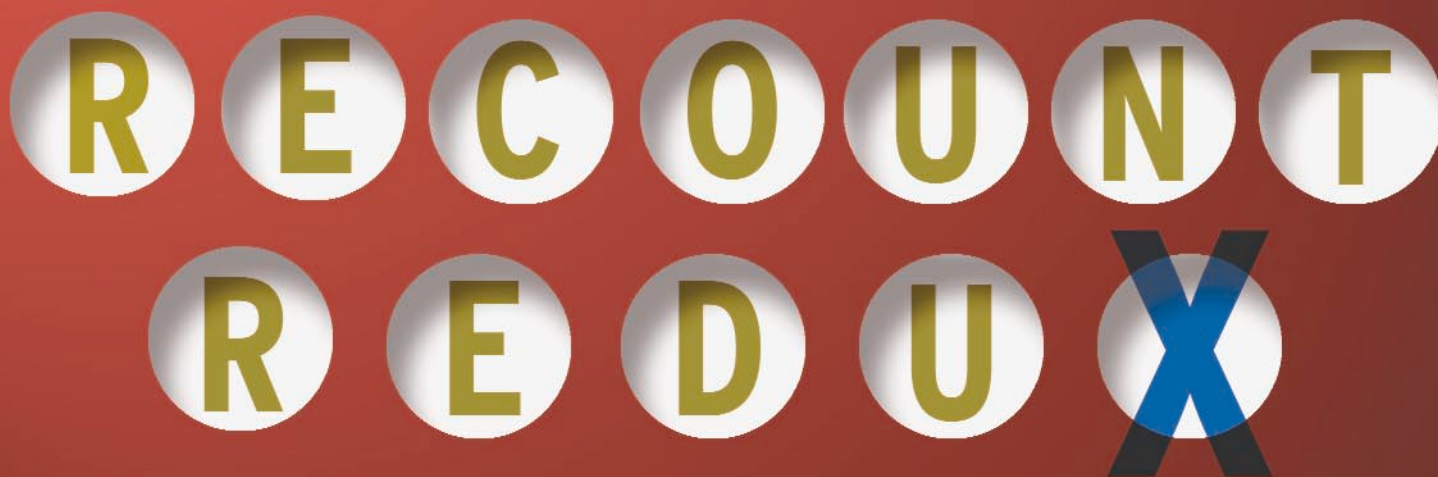


Could Florida's Election Hurricane Happen in Arizona?

Many Arizonans probably have asked themselves, Could it have happened here? What if after the initial count in last year's presidential election, George W. Bush's lead over Al Gore in Arizona was 1,784 votes? Assuming the election was clearly decided in every other state, could the same vote count issues that arose in Florida last year have arisen in Arizona?



by Joseph Kanefield

THE HEART OF THE SOLUTION is found when we examine when and how an Arizona recount would occur. If the difference between the candidates' electors was fewer than 1,467 votes, then in Arizona (as in Florida) an automatic recount would have been tabulated on the same electronic voting equipment on which the votes were initially tabulated.⁶ However, the recounts would have been conducted by the secretary of state using a computer program different from the one used in the initial tabulation.

The Hardware of Arizona Voting

Ten of Arizona's 15 counties use punch card equipment similar to the kind that was used in Florida. The other five counties, including populous Maricopa and Pima counties, use a "mark-sense" optical scan ballot. With this system, the voter marks his ballot using a pen with graphite ink that is then read by an optical scanner.

