

# Memo

July 29, 2010

## The Legal Effect of Uniformity in Elections

By Charlie Hendrix, Legal Clerk

### Introduction

The central question in this writing is whether or not a governmental entity can be sued for lack of uniformity in the elections processes that it administers. The short answer is yes. However, absent specific facts, it is difficult to fully analyze the possible legal implications of a case.<sup>1</sup> As a result, this memo will speak more to policy and will seek to give a broad overview of the overarching principles.

The United States was the first country in history to adopt a constitution. By 1992, all but six countries had adopted individual constitutions based on the U.S. model.<sup>2</sup> Of key importance to this constitution was the balance between local control and the establishment of a strong central government. Decentralized electoral processes were an important part of that balance and continue to be unique to this country.<sup>3</sup> To this day, more than 13,000 individual governing bodies continue to manage the bulk of electoral processes in this country.<sup>4</sup> Ultimately, the several 50 states retain the responsibility for oversight of elections.<sup>5</sup> The courts have sought to protect this unique local right as much as possible.<sup>6</sup>

However, as with most constitutional issues, there is a careful balance to be had between the need for strong local control and a unifying central government. It was not until 2002 that the United States Congress first sought to intervene in local election administration, with the passage of The Help America Vote Act. This intervention was triggered by irregularities in the 2000 presidential election.<sup>7</sup>

In this legislation, Congress asserted the purpose of the law to be the establishment of “minimum election administration standards for states and units of local government with responsibility for the administration” of elections.<sup>8</sup> At least one court has referred to HAVA as a “floor beneath which the states are not permitted to go.”<sup>9</sup> HAVA has been largely untested in a legal context.<sup>10</sup> However, one court suggests that HAVA requires states to create uniform statewide standards to determine the definition of a valid vote.<sup>11</sup> HAVA also requires that once an individual presents themselves as registered to vote, they must at least be offered a provisional ballot.<sup>12</sup>

HAVA primarily sought to accomplish its goal through an infusion of badly needed funding.<sup>13</sup> However, the bill also provided for the establishment of The U.S. Election Assistance Commission (EAC).<sup>14</sup> Currently the EAC may only recommend best practices.<sup>15</sup> Although this body does not yet have any direct regulatory control, legislation is regularly proposed which would broaden the role of this body.<sup>16</sup> Proponents of this legislation argue, among other things, that the lack of uniformity which exists within state administrations requires a stronger national presence in local affairs.<sup>17</sup> It can be deduced that in the event states fail to develop clear uniform procedures, the federal government will likely intercede via an amendment to HAVA.<sup>18</sup>

### The Right to Vote has Always been Limited

The U.S. Constitution only guarantees the right to vote in elections for the United States Congress. Even then, an individual may only vote for these offices if they are qualified to vote for

state legislative offices.<sup>19</sup> The right to vote is largely left to the states to assign as they see fit.<sup>20</sup> However, once a state bestows this right to vote, it becomes a fundamental right.<sup>21</sup> States are then required to protect these rights.

Courts often rearticulate the importance of this protection via the Supreme Court's assertion that this right "is preservative of other basic civil and political rights."<sup>22</sup> One court has said, "Other rights, even the most basic, are illusory if the right to vote is undermined."<sup>23</sup>

The Supreme Court has further articulated that "having 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>24</sup> This is likely because the right "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."<sup>25</sup> The Nebraska Supreme Court has described the Equal Protection Clause as "keep(ing) governmental decision makers from treating differently persons who are in all relevant aspects alike."<sup>26</sup>

These standards apply mostly to the formalized protected classes, but have also been extended to geographical and other methods of systematic discrimination as well.<sup>27</sup> Traditionally, the strictest scrutiny is applied to cases of race, with the least scrutiny being given to issues of geography.<sup>28</sup> The two are often intermingled. Issues that implicate fundamental rights also require strict scrutiny.<sup>29</sup>

A violation of the equal protection clause is generally established when "(1) The government acted in a manner that burdens (the) (2) fundamental right to vote and that (3) the action was not narrowly tailored to serve a compelling governmental interest."<sup>30</sup> Courts have differed in their interpretations of this "compelling government interest."

