

VI. A Democratic Process *that Handles Close Elections in a Foreseeable and Fair Way*

Everyone who observed the 2000 election crisis was struck by the sheer unreadiness of every part of the system to deal with a close election. Recount and contest laws were not designed for statewide challenges. The relevant state deadlines did not mesh well with the federal schedule. Each county made its own decisions about what, when, or whether to recount. In performing the recounts the definition of a vote varied from county to county, and from official to official within the counties. Lawsuits materialized across Florida, urging judges to construct law that would overcome the alleged deficiencies of the statutes. The principal television networks also found themselves unready to deal with a very close election. Unable to handle extremely close results carefully and accurately, they dealt with them negligently and inaccurately—and loudly too—erring assertively again and again during the course of Election Night and thereby affecting the course of the very history they were supposedly only trying to report.

Objective Vote Definitions and Foreseeable Post-Election Procedures

A major part of the problem in Florida was that the vote counting process was so subjective and variable. The Supreme Court of the United States found such a standardless process to be unconstitutional, a violation of the Equal Protection Clause of the Constitution. Florida is not alone. Most state statutes do not specify a legal standard for election officials to follow in recounting votes. Amorphous statutory references to the “intent of the voter” invite still more divinations.

To the maximum extent possible, partisans on either side should be able to foresee, before a recount, how a vote will be defined by the recounters. In other words, the definition of a vote should be as objective as possible and spelled out in clear language before Election Day.⁶⁰

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Three disputed ballots,
Palm Beach County, FL,
November 28, 2000.



★ ★ **Policy Recommendation** ★ ★ ★

Each state should adopt uniform statewide standards for defining what will constitute a vote on each category of voting equipment certified for use in that state. Statewide recount, election certification, and contest procedures should take account of the timelines for selection of presidential electors.

1. Statewide standards for defining a vote in advance of an election should be uniform and as objective as possible.
2. Each state should reevaluate its election code to consider adopting a predictable sequence of: a) vote tabulation and retabulation; b) machine or manual recounts to encompass the entire jurisdiction of the office being recounted, triggered by whatever threshold the state may choose; c) certification of a final count; followed then by d) contests of the certification limited to allegations of fraud or other misconduct.
3. In such a sequence, each state should allow at least 21 days before requiring certification of the final count. But we recommend retention of a federal deadline under which the “safe harbor” for conclusive state determination of presidential electors will expire.
4. Each state should also develop a uniform design for the federal portion of the state ballot, for use in each of that state’s certified voting equipment systems.

The Florida Election Reform Act of 2001 rewrote the rules for manual recounts of ballots. Its approach to the problem of statewide definitions of a vote, if there is a manual recount, was to start with a sound general principle, to count a vote if there is “a clear indication on the ballot that the voter has made a definite choice.” The Department of State is then commanded to adopt specific rules for each certified voting system prescribing what will constitute such clear indications. The law provides two boundaries for such rulemaking. On the one hand, the Department of State may not “exclusively provide that the voter must properly mark or designate his or her choice on the ballot.” On the other, the rules may not “contain a catch-all provision that fails to identify specific standards, such as ‘any other mark or indication clearly indicating that the voter has made a definite choice.’”⁶¹

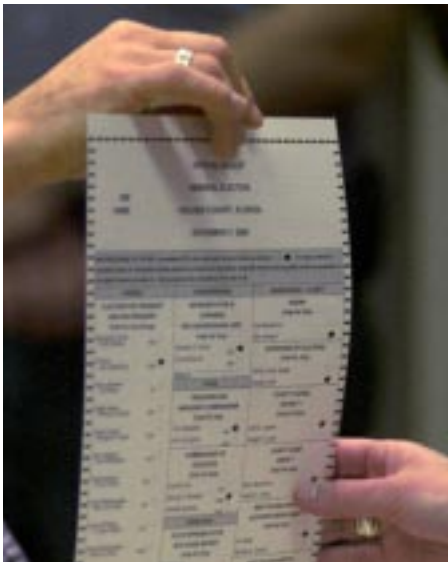
In other words, the Florida law requires that some allowance be made for at least some voter errors that nonetheless indicate a clear choice, while it also warns that the varieties of voter error that will be tallied in a manual recount must still be specified, and specified statewide, before such a recount begins. This strikes us as a reasonable and necessary balance that states should endeavor to find in drafting their own standards, either in statute or in published administrative rules.