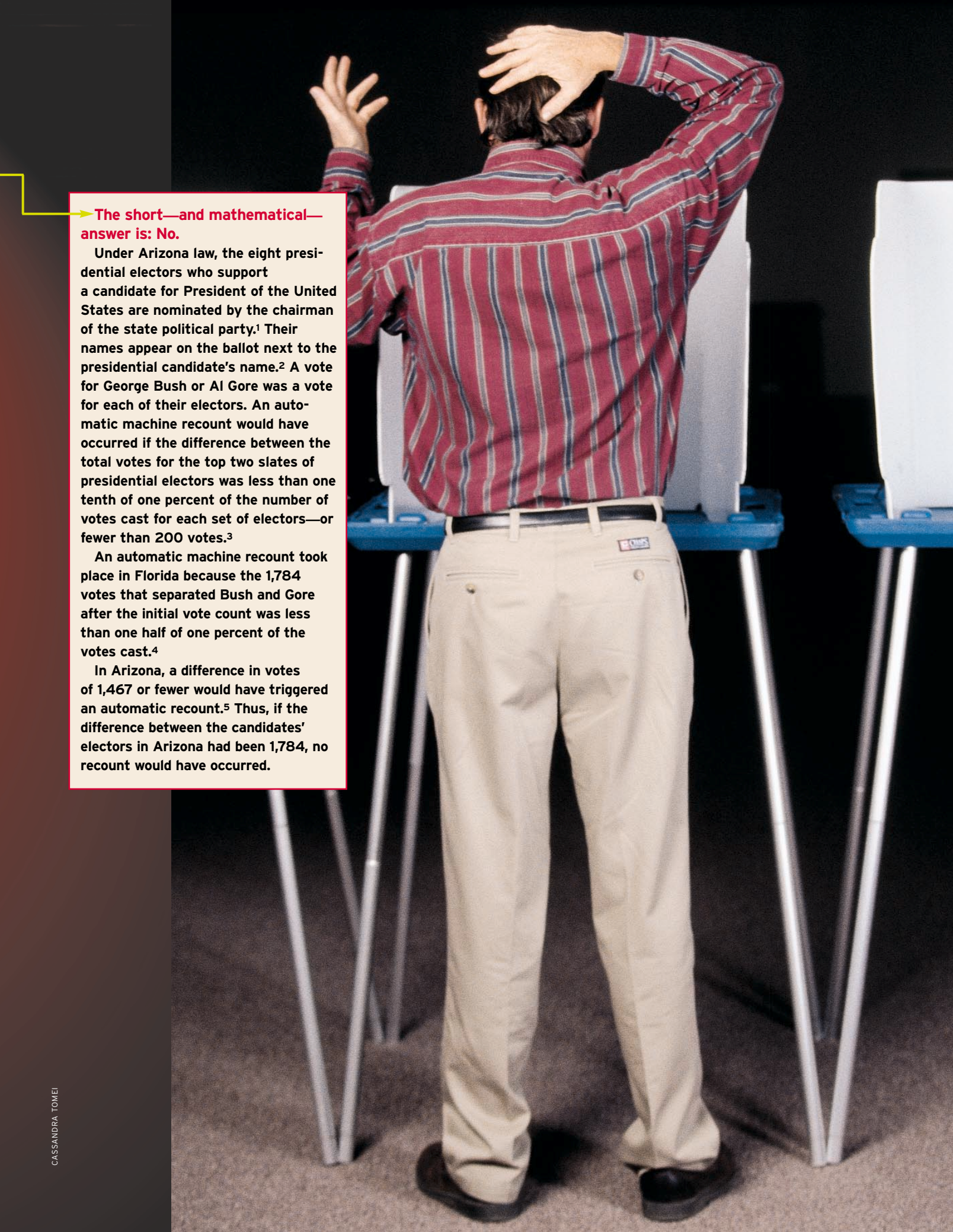
Due to the concentration of population in Maricopa and Pima counties, more than 80 percent of Arizona voters use optical scan ballots. By law, all vote tabulation equipment is subject to an independent logic and accuracy test that is conducted by the secretary of state's office within a week before the election.⁷ The test is done in accordance with a uniform procedure manual created by the secretary of state pursuant to statute, which has the force and effect of law upon approval by the governor and the attorney general.⁸ The secretary of state's staff marks or punches votes on test ballots for each county that are identical to the ballots that will be used in the election. These ballots are hand-counted before they are tabulated on each county's equipment. Each machine is separately tested in public to assure that it has been programmed and calibrated to count accurately the actual ballots cast at the

election.⁹ The secretary of state will not approve the equipment unless the equipment passes the test.

