 to 2,912,253—a 537-vote victory.<sup>11</sup> Marking a first in American history, Gore filed a formal contest of the presidential election results in three Florida counties the day after the certification.<sup>12</sup> Meanwhile, one of the court cases led to a Florida Supreme Court decision that required the hand counting of *all* of Florida's presidential votes.<sup>13</sup> Many will remember the pandemonium that ensued as ballot counters scrutinized paper “punch card” ballots to divine the supposed intent of a far-removed voter.

Voters could only sit and wait to learn the outcome of the swirling legal battles in Florida and Washington. There was a deadline, however. Federal statutory law gives presumptive protection to electors who were chosen using the laws in place six days prior to the meeting of the electors from around the nation.<sup>14</sup> Gore's attorneys conceded that Florida's votes needed to be counted before December 12, 2000.<sup>15</sup> Counting the votes by December 12 would allow the state's slate of electors to cast their votes unchallenged. Eventually, as we all now know, the United States Supreme Court effective-

---

within 72 hours after the election, would have been a public relations disaster, interpreted by opponents and even neutral observers as an effort to prolong the election unnecessarily. *Id.*

11. U.S. News Online, Election 2000: Timeline of Postelection Events <http://www.usnews.com/usnews/news/election/magtimeline.htm> (last visited July 31, 2007). During the maniacal maneuvering that accompanied this battle, some counties began loosening their counting standards to include dents and marks that appeared on the ballots, while at the same time Miami-Dade's board concluded that the task was too daunting and halted its counting altogether. *See id.*

12. *See id.*

13. *See Gore v. Harris*, 772 So. 2d 1243, 1262 (2000). In the majority opinion, the court cites Florida Statute section 102.168(8) which gives the circuit judge authority to “fashion such orders as he or she deems necessary to . . . provide any relief appropriate under such circumstances.” FLA. STAT. ANN. § 102.168(8) (2000). The opinion also cites the statutory provision purporting to guide the counting of returns. *See id.* § 101.5614 (2000) (noting that any ballot which is damaged or defective so that it can not be machine-read “shall be counted manually at the counting center by the canvassing board;” and stating, “[N]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.”).

14. *See* 3 U.S.C. § 5 (2000) (describing the so-called “safe harbor” for states' electors).

15. *See Drehle, supra* note 2. In an exchange between Florida Supreme Court Chief Justice Wells and Gore lawyer David Boies during oral arguments in which the Chief Justice was pressing on this matter, Mr. Boies replied, “as long as the manual recounts will not impair the final certification in time to permit the selection of electors by December 12, those manual recounts must be included.” *Id.* “[Boies] referred directly five times, and indirectly several more, to the Dec. 12 deadline. Underlying all his answers—and many of the questions from the bench – was an unspoken assumption that the count was sure to give the lead to Gore. Then the ticking clock would be Bush's problem.” *Id.* (citations omitted).

ly stopped the vote counting in Florida.<sup>16</sup> Because the Florida Secretary of State had certified Bush as the winner, halting the vote count meant that the state's decisive electors would go to George W. Bush, thereby allowing him to become the next United States President.

### III. *BUSH V. GORE*

The United States Supreme Court has repeatedly held that Americans have a fundamental right to vote that is protected under the Equal Protection Clause of the Constitution.<sup>17</sup> In its landmark decisions of *Gray v. Sanders*<sup>18</sup> and *Reynolds v. Sims*,<sup>19</sup> the Court explained that the Constitution undeniably protects the right to vote<sup>20</sup> and that equal protection demands that each person must have one vote.<sup>21</sup> It was this idea of equal protection and "one person, one vote" that was the linchpin of the case deciding the 2000 election. In *Bush II*, the United States Supreme Court reversed the Florida high court's order to conduct a statewide recount of all of the State's "undervotes."<sup>22</sup> Although the Court remanded the case to Florida, recounts could not continue due to the timing constraints and the requirements prescribed by the order.<sup>23</sup>

George W. Bush had presented the following questions to the Supreme Court: "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Pro-

16. See *Bush v. Gore (Bush II)*, 531 U.S. 98, 111 (2000) (per curiam) (reversing the Florida Supreme Court's recount order).

17. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW; PRINCIPLES AND POLICIES 710 (Aspen Law and Business 1997) (citing *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

18. 372 U.S. 368 (1963).

19. 377 U.S. 533 (1964).

20. See *id.* at 554. See also DONALD E. LIVELY, LANDMARK SUPREME COURT CASES; A REFERENCE GUIDE 150 (1999).

21. See *Reynolds*, 377 U.S. at 561–62. Although this case is viewed as the point at which the court establishes the principle, it was first announced in the preceding year in *Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The concept of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

22. See *Bush II*, 531 U.S. at 111 (per curiam). Describing the problems of so-called "undervotes," the Court said, "[n]ationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason . . . . This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter." *Id.* at 103–04.

23. See *id.* at 111.

tection and Due Process Clauses.”<sup>24</sup> The Court restated the question in the *per curiam* opinion: “The question before us . . . is whether the recount procedures of the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.”<sup>25</sup>

The Court began by reviewing the Florida Supreme Court’s decision to order the recount of Florida’s ballots.<sup>26</sup> The Supreme Court explained that the Florida court had defined a “legal vote” as “one in which there is a clear indication of the intent of the voter.”<sup>27</sup> In explaining the equal protection application to voting, the Court noted that the protection extends beyond the allocation of the franchise to “the manner of its exercise.”<sup>28</sup> Further, “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”<sup>29</sup> The Court then reminded the reader that dilution of a vote’s weight effectively denies the voter the free exercise of the franchise.<sup>30</sup>

Because the Florida court had ordered the intent of the voter to be discerned by a visual inspection of ballots unread by machines, the Court concluded that individuals’ votes had an unequal opportunity to be counted.<sup>31</sup> Without rules on what indicated a vote for a candidate, it was the Court’s opinion that one person’s vote was more or less likely to be counted depending on where and by whom it was counted.<sup>32</sup> The Court concluded that this constituted a violation of the principle of “one person, one vote” established in the Court’s 1963 *Gray* decision.<sup>33</sup>

In addition, the Court conveyed concern that the Florida Supreme Court permitted the inclusion of partial recounts in the final certification.<sup>34</sup> According to the *per curiam* opinion, including partial recounts compounds the inequality of counting votes pursuant to the Florida court’s direction.<sup>35</sup> Without going into any further legal analysis of this concern, the Court an-

---

24. *Id.* at 103.

25. *Id.* at 105.

26. *See id.* at 100.

27. *Id.* at 102 (quoting *Gore v. Harris*, 772 So. 2d 1243 (2000)).

28. *Bush II*, 531 U.S. at 104.

29. *Id.* at 104–05 (citing *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966)).

30. *See id.* at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

31. *See id.* at 106.

32. *See id.* at 106. The court noted that at oral arguments it was revealed that “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.” *Id.* (*per curiam*).

33. *See id.* at 107. Likewise, the Court noted that by the Florida order only requiring a counting of undervotes, the so-called “overvotes” (ballots where more than one candidate was marked) were similarly denied equal treatment. *See id.* at 107–08.

34. *See Bush II*, 531 U.S. at 108.

35. *See id.* at 108.

nounced that “[t]he press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.”<sup>36</sup>

The Court’s *per curiam* opinion ended by describing what, *if time permitted*, would be a constitutionally sound course for the Florida Supreme Court to follow—essentially, practicable statewide uniform standards and orderly judicial review.<sup>37</sup> The Court ordered a reversal of the Florida Supreme Court decision to recount the undervotes and remanded the case for further consistent proceedings.<sup>38</sup> Since the votes needed to be counted pursuant to the state’s laws as of 11:59 p.m. on December 12, 2000, this decision by our highest court issued at 9:54 p.m. on December 12, 2000, did not permit the state time to manually recount the votes and retain the safe harbor protections for its electors. With this order, the United States Supreme Court effectively ended Florida’s vote counting, and the state’s decisive electors were finally placed in the Bush column.