In examining the procedures for recounts and contests, we are struck—like practically all others who have taken such inventories—by the bewildering variety of procedures, criteria, and deadlines found around the country. We are opposed to any uniform federally imposed system. But in our mobile society, with national elections and media scrutiny, we think some rudimentary consistency of approach from one state to another may make the workings of an inherently contentious process more foreseeable and understandable.⁶²

Our evaluation of best practices envisions the following model sequence:

- Initial machine tabulation (and retabulation) of ballots, including the tabulation of all absentee and provisional ballots. Given our recommendation of greater use of provisional ballots and the time line for counting overseas votes, we think that at least 14 days should be allocated for this process, even if states call for more immediate transmission of unofficial machine tabulations.
- Manual recounts, triggered by criteria set by each state (Florida's new law has a suggestive set), that should extend throughout the area in which the contest was on the ballot. These recounts would be guided by the uniform statewide standards mentioned above. The U.S. Supreme Court decision in *Bush v. Gore* appears to require this reform. Nonpartisan appointees should supervise them. We believe at least 7 days should be allocated for this process, especially if the recount is statewide.
- Certification of the final vote count. In large election jurisdictions, at least 21 days should be allowed before requiring certification. But at this point all issues regarding the tabulation of votes should be settled.
- Contests. These contests would concede the accuracy of the count, hence they are different from recounts. In a contest the argument should instead be that the votes that were counted should be invalidated because of fraud or other misconduct in the electoral process. Under Florida's old law, and the law of thirteen other states, the distinction between recounts and contests is blurred by allowing a contest for any reason that casts the election outcome in doubt. Florida has now adopted the distinction we recommend. Since contests can involve extensive litigation and taking of evidence about possible misconduct, however, we think the contest phase should clearly be separated from the vote count and certification process itself.

A ballot during manual recount, DeLand, FL, November 12, 2000.



Congress has established a deadline of December 12, about five weeks after the election, by which states should resolve controversies about the appointment of a state's electors if they want their resolution to be binding on the Congress's own consideration of the dispute.⁶³ That due date allows enough time for counting and

recounting ballots and some time for resolution of contests as well. The December 12 date was adopted at a time when presidents were not inaugurated until March of the following year. Presidents are now inaugurated on January 20, as a result of the 20th Amendment to the Constitution. Though we do not recommend pushing the “safe harbor” deadline even earlier than December 12, we also do not recommend setting this date any later. A new president needs a decent opportunity to get the minimally necessary elements of a new administration into place.

Media Projections of Election Results

On Election Night 2000 the major television news organizations (ABC, CBS, NBC, CNN, and Fox) and Associated Press made a series of dramatic journalistic errors.



Report on the presidential race, November 8, 2000.

While polls were still open in Florida’s panhandle, they projected that Vice President Gore had won the state. They later had to retract this projection. They also projected that Bush had won Florida and, with it, the presidency. Gore then moved to concede the election, beginning with a call to Governor Bush. He then had to retract that call, and the news organizations had to retract theirs. (Associated Press did not; it had not made the second error.) The first set of errors may have influenced voters in Florida and in other states where the polls were still open. The second set of errors irretrievably influenced public perceptions of the apparent victor in the election, which then affected the subsequent controversy over the outcome in Florida.

These problems are not new and are not limited to close elections. Early projections of Johnson’s victory in 1964 came well before the polls closed in the West. The same was true in 1972. In 1980, as a result of the media projections, President Carter felt obliged to concede his defeat while polls were still open in the West. In all these cases candidates

further down the ballot felt the effect. In 1980 the estimated voter turnout was about 12% lower among those who had heard the projections and not yet voted when compared with those who had not heard them.