Minnesota courts have perhaps been the most favorable jurisdictions to governmental regulation. These courts have construed federal case law to develop a sort of sliding scale standard. The more severe the impact a regulation has on a right to vote, the more compelling the state's interest must be in the established regulation.<sup>31</sup> Minnesota courts do not require empirical evidence of the state's assertions.<sup>32</sup>

### **Bush v. Gore**

Traditionally courts have been cautious when broadening due process rights.<sup>33</sup> As a result, not every election dispute is a constitutional infringement.<sup>34</sup> However, the landmark *Bush v. Gore* election re-count case has expanded the position of courts dealing with voter's equal protection claims.<sup>35</sup>

*Bush* ended the recounting of votes in Florida during the 2000 presidential election and had the effect of turning the election in favor of would-be President George W. Bush. At the time of the decision, scholars argued that the case would never again be referenced, because of the "special circumstances" cited by the court.<sup>36</sup> However, the *Bush* incident brought forward a more universal concern about non-uniform elections in the decentralized model. Over the past 10 years, approximately 50 appellate decisions have referenced *Bush v. Gore*.<sup>37</sup> Interestingly, most of these cases appear to relate to issues other than the manual recounting of votes.<sup>38</sup> HAVA was passed in response to *Bush* and continues to be re-evaluated on a regular basis.<sup>39</sup>

Before *Bush*, the lack of uniformity and security in election processes was of growing concern. Dramatic advancements in technology, coupled with major population shifts, led to greater inequality across the electoral spectrum.<sup>40</sup> However, it was not commonly thought that those issues could rise to a level that would have a significant impact on the outcome of an election.<sup>41</sup> *Bush* fundamentally challenged those assumptions.

### **Rural Jurisdictions**

Typically it is the smaller, more rural jurisdictions that do not have the systems and processes in place to afford them equal protection.<sup>42</sup> Individuals in these areas generally earn smaller wages and obtain less education.<sup>43</sup> This leads to a smaller tax base and fewer individuals to shoulder economic burdens.<sup>44</sup> Without proper funding, it is difficult for rural counties to keep up

with larger, more urban counties. Thus, great disparities develop with regards to training, processes, procedures, staffing and equipment.<sup>45</sup>

Rural counties also are hindered in the political influence they can assert over larger jurisdictions.<sup>46</sup> It is easy to see how this might lead to the formation of electoral policies that are more progressive in urban areas and leave smaller jurisdictions without a means to keep up. More than 25 percent of the nation's population lives in rural areas.<sup>47</sup> *Bush* was a wake-up call to the nation that without greater uniformity, the election process was in jeopardy of excluding significant portions of the population in favor of others that could more readily affect electoral outcomes. Courts have long recognized the human element in the electoral process and have been more concerned with whether the processes were equal than with whether the processes were entirely accurate.<sup>48</sup>

### **County Disparity in Bush**

In *Bush*, various counties used unique standards for the manual hand counting of votes.<sup>49</sup> The result was that in some counties, far more ballots were counted as 'under votes' than in other counties. In one such county, the result equaled up to three times the amount of votes than in other comparable counties with more stringent standards.<sup>50</sup> This resulted in a large geographical disparity and the votes of certain voters were diluted. Such "uneven treatment," even if the individuals affected are unknown to administrators or unintentionally discriminated against, still resulted in a violation of the Equal Protection Clause of the Constitution.<sup>51</sup> The Supreme Court's decision asserted that the Florida processes did not "satisfy the minimum requirement for no arbitrary treatment of voters necessary to secure the fundamental right to vote." These arbitrary standards were found not to be constitutional, even when there is no apparent invidious discrimination.<sup>52</sup>

