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Punch-Card Voting Systems and the California Gubernatorial Recall: Overview of Appellate Court Decisions

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Summary

On September 23, 2003 an eleven member panel of the U.S. Court of Appeals for the Ninth Circuit unanimously reversed the decision in *Southwest Voter Registration Education Project v. Shelley* in which a three-judge panel of the Ninth Circuit had ordered the California gubernatorial recall election postponed. The *en banc* panel determined that the plaintiffs had not shown a strong likelihood of success on the merits of their argument that holding the recall election on October 7, 2003 would violate the Equal Protection Clause of the U.S. Constitution because voters in counties that use error prone punch-card machines would have a comparatively lesser likelihood of having their votes counted than voters in counties that use other technologies. The *en banc* court determined that at the current time, it is "merely a speculative possibility" that a denial of the right to vote will influence the result of the election. In the earlier three-judge panel decision, the court had agreed with the plaintiffs, relying on the 2000 Supreme Court decision *Bush v. Gore*, that using error prone punch-card voting machines in counties that included forty-four percent of registered voters in California would unconstitutionally disenfranchise voters in violation of the Equal Protection Clause. Plaintiffs have stated that they will not appeal this decision to the U.S. Supreme Court. As a result, the California gubernatorial recall election is scheduled to occur on October 7, 2003.

Background

On March 25, 2003, a petition for the recall of California Governor Gray Davis was served on the Secretary of State pursuant to Article II, Section 14(a) of the California Constitution. On July 23, 2003, the Secretary of State certified that the petition contained a sufficient number of signatures to hold an election. The Lieutenant Governor set the election for October 7, 2003 in accordance with Article II, Section 17 of the California Constitution. In addition, the Secretary of State added two ballot initiatives that were originally scheduled for the March 2004 regular election ballot to the special recall

election ballot.[1] On August 7, 2003, the American Civil Liberties Union (ACLU) filed suit in U.S. district court on behalf of three civil rights groups: the Southwest Voter Registration Education Project, the NAACP, and the Southern Christian Leadership Conference, seeking an injunction to delay the recall election until it could be conducted without the use of error prone punch-card balloting machines. Plaintiffs argued that using error prone punch-card voting machines would violate the Equal Protection Clause of the Constitution because voters in counties that use punch-card machines would have a comparatively lesser likelihood of having their votes counted than voters in counties that use other technologies. On August 20, 2003, the district court denied the injunction.

Ninth Circuit Three-Judge Panel Decision

On September 15, 2003 a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed the district court's denial of a preliminary injunction with respect to the California gubernatorial recall election (and two ballot initiatives) and ordered the election postponed. In *Southwest Voter Registration Education Project v. Shelley*, the Ninth Circuit panel, relying on the Supreme Court's decision in *Bush v. Gore*,[2] found that California would face a substantial risk that votes by forty-four percent of the electorate would not be counted with the use of error prone punch-card voting machines in violation of the Equal Protection Clause of the U.S. Constitution[3] if the election took place as scheduled on October 7, 2003.[4] According to the court, at least six California counties plan to employ punch-card voting technology during the recall election: Los Angeles, Santa Clara, San Diego, Sacramento, Medocino, and Solano, which comprise 44% of the total electorate in the state.

In its decision, the three-judge panel observed that "[v]oting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment."[5] Finding that the plaintiffs' equal protection claim "mirrors" the claim that the Supreme Court analyzed in its 2000 decision in *Bush v. Gore*, the three-judge panel noted that the Court in that case held that: "[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."[6] Moreover, the court found that the *Bush v. Gore* decision was consistent with established Supreme Court precedent including its holding in the 1964 decision *Reynolds v. Sims* where it announced: "Undeniably the Constitution of the United States protects the right

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[1] *See,* Southwest Voter Registration Education Project v. Shelley, No. 03-05715, slip op. at 11-12 (9th Cir. 2003). Proposition 53, a proposed constitutional amendment that would require a portion of the state's budget be set aside for infrastructure spending and Proposition 54, a measure that would prohibit government agencies from collecting certain racial information, are also scheduled to appear on the October 7, 2003 election ballot.

[2] 531 U.S. 98 (2000).

[3] U.S. CONST. amend XIV, § 1.

[4] Southwest Voter Registration Education Project v. Shelley, No. 03-05715, slip op. at 13 (9th Cir. 2003).

[5] *Id.* at 16.