For decades, public opinion surveys have disclosed abiding irritation with early projection of election results by the news media—and that was when the news organizations’ projections were accurate. Then came the 2000 election. The media projection errors on Election Night 2000 highlight a foolish race for momentary bragging rights and a tiny ratings advantage.

The Commission condemns the controversial practice by which national news networks declare a projected winner in the presidential election before all polls close within the contiguous 48 states of the United States.

This practice demeans democracy. It discourages citizens from participating in the most basic and enriching aspect of self-government—voting. It robs candidates, from the White House to the state house to the courthouse, of votes they have a right to expect. It mocks the most salient lesson of the November election—that every vote is important and should be counted.

The assertion by network executives that it would be dangerous or wrong to delay calling the outcome of the presidential election until all polls close at 11:00 p.m.

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(EST) is disingenuous and dishonest. In fact, the networks in the last several presidential elections voluntarily have withheld calling the projected presidential winner in Eastern Time Zone states until after 7:00 p.m. (EST). In addition, as a result of the erroneous news reporting in Florida on the night of November 7, the networks now voluntarily have agreed to withhold calling the projected presidential winner

in states with two time zones until all polls have closed in those states.

Networks contend there is no evidence that early reporting of a presidential winner deters voters from going to vote or remaining in line at the precincts. As the decisions recited above clearly indicate, they know better. The networks' refusal to adopt a national policy to withhold declaring a presidential winner until all polls close is knowingly inconsistent and discriminates against citizens and candidates in much of the nation.



St. Petersburg Times headline declares winner on, November 8, 2000.

Government cannot prohibit news organizations from irresponsible political reporting. It cannot bar the exit polls on which networks largely rely for their early calls of a projected winner. The Commission notes the body of evidence that has mounted since November documenting the unreliability of exit polls. The networks now know, from their internal investigations and from studies by their paid consultants that exit polling is seriously flawed. The dirty little secret of the last campaign was that exit polls conflicted with the actual final results in

many states—and in five specific instances by as much as seven to sixteen percent.

Network officials acknowledge that these exit polls have become more fallible over the years as more and more voters have refused to participate in them. The Commission was shocked by reports that network interviewers at polling precincts have offered tawdry inducements, such as small sums of money or cigarettes, as enticements to citizens to participate in exit polling. Such conduct cheapens journalism and creates an unhealthy polling place environment. The Commission strongly encourages citizens not to participate in exit polling. If candidates, political parties and election officials actively encouraged voters not to participate in the exit polling game, it could further erode the credibility of exit polls and network reliance on them.

At the same time, Congress and the states may not be completely powerless in making it difficult for the networks to call prematurely a projected winner in presidential elections. In addition to exit polls, networks rely for their early projections on official vote tallies from carefully selected precincts across a state and preliminary raw vote tallies from the state as a whole. Government officials need not be so cooperative. Statutes prohibiting public disclosure of official presidential election tallies until all polls close could limit the news media's ability to project an early winner and be consistent with the First Amendment. At the very least, withholding official vote tallies would leave the networks relying on unreliable exit polls.

★ ★ Policy Recommendation ★ ★ ★

News organizations should not project any presidential election results in any state so long as polls remain open elsewhere in the 48 contiguous states. If necessary, Congress and the states should consider legislation, within First Amendment limits, to protect the integrity of the electoral process.

1. In practice, this would mean that news organizations would voluntarily refrain from projecting the outcomes of the presidential elections in any state until 11:00 p.m. Eastern Standard Time (8:00 p.m. Pacific Standard Time). Voluntary restraint is preferable to government action.
2. If news organizations refuse to exercise voluntary restraint, Congress and the states should consider prohibiting any public disclosure by government entities of official election tallies in the race for president and vice-president at the precinct level and above until 11:00 p.m. EST (8:00 p.m. PST), where such regulations are consistent with existing provision for public observation of the vote tabulation process.
3. If news organizations refuse to exercise voluntary restraint and other measures cannot protect the integrity of the electoral process, Congress should impose a plan for uniform poll closing hours in the continental United States for presidential elections.
4. National television broadcasters should provide, during the last thirty days of the presidential campaign, at least five minutes each night of free prime television time to each presidential candidate who has qualified for federal matching funds. They or their local affiliates should further make free time available for state and local election officials to provide necessary voter education.

Government cannot prohibit exit polls, or even do very much to constrain them. But the First Amendment does allow government to control what its own officials do.

Voters in Chubbock, ID,
November 7, 2000.



Even if the states do not act on their own, we believe Congress may be able to legislate directly in the limited fashion we have suggested under the Elections Clause (protecting the integrity of congressional elections by insuring that turn-out is not depressed by announcements of results for the top of the ballot). Or Congress can rely on Article II, Section I's power to set the "the time of choosing" electors and the Spending Clause. The networks could still discuss their polls, as they do before an election, but their capacity to call elections—already somewhat shaken—will erode still further.

These legislative remedies are not a sure cure. Deprived of or constrained in getting official tallies, the news organizations—through the Voter News Service—might choose to redouble their exit polling efforts. That source has become more fragile, though, as survey response rates fall and the prevalence of early and absentee voting rises. Nevertheless, by doubling or tripling or quadrupling the polling effort, VNS might offset some of this lost data. This approach would shift the burden in

spending from media projections right back to where it belongs—to the television industry that hopes to profit from making them.

The most popular idea for discouraging media projection of presidential election results is to adopt a plan of uniform poll closing times. This Commission cannot summon much enthusiasm for this approach. For such a law to work, polls must stay open later in the East or close earlier in the West. Several problems arise. Extending poll closing hours can be very costly, especially if polls must remain open for 15 hours (currently true in New York). If polls end up being open longer in the East, Western voters could complain about the differential treatment. Closing polls earlier in the West is a bad option; many Western voters turn out in the hours between 6 and 8 p.m. local time. Obtaining conformity of poll closing times in the Central and Mountain time zones is also no easy task. Some bills call for easing this burden by setting up special daylight savings time arrangements that would operate in presidential election years. This approach seems too complicated and disruptive.

In general, uniform poll closing time proposals would make voters and financially strapped counties pay the price because the television industry prefers to chase an ephemeral ratings edge. However, it may be the final option available to Congress as a last resort if voluntary restraint or prohibiting disclosure of tallies fails to protect the integrity of the electoral process.

1	27	53	79	105	131	157	183	209	235	261	287
2	28	54	80	106	132	158	184	210	236	262	288
3	29	55	81	107	133	159	185	211	237	263	289
4	30	56	82	108	134	160	186	212	238	264	290
5	31	57	83	109	135	161	187	213	239	265	291
6	32	58	84	110	136	162	188	214	240	266	292
7	33	59	85	111	137	163	189	215	241	267	293
8	34	60	86	112	138	164	190	216	242	268	294
9	35	61	87	113	139	165	191	217	243	269	295
10	36	62	88	114	140	166	192	218	244	270	296
11	37	63	89	115	141	167	193	219	245	271	297
12	38	64	90	116	142	168	194	220	246	272	298
13	39	65	91	117	143	169	195	221	247	273	299
14	40	66	92	118	144	170	196	222	248	274	300
15	41	67	93	119	145	171	197	223	249	275	301
16	42	68	94	120	146	172	198	224	250	276	302
17	43	69	95	121	147	173	199	225	251	277	303
18	44	70	96	122	148	174	200	226	252	278	304
19	45	71	97	123	149	175	201	227	253	279	305
20	46	72	98	124	150	176	202	228	254	280	306
21	47	73	99	125	151	177	203	229	255	281	307
22	48	74	100	126	152	178	204	230	256	282	308
23	49	75	101	127	153	179	205	231	257	283	309
24	50	76	102	128	154	180	206	232	258	284	310
25	51	77	103	129	155	181	207	233	259	285	311
26	52	78	104	130	156	182	208	234	260	286	312

GENERAL ELECTION BALLOT
 NOVEMBER 7