#### IV. CONSEQUENCES OF *BUSH V. GORE*

After the chaos of the Florida recount and the resulting court cases, American political leaders were eager to prevent a recurrence. In early 2001, Congress moved to reform the nation’s election laws. Congress was reacting not only to the debacle seen in Florida, but also to the shock of having the judicial branch of our government play such a central role in affecting the outcome of a presidential election. Despite the historical importance of one branch of our government having such a dramatic impact on another branch, the Court’s self-limiting decision may have considerably diminished the enduring legal significance of the case. The *Bush v. Gore* decision did not explicitly compel states to devise statutes or judicial construction guaranteeing uniform treatment of ballots. Nor does the Court indicate that state courts will be limited in their ability to review their states’ election statutes.

The *Bush v. Gore* decision may very well have been an impetus for modernization and uniformity of election procedures, but only as an indirect result. The publicity and drama that surrounded this election and legal battles did much to encourage reform of election procedures—perhaps more so than the Court’s actual decision. Acrimony and accusations became pervasive as the election devolved into legal challenges. All branches of the Florida government were in unenviable positions in late 2000 as the vote counts

---

36. *Id.*

37. *See id.* at 110. “It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and a practicable procedure to implement them, but also orderly judicial review of any disputed matters that might arise.” *Id.*

38. *See id.* at 111.

and legal fights swirled around them. We would be wise to remember the following appearance of impropriety: the Governor of Florida was Bush's brother; Florida's top election official was a co-chairman of Bush's State campaign; the Florida Supreme Court Justices had all been appointed by Democrats and continually delivered decisions that benefited Gore; and the Republican-controlled Florida State Legislature was preparing to call a special session to select a slate of electors for Bush. If Florida had had a clearer record of the votes cast by its electorate, this national trauma could have been avoided.

During the 2000 election, Florida was still using the somewhat antiquated so-called punch card ballots. The phrase "hanging chad" became a sad punch line to a very troubling joke.<sup>39</sup> Because many of the ballots were not properly "punched," election officials had to make a subjective determination as to whether a voter *tried* to cast his or her vote for a particular candidate but was unable to do so. The time had come to modernize the means for the nation's electorate to cast its vote. "In response to that election, Congress passed a law in 2002 that provided billions of dollars to the states to replace outdated voting machines."<sup>40</sup>

An obvious solution to the ongoing problems of vote counting is to have a clear paper trail created by voters. Ideally, the voter could personally inspect the ballot before its final submission.<sup>41</sup> The Help America Vote Act (HAVA),<sup>42</sup> passed in the wake of the 2000 election, "does not require any particular voting system, but it sets requirements that influence what systems election officials chose."<sup>43</sup> One of the HAVA requirements was to make voting more accessible to disabled persons.<sup>44</sup> To achieve this goal, many election officials turned to so-called Direct Recording Electronic Voting Machines (DREs), commonly known as "touch screen" voting machines.<sup>45</sup>

39. See Peter Carlson, *No Hanging-Chad Cliffhanger? Oh, For the Days of '00*, WASH. POST, Nov. 4, 2004, at C1 ("The whole ordeal made [it] fun to watch Letterman and Leno."); see also Marc Peyser, *Who's Next 2004: Red, White & Funny*, NEWSWEEK, Dec. 29, 2003 ("Any second-rate comic can mock hanging chad, the Supreme Court and a nail-biting election—even Bill Maher seemed funny back in 2000.").

40. Zachary A. Goldfarb, *Campaign Strengthens For a Voting Paper Trail*, WASH. POST, Feb. 19, 2007, at A17.

41. In this author's Arkansas voting precinct, the voters use a paper ballot and a black ink pen on which voters mark an arrow pointing at the name of the selected candidate. The voter then feeds his or her paper ballot into a machine that optically scans the ballot to "read" the candidate selected. The paper ballot, which does not identify the particular voter, is then retained for later use if a recount is needed.

42. Pub. L. No. 107-252 (2002).

43. KEVIN J. COLEMAN & ERIC A. FISCHER, CONG. RES. SERVICE REP. FOR CONGRESS, ELECTION REFORMS: OVERVIEW AND ISSUES 2 (2004).

44. *Id.*

45. *Id.*



While these DRE systems have the ability to print a paper audit of the votes entered into the machine, they typically do not print out paper ballots for verification by the individual voter. Because the machines directly record the votes, there is too often no way to recount each vote cast using a paper ballot. Rather, the election officials must rely on the integrity of the computer system's software and the technical support from the vendors supplying the system to print an audit report.

In Florida, perhaps ironically, the efforts to modernize its voting systems have led to a new controversy. Florida's United States Congressman Robert Wexler filed suit in United States District Court arguing that Florida is currently not in compliance with the *Bush v. Gore* standard and the Equal Protection Clause of the United States Constitution because 52 counties in Florida use optical scan machines that allow for a manual recount, while the other 15 counties use touch-screen voting machines that have a paperless system, which cannot be recounted in the event of a close election.<sup>46</sup>

Following Wexler's defeat at the trial court level, the Eleventh Circuit Court of Appeals analyzed the Congressman's claims under the Due Process and Equal Protection clauses using the precedent of *Bush v. Gore*.<sup>47</sup> The Eleventh Circuit affirmed the trial court's ruling, concluding that strict scrutiny should not apply because the potential burden on voters is too remote and slight to overcome the state's important regulatory interests.<sup>48</sup> In January 2007, the United States Supreme Court chose to avoid revisiting its fractious *Bush v. Gore* decision with a denial of certiorari for the case.<sup>49</sup> Of course, this issue is much too important to fade away with just one courtroom defeat (or even three, in the case of *Wexler v. Anderson*).

On February 1, 2007, the recently elected Governor Crist of Florida, in conjunction with Congressman Wexler, announced that his recommended budget would include \$32.5 million to establish a paper trail for all votes

---

46. Press Release, United States Congressman Robert Wexler (Feb. 1, 2007) available at <http://wexler.house.gov/news.php?ID=279>. See also *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006), cert. denied, 127 S. Ct. 934 (Jan. 08, 2007).

47. *Wexler*, 452 F.3d at 1231 (citing *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam)).

48. *Id.* at 1232–33 (“[I]f voters in touchscreen counties are burdened at all, that burden is the mere possibility that should they cast residual ballots, those ballots will receive a different, and allegedly inferior, type of review in the event of a manual recount. Such a burden, borne of a reasonable, nondiscriminatory regulation, is not so substantial that strict scrutiny is appropriate.”) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding that a regulation imposing “severe” restrictions must be “narrowly drawn to advance a state interest of compelling importance”); *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) (“We cannot say that use of paperless, touchscreen voting systems severely restricts the right to vote.”); cf. *Stewart v. Blackwell*, 444 F.3d 843, 868–72 (6th Cir. 2006) (applying strict scrutiny where plaintiffs “alleged vote dilution due to disparate use of certain voting technologies”).

49. *Wexler v. Anderson*, 127 S. Ct. 934 (2007).

cast in Florida elections.<sup>50</sup> These funds would be used to “replace touch-screen voting machines with optical scan machines in all precincts statewide.”<sup>51</sup> Wexler stated, “[t]hanks to the leadership of Governor Crist, Florida closes the chapter on our mismanaged elections of the past, and this state now leads the way in election integrity—with the guarantee of a paper trail for all votes cast.”<sup>52</sup>

Obviously, Florida is not alone in its difficulties in counting votes. Another lawsuit was begun recently in New Jersey in an attempt to prove (or disprove) the reliability of the electronic voting machines used in that state.<sup>53</sup> That suit does not specifically challenge the lack of a paper trail but rather that the state did not properly certify that the voting machines were adequately protected from tampering.<sup>54</sup> Counsel for the plaintiffs in the suit claims that a Princeton University computer science professor was able to circumvent the security measures of the machines within minutes.<sup>55</sup> New Jersey does have a January 2008 deadline to equip all voting machines to enable paper printouts to check for discrepancies in the event of irregularities;<sup>56</sup> this still does not ensure that there is an adequate paper trail, however, for *each* vote cast. If, for instance, a machine were entirely disabled, defective,<sup>57</sup> or its security became compromised,<sup>58</sup> there would not be a simple way to go back to the ballot boxes from that machine and recount those votes.

Again today, efforts are under way in Washington to correct the problems associated with uncounted or undercounted ballots. At the time of writing this article, the United States House of Representatives has pending H.R. 811 to amend the HAVA to require a voter-verified permanent paper ballot.<sup>59</sup> The bill presently has 216 co-sponsors, including three of Arkansas’s four United States Congressmen, Marion Berry, Vic Snyder, and Mike Ross. Considering that only 218 votes are required to pass a measure in the House,

---

50. Press Release, Florida Governor Charlie Crist (Feb. 1, 2007), *available at* <http://www.flgov.com/releases/8585>.

51. *Id.*

52. Press Release, U.S. Congressman Robert Wexler, *supra* note 46.

53. Richard G. Jones, *Proof Sought on Reliability of Vote Units*, N.Y. TIMES, Feb. 17, 2007, at B4.

54. *Id.*

55. *Id.*

56. *Id.*

57. Anyone who is at all familiar with personal computers can attest that today’s computer’s operating systems are far from perfectly stable.

58. There may seem to be little incentive for a computer science expert to interfere with the electronic voting systems, yet frequently new computer viruses are created and disseminated that have no obvious benefit to their inventors. Either through design defects or malfeasance, modern computers are prone to malfunctions.

59. H.R. 811, 110th Cong., § 2(a)(2)(A)(i)(2007).

this level of co-sponsorship bodes well for the bill's passage in that body. In addition, the United States Senate has a companion bill, S. 559, introduced by Florida Senator Bill Nelson.<sup>60</sup>

Both the House and the Senate bills state that "[t]he voting system shall require the use of or produce an individual voter-verified paper ballot of the voter's vote that shall be created by or made available for inspection and verification by the voter before the voter's vote is cast and counted."<sup>61</sup> In other words, the bills would allow a voter to determine in advance if the ballot accurately reflects his or her intention and later would allow election officials to review those ballots to verify the vote count. This appears to be a long-overdue protection for the fundamental rights to vote and to have one's vote count.

## V. CONCLUSION

We all deserve to have our voices heard and our votes counted. Those two fundamental rights demand equal protection under our laws. Settling for less than a verifiable and secure method to exercise our fundamental right to vote seems not only shortsighted, but also foolish. The continuation of our democracy relies on our ability to vote freely and without disruption; therefore, the public and our leaders must demand election systems to count every vote.

We definitely should not make the election system any more complicated than is necessary. I can think of no simpler method to ensure that all votes are counted than the use of paper ballots that are retained until the election is certified. Perhaps this practice seems quaint and anachronistic, but it works. Let us hope that we never again see a need to hand count and recount a state's ballots for president. If we do have to undertake that task, we must act now to ensure that there are some actual ballots to count.

---

60. S. 599, 110th Cong. (2007).

61. *Id.*; see also H.R. 811, 110th Cong., § 2(a)(2)(A)(i)(2007).