[6] *Id.* at 17 (quoting Bush v. Gore, 531 U.S. 998, 104-05 (2000)).

of all qualified citizens to vote ... [and] it has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted."[7]

Plaintiffs argued that the use of defective, error prone voting systems creates a substantial risk that votes will not be counted. Furthermore, plaintiffs maintained that the use of error prone voting systems in some counties while using more accurate systems in other counties denies equal protection of the laws by impermissibly diluting voting strength of the voters in counties using the defective systems. Persuaded by plaintiffs' arguments, the three-judge panel found that the weight afforded to votes in counties not using punch-card voting is greater than the weight afforded to votes in counties using punch-card voting because a higher proportion of the votes from counties using punch-card voting would not be counted. Therefore, the court held, "the effect of using punchcard voting systems in some, but not all, counties, is to discriminate on the basis of geographic residence," creating a "classic voting rights equal protection claim."[8]

Invoking the Supreme Court's holding in *Bush*, that using different standards for counting votes in different counties throughout Florida violated the Equal Protection Clause, the *Southwest Voter Registration* three-judge court panel concluded that using error prone voting equipment in some counties, but not in others, "will result in votes being counted differently" among the counties in California.[9] Accordingly, the court agreed with plaintiffs that the issuance of a preliminary injunction was warranted and reversed the order of the district court.

Ninth Circuit *En Banc* Decision

Shortly after the three-judge panel decision was issued, the State of California and representatives from groups favoring the recall appealed. On September 23, 2003, an eleven member panel of the U.S. Court of Appeals for the Ninth Circuit, unanimously reversing the three-judge panel decision in *Southwest Voter Registration Education Project v. Shelley*, reinstated the October 7, 2003 California gubernatorial recall election. In the *en banc* opinion, the court found that if the election were postponed, because of the "enormous resources" already invested in the gubernatorial recall effort, the state of California and its citizens would suffer "material hardship."[10] Specifically, the court noted that funds had been expended for election materials and that hundreds of thousands of absentee voters had already cast their ballots. According to the court, "[i]nterference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented"; furthermore, "[i]nvestments of time, money and the exercise of citizenship rights cannot be returned."

In its opinion, the *en banc* court noted that it was required to grant substantial deference to the U.S. district court's ruling in this case, unless it found that the court had

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[7] *Id.* (quoting Reynolds v. Sims, 377 U.S. 533, 554-55 (1964).

[8] *Id.* at 18.

[9] *Id.* at 20.

[10] Southwest Voter Registration Education Project v. Shelley, No. 03-56498, slip op. at 10 (9th Cir. 2003)

abused its discretion or relied on an erroneous legal premise.[11] The eleven-judge panel concluded that the district court did not abuse its discretion or misinterpret the law in holding that plaintiffs had not established a clear probability of success on the merits of their equal protection claim.[12] Accordingly, the eleven-judge panel exercised deference and did not address the substantive issues presented in this case such as whether the use of punch-card machines would violate the Equal Protection Clause or the Voting Rights Act.[13]

Acknowledging that the plaintiffs were "legitimately concerned that the use of the punch-card systems will deny the right to vote to some voters who must use that system," and that "there is no doubt that the right to vote is fundamental," the court nonetheless determined that at the current time, it is “merely a speculative possibility” that such a denial of the right to vote will influence the result of the election.[14] According to the court, "there is a significant dispute in the record as to the degree and significance of the disparity" in error rates between the punch-card machines and the types of equipment used in the other California counties. Consequently, the court concluded, the plaintiffs had only shown "a possibility of success on the merits," not "a strong likelihood," which is the required standard for obtaining an injunction, according to the court.[15] Finally, the court determined that the district court did not abuse its discretion in finding that "[p]laintiffs will suffer no hardship that outweighs the stake of the state of California and its citizens in having this election go forward as scheduled and as required by the California Constitution.”[16]

Shortly after the Ninth Circuit *en banc* decision was issued, plaintiffs issued a statement indicating that they would not appeal the decision to the U.S. Supreme Court because the recall election is only two weeks away and they want to avoid prolonging the uncertainty surrounding it. Some commentators have predicted that there might be more litigation regarding this election following the October 7, 2003 election if the vote on the recall and the two ballot initiatives is close.[17]

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[11] *Id.* at 7.

[12] *Id.* at 8.

[13] Codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1.

[14] *Id.* at 10-11.

[15] *Id.* at 8-10.

[16] *Id.* at 12.

[17] *See, e.g.*, Henry Weinstein, *Court Sees Delay As Too Disruptive*, L.A. TIMES, Sept. 24, 2003.