Taking Matters in Hand

Unlike a candidate in Florida, a candidate in Arizona does not have a statutory right to request a manual recount in individual counties after the initial vote tabulation is conducted.¹⁰ Although Arizona's counties run the election and conduct the first vote count, the secretary of state declares the results and, in sufficiently close races, conducts the automatic recount of the ballots for the entire state.¹¹ The Arizona Court of Appeals has declared that whether to provide a recount lies within the discretion of the legislature.¹² Thus, unless provided for in statute, a candidate does not have any statutory right to request a manual or hand recount.

*Barrera v. Superior Court*¹³ is the only case in Arizona addressing the issue of a



→ **The short—and mathematical—answer is: No.**

Under Arizona law, the eight presidential electors who support a candidate for President of the United States are nominated by the chairman of the state political party.¹ Their names appear on the ballot next to the presidential candidate's name.² A vote for George Bush or Al Gore was a vote for each of their electors. An automatic machine recount would have occurred if the difference between the total votes for the top two slates of presidential electors was less than one tenth of one percent of the number of votes cast for each set of electors—or fewer than 200 votes.³

An automatic machine recount took place in Florida because the 1,784 votes that separated Bush and Gore after the initial vote count was less than one half of one percent of the votes cast.⁴

In Arizona, a difference in votes of 1,467 or fewer would have triggered an automatic recount.⁵ Thus, if the difference between the candidates' electors in Arizona had been 1,784, no recount would have occurred.

manual recount. In *Barrera*, the Arizona Court of Appeals rejected the request of an unsuccessful Graham County Board of Supervisors candidate for a manual recount of ballots based on the candidate's hunch that the machine count was not accurate. The court essentially held that the only process available to a candidate to question a machine's accuracy was through a contest action, which the candidate did not timely pursue. In contrast to Florida, a candidate in Arizona could not request—and *Barrera* establishes that a court would not order—a manual recount before the final vote canvass, which occurred on November 27, 2000.¹⁴ However, this does not mean that the issue of manual recounts would not have arisen in an election contest action.

In Arizona, any person properly registered to vote can contest the election of any person declared elected to state office.¹⁵ The contest action must be filed within five days after the canvass is completed.¹⁶ It was under Florida's election contest statute that Gore challenged the certified result of the Florida election declaring Bush to be the victor. He

argued that "a number of legal votes sufficient to change or place in doubt the result of the election" had been rejected as a result of their failure to be counted by the punch card machines.¹⁷

The Florida Supreme Court's decision allowing the manual recount to proceed based on Gore's contest action was overturned by the U.S. Supreme Court. In *Bush v. Gore*, the Court held that absent uniform rules, the county-by-county recount mechanisms implemented in response to the Florida Supreme Court's decision did not satisfy the minimum requirement for nonarbitrary treatment of votes necessary to serve the fundamental right to vote guaranteed to each voter under the equal protection clause of the U.S. Constitution.¹⁸ The Court was concerned that each county election board was determining the "intent of the voter" based on different standards. For example, some boards counted as votes punch card ballots with a "dimpled," "indented" or "pregnant" chad, the piece of paper on the ballot that is punched through by the voter with a stylus. Other boards did not. The Court concluded that equal protection required uniform

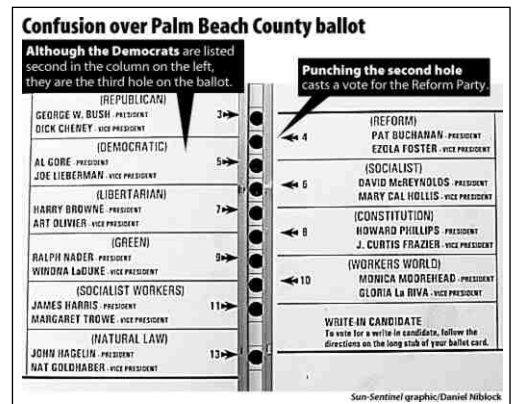
SO WHAT REALLY HAPPENED IN FLORIDA?

Although there were many lawsuits filed in Florida after the election on November 7, 2000, here is a quick review of the dispute that was ultimately resolved by the U.S. Supreme Court.

The initial vote count after the election revealed that George Bush had 1,784 more votes than

Al Gore. By law, an automatic machine recount occurred, which resulted in Bush remaining ahead but by a smaller margin of votes. As permitted by Florida law, Gore then requested a manual recount in four of Florida's counties.

After a lawsuit was filed to stop the recount, the Florida Supreme Court allowed the recount to continue.¹ The U.S. Supreme Court ultimately overruled the Florida Supreme Court on the grounds that the recount was not being conducted in a uniform manner, which was a violation of the Constitution's equal protection clause.² Specifically, the Court was concerned that different counties were applying different standards in determining whether a vote should count.³



1. *Palm Beach County Canvassing Board v. Harris*, 2000 WL 1725434 (Fla. 2000); *Palm Beach County Canvassing Board v. Harris*, 2000 WL 1804707 (Fla. 2000).

2. *Bush v. Gore*, 121 S. Ct. 525 (2000).

3. 121 S. Ct. at 530.

rules for determining voter intent.¹⁹ There was not enough time to develop uniform standards, and the result of the election before the hand counts began became final.

The same issue could have presented itself in Arizona in the 10 counties that use the punch card system. Like Florida, Arizona uses an “intent of the voter” standard in determining how a questionable ballot should be counted.²⁰ Also like Florida, the standard used to ascertain the intent of the voter is applied by election boards in each county. However, this determination is made pursuant to the uniform procedures manual and done before the votes are initially counted.²¹

Arizona Procedures Take on Chad and Other Dangling Problems

The secretary of state’s procedures manual identifies rules for attaining “the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.”²² Jessica Funkhouser, the state’s election director, notes that “Arizona’s procedures manual answers a lot of the questions that arose in Florida, and all counties are required to use these procedures.”²³

Moreover, county election officials and employees must undergo training and become certified.²⁴ This includes people who recruit and train poll workers. It is at this training that the uniform standards set forth in the procedures manual are taught to the election officials. Thus, there is little room for different standards to be applied by each county election board.

The procedures manual, for example, deals with the chad issue that the Supreme Court found troubling in Florida by requiring that an “Inspections Board” examine punch card ballots and remove a “hanging chad/chip” before the ballots are counted the first time.²⁵ Such “hanging” chads are generally understood

to be those chads that are attached to the ballot by one or two corners. Unlike the case in Florida, Secretary of State Betsey Bayless notes, “This is done at a time when no one yet knows the outcome of the election.” Although the manual does not address whether a dimpled, indented or pregnant chad should be counted, it sets forth procedures that reduce the possibility of these chads. For example, election board workers are required to make sure it is possible to punch the stylus completely through a ballot for every office on the ballot periodically throughout the day of the election.²⁶ This decreases the possibility of chad buildup that can make it difficult to punch the stylus through the ballot.

Arizona ballots that contain chads that were not detached by two or more corners are likely to be counted as a “No” vote for the candidate. They would not have been counted during the initial tabulation, and they likely would not have been counted during the automatic machine recount. Moreover, there is no provision in the law that would allow a candidate to demand a manual recount or inspection of these ballots after the recount. Thus, it is true that what occurred in Florida before the final vote certification would not have occurred in Arizona. Nevertheless, a contest action still could have been filed here by the losing candidate.

Contest Actions

The contest statute, A.R.S. § 16-672, identifies six grounds for contesting the result of an election: (1) misconduct on the part of election officials, (2) ineligibility of the person elected, (3) bribe of an election official or judge, (4) illegal votes, (5) erroneous count of votes, and the catchall (6) any other offense against the elective franchise. Although this statute does not have a “rejection of a number of legal votes” ground as Florida does, a similar challenge could have been made for an alleged “erroneous count” that did not include lawful votes that were not

IN THE FLORIDA ELECTION TRENCHES

The *ABA Journal* provides a behind-the-scenes glimpse of one week in the Florida recount in its January 2001 cover story. Reporters followed lawyers who filed suits for various parties and those who advocated for Florida Secretary of State Katherine Harris. Read the whole tale at <http://www.abanet.org/journal/jan01/home.html>.

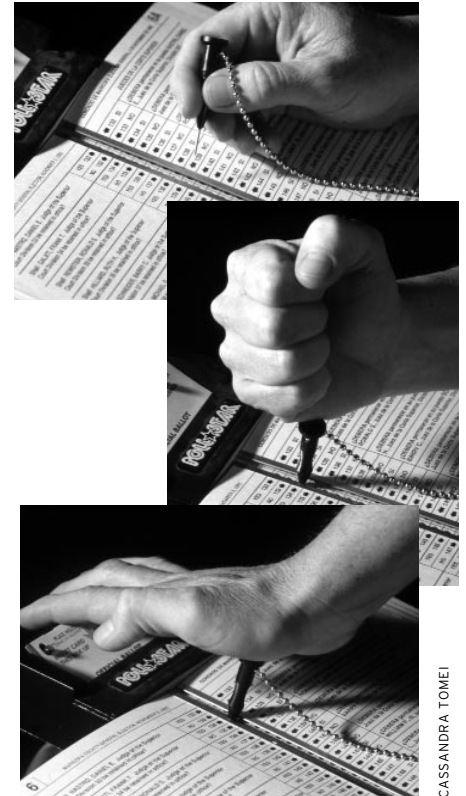
counted by the machine. Such a challenge could raise the issue of whether a dimpled, indented or pregnant chad should count as a legal vote in Arizona.²⁷ Moreover, a failure to include lawful votes also arguably might be “an offense against the elective franchise,” which is another statutory basis for an election contest.

The optical scan ballot used by a majority of Arizona voters makes it less likely that the same issues that arose in Florida would have arisen in Arizona. This system has a much lower error rate and eliminates any dispute about chads.²⁸ Nevertheless, improperly marked optical scan ballots still may raise questions about voter intent. The optical scan ballot works by connecting a broken arrow or filling in an oval next to a candidate’s name with a pen that contains graphite. If the line, for example, is improperly marked or the oval is not completely filled in, the vote may not be read by the machine. Similar to the chad issue, the question could be raised whether the voter intended to vote for that candidate or simply changed his or her mind. Moreover, similar questions may arise with respect to early ballots, which a large percentage of Arizona voters now use to vote. That discussion, however, is beyond the scope of this article.

Scanning the Future of Election Technology

Because of the nationwide debate about chad, Arizona and other states are now reviewing their voting technology. The Supreme Court noted that in the aftermath of this election, “It is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.”²⁹ Secretary of State Bayless has weighed in on the issue, saying that she would like to see all Arizonans voting on equipment that minimizes the possibility of accidental overvotes and maximizes ease of voting for all voters. In addition, Arizona State

Because of the nationwide debate about chad, Arizona and other states are now reviewing their voting technology.



CASSANDRA TOMEI

Senators Chris Cummiskey (Democrat) and David Petersen (Republican) have formed a bipartisan “Modern Election Practices Task Force” to study Arizona’s voting procedures and technology and make recommendations to the legislature. The task force is reviewing ways to make voting technology more uniform throughout Arizona. Identifying the best and most reliable technology—along with necessary funds—are the most difficult

INITIATIVE SEEKS TO CHANGE BALLOT PROCESS

The aftermath of the Florida election has produced at least one proposed change to the Arizona Constitution. A group calling itself “Our Vote Counts?” has filed with the Secretary of State a statement of intent to gather signatures to place an initiative on the 2002 general election ballot. The initiative would amend the Constitution and require all certified election results to be determined by a manual tabulation of individual ballots. For this referendum to appear on the ballot, the supporters will need to gather 152,643 voter signatures before July 4, 2002.

issues the task force, and ultimately the legislature, must confront.

Former U.S. Representative Sam Coppersmith believes that the U.S. Supreme Court's decision can be read to require each state to use the same voting equipment statewide because using different machines means that, by definition, different vote-counting standards apply: "States are going to have to bring all of their local jurisdictions up to the best technology currently in use in their state to satisfy the uniformity requirement set forth by the Court." Congressman Coppersmith is knowledgeable about recounts; he was involved in a highly publicized statewide recount in 1994 after the initial vote count in the state's Democratic primary for U.S. Senate revealed that he led challenger Secretary of State Dick Mahoney by only 122 votes. The recount was conducted, and Coppersmith was declared the winner.

However, Congressman John Shadegg, considered an expert on election law, does not believe the Supreme Court's decision



Sam Coppersmith

requires that states now use the same voting technology statewide. Rather, he says that in following the Supreme Court's decision, if a state is going to have a manual recount of ballots, "it needs to happen in every county that used the same type of equipment" to satisfy the equal protection requirement. This does not mean that every

county has to use the same technology. In addition, Congressman Shadegg argues that if there is going to be a recount, equal protection also requires that "it has to happen using consistent and uniform standards."

Although people may disagree about the scope of the Supreme Court's decision in *Bush*, it



Congressman John Shadegg

is clear that changes in the voting procedures are necessary. Even though what happened in Florida could not have happened the same way in Arizona, challenges centering around Arizona's voting technology could still have arisen. It seems likely that, given the

recommendations of the task force, there will be legislation introduced this session to help ensure that questions about hanging chad will never determine the outcome of an election in Arizona. For now, let's be thankful that we were not put in Florida's situation and hope our lawmakers are successful in minimizing the chances of a similar situation ever occurring in Arizona. ❖



WEB ELECTION RESOURCES

Arizona Secretary of State: www.sosaz.com

Maricopa County Elections: www.recorder.maricopa.gov/recorder/elections/

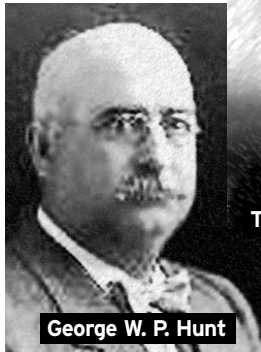
Pima County Elections: www.recorder.co.pima.az.us/

Useful election law links (all the pleadings filed in the Florida litigation, including relevant cases): www.law.stanford.edu/library/reserves/electionmain.html

The Test of Voter Intent in Arizona

BY JOSEPH KANEFIELD

Arizona's election contest statute was put to the test early in this state's history. On November 7, 1916, Thomas E. Campbell was declared governor after the vote tally indicated that he had narrowly defeated the incumbent George W. P. Hunt by 67 votes: Campbell received 28,151 votes to Hunt's 28,084. Hunt filed an election contest alleging that many uncounted ballots should have been counted for him. The Arizona Supreme Court resolved the matter in Hunt's favor and in the process set forth the test that the Arizona courts now follow in determining a voter's intent.¹



In *Hunt v. Campbell*, the court held that a voter must "express his choice substantially in the manner provided by statute" for his vote to be counted (169 P. at 606). The court expressed some skepticism that judges would be able to ascertain the intentions of voters. Specifically, the court said, "This rule of intention, unless it be bridled and bitted, is a stealthy invitation to the judges to express the voter's choice, rather than by well-defined rules of law letting the elector do it himself" (169 P. at 606). The court therefore decided that a voter's intent could best be ascertained by asking whether the voter substantially complied with the statutory voting procedures.

The manner in which the court examined two of the contested ballots shows how the substantial compliance test was applied and also sheds some light on how a punch card ballot with a "dimpled," "indented" or "pregnant" chad might be counted in Arizona today. In 1916, Arizona's electors voted using a paper ballot on which they were instructed to mark a "cross" or an "X" in the box next to the candidate's name. Ten of Arizona's 15 counties now use the punch card ballot system, similar to the one used by several Florida counties in last year's election. This system requires a voter to indicate his preference by punching out a paper chad on a computer card with a stylus. A chad is generally understood to be dimpled, indented or pregnant when it remains attached to a ballot by three or more corners.

On one ballot, the box next to Hunt's name was marked "with just the faintest intersection of the lines" (169 P. at 611). The court counted the ballot for Hunt because it manifested a bona fide effort by the voter to make a cross and mark it substantially in the square (169 P. at 611). By contrast, the court rejected a vote for Campbell on another ballot on which the voter had written the number "1" inside the box next to Campbell's name instead of a cross while at the same time marking "an excellent cross" in the squares next to many other candidates on the same ballot (169 P. at 610).

How would the court have applied the *Hunt* test to a ballot with a dimpled chad had the question arisen after last year's election? Would the court have held that a dimpled chad manifested a bona fide effort to punch the stylus through the ballot and therefore counted the ballot as a vote? Would the result have been the same if the chad for the other candidates on the same ballot had been cleanly punched through? We may never know. What *Hunt* does tell us, however, is that the court may have been willing to take a closer look at the ballots had the question arisen.

After the dust settled, Hunt was declared the winner of the election by the court on December 22, 1917, having received 28,094 votes to Campbell's 28,051—a difference of 43 votes (169 P. at 614). Campbell's certification of election was declared void (169 P. at 614). In addition, Campbell was required to repay to the State of Arizona all of the salary he had received during his almost 12 months of service.²

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ENDNOTES

1. ARIZ. REV. STAT. § 16-344.
2. ARIZ. REV. STAT. § 16-507.
3. ARIZ. REV. STAT. § 16-661(A).
4. FLA. STAT. § 102.141(4).
5. The number is calculated by adding total votes cast for Bush's electors (781,652) and the total votes cast for Gore's electors (685,342) and multiplying by .001.
6. ARIZ. REV. STAT. § 16-664(A).
7. ARIZ. REV. STAT. § 16-449.
8. ARIZ. REV. STAT. §§ 16-449(B), 16-452.
9. *Id.*
10. See FLA. STAT. § 102.166.
11. ARIZ. REV. STAT. § 16-664(A).
12. *Barrera v. Superior Court*, 573 P.2d 928, 929 (Ariz. Ct. App. 1977).
13. *Barrera*, 573 P.2d at 930.
14. The final vote canvass occurs on the third Monday following the general election. ARIZ. REV. STAT. § 16-648.
15. ARIZ. REV. STAT. § 16-672(A).
16. ARIZ. REV. STAT. § 16-673(A).
17. *Bush*, 121 S. Ct. at 528. The number of legal votes at issue was 60,000. *Id.* at 544 (Souter, J., dissenting).
18. 121 S. Ct. at 530.
19. 121 S. Ct. at 530.
20. See ARIZ. REV. STAT. §§ 16-610, 16-611 (rejecting ballots if it is impossible to determine the voter's choice); 16-645(A) (intent of voter standard for canvassing write-in votes); *White v. De Arman*, 362 P.2d 122, 123 (Ariz. 1961) (in counting ballots, the determination of the intent of the voter is the question of primary importance, subject to statutory mandates as to how the voter's intention must be expressed); *Hunt v. Campbell*, 169 P. 596, 606 (Ariz. 1917) (voter's intent can best be ascertained by asking whether the voter substantially complied with the statutory voting procedure).
21. Section § 16-452 provides that the secretary of state, in consultation with the county election officials, "shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency" on the voting procedures and of vote counting and tabulating.
22. *Id.*
23. Jessica Funkhouser credits Jim Shumway with originating the idea of creating a statewide uniform election procedures manual. Shumway served as the state elections director under Secretary of State Rose Mofford and then as secretary of state.
24. ARIZ. REV. STAT. § 16-532(A).
25. Electronic Voting System Instructions and Procedures Manual, Punch Card Manual, January 2000, p. 84 (Arizona Secretary of State).
26. *Id.* at p. 60.
27. The Arizona Constitution provides, "In all elections held by the people in this state, the person, or persons, receiving the highest number of *legal votes* shall be declared elected." ART. VII, § 7 (emphasis added).
28. Justice Stevens noted that the punch card system has a 3.92 percent rate of error compared with the optical scan system's 1.43 percent. *Bush*, 121 S. Ct. at 540 n.4 (Stevens, J., dissenting).
29. *Bush*, 121 S. Ct. at 529.

1. *Hunt v. Campbell*, 169 P. 596, 599 (Ariz. 1917).

2. STEPHEN C. SHADEGG, ARIZONA POLITICS 15 (Arizona State University Press 1986).