This decision has been interpreted by other federal courts to mean that "a state must impose uniform statewide standards in each county in order to protect the legality of a citizen's vote. Anything less implicates constitutional problems under the Equal Protection Clause of the Fourteenth Amendment."<sup>53</sup> Each voter must be given an equal opportunity to participate in an election equally.<sup>54</sup>

Some jurisdictions might seek to avoid this sort of liability by avoiding manual hand counts, severely limiting the inclusion of provisional ballots, and using other administrative strategies to avoid controversial issues. However, federal courts have asserted that the "power to throw out a ballot must be exercised very sparingly and with the idea in mind that a group of voters are not to be disenfranchised at an election except for compelling reasons".<sup>55</sup>

According to one scholar, the most significant assertion in *Bush* was that identical pieces of evidence must be treated uniformly.<sup>56</sup> Although *Bush* applied principally to the manual hand counting of votes, it has been analogized to other areas of the law as well. Indeed, the courts have said on other occasions that "the right to vote extends to all phases of the voting process".<sup>57</sup> These rights have been extended to voter registration, verifying voter registration at the polls, provisional ballots, voting machines, precinct boundary lines, disabled voting, and other administrative practices.<sup>58</sup>

### **Implications for Nebraska**

Absent a specific set of facts, it is difficult to determine the exact liability that might be in store for the state of Nebraska with regard to uniformity issues. However, there is sufficient reason to be concerned. The election statutes seem crafted in such a way as to give great deference to the various counties implementing them and do not always specify standards of uniformity.

However, the election act requires that the Secretary of State make uniform interpretations of the act.<sup>59</sup> The Secretary of State's office does not publish guidance or "interpretations" that it gives. It does publish the administrative code on its website. The Attorney General's office posts issued opinions on its website. A search of the term "elections" produced almost 40 opinions issued by the Attorney General in the last 10 years.<sup>60</sup> Most of these opinions

seem to be advice to the Legislature regarding the legalities of proposed legislation.<sup>61</sup> It appears that few, if any, directly address the administration of elections.<sup>62</sup>

The Elections Act also places the burden for supervising primary and general elections on the Secretary of State and requires that the Secretary of State provide adequate training.<sup>63</sup> The Eighth District Court of Appeals has joined with other courts in finding that in some areas of the law, failure to adequately train municipal employees will rise to the level of constitutional infringement. A direct link between the infringement and the training must exist.<sup>64</sup> Neither state nor county officials are immune from legal liability in these cases.<sup>65</sup>

Perhaps the best way to ensure compliance with these laws and ensure the equal protection of Nebraska voters would be through the establishment of a statewide elections manual. This would be particularly effective if both rural and urban counties were given the opportunity to participate in the manual's development. In at least one state, county election officials meet weekly via phone to discuss certain voter issues and develop solutions, with the Secretary of State's office acting as a sort of facilitator.<sup>66</sup> This sort of collaboration has the potential to both strengthen the decentralized voting model, while also ensuring the uniformity necessary to protect voters. As one elections director put it, "There is strength in numbers."<sup>67</sup>

## Conclusion

Although it is not clear what sort of legal liability the state of Nebraska faces in terms of uniformity challenges, it is clear that the national trends, both in the courts and in Congress, have been moving toward the requirement of more uniformity in elections. As states act independently to adopt uniform election standards, two things are accomplished. First, the decentralized election model is strengthened. Second, the rights of the voter are protected because each vote is weighed equally. Regardless of what the legal liability is today, at least one court has said; "It is always in the (best) interest to protect constitutional rights."<sup>68</sup>

---

<sup>1</sup> *Wash State Garage v. Wash State Rep Party*, 552 U.S. 442, 442-469 (2008); *Black v. McGuffage*, 209 F.Supp.2d 889, 889- 902 (N.D. Ill. March 2002).

<sup>2</sup> Dalin H. Oaks, *The Divinely Inspired Constitