Bush vs. Florida

By Einer Elhauge

CAMBRIDGE, Mass.

The lawsuit by George W. Bush challenging Florida's manual recount has had a rough reception. A federal appellate court declined on Friday to issue an injunction while the matter is in state court. And most legal scholars panned Mr. Bush's federal lawsuit, arguing that federal courts hate interfering in state-run elections, especially when the challenge is to a rule that seems neutral and has a long history of use.

Hold on. Doesn't anyone remember John Anderson?

Mr. Anderson ran for president in 1980. Having lost the Republican nomination, he ran as an independent candidate, but he had a little problem. Some states, like Ohio, had early filing deadlines that made it difficult for an independent to launch a late presidential campaign.

Yes, federal courts can — and do — step into state elections.

So Mr. Anderson went to federal court to invalidate Ohio's filing deadlines. And he won, even though he was challenging the conduct of a state-run election. He won even though filing deadlines, like manual recounts, seem neutral and had long been an accepted practice. He won because the federal courts accepted the argument that filing deadlines tend to discriminate against late-emerging, independent candidates without reasonably advancing important state interests.

Indeed, Mr. Anderson's case made it all the way to the United States Supreme Court, which established that state election law must be reasonable and nondiscriminatory — even in a state-run election for state offices.

How does Mr. Bush's lawsuit stack up against this standard? One must first understand that the Bush lawsuit is not against manual recounts, but against an election system run by partisan county officials who lack any objective standard for whether or how to conduct manual recounts, and who have allegedly exercised their power in a discriminatory fashion.

Isn't there something a little worrisome in an electoral system that gives partisan county officials unfettered power to decide whether to conduct manual recounts? The obvious concern is that county officials will grant manual recounts only when asked by candidates they like. Moreover, in Florida, a state appellate court ruled in 1992 that such county decisions are not reviewable in state court at all. In that case, Broward County declined to do a manual recount in a local council race even though the gap between candidates in a computer recount was only five votes.

It's also worrisome that the handling during manual recounts tends to alter punch-card ballots and that there are no clear objective standards for interpreting chads. Republicans have already offered multiple affidavits claiming discriminatory handling and interpretation of the ballots. Given these problems, a federal court might well conclude that a machine that makes errors equally for both candidates is preferable to a hand count that might be biased toward one candidate.

Whether the Bush litigation will succeed is, of course, another matter. But this is certainly the sort of claim that the federal courts can and should treat very seriously.

Presidential elections "implicate a uniquely important national interest," wrote Justice John Paul Stevens in Anderson v. Celebrezze. "For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.... The state has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the state's boundaries."

So, if the Florida Supreme Court rules that manual recounts must be included in the presidential vote, no one should be surprised if the U.S. Supreme Court steps in. ☐

Einer Elhauge is a professor at Harvard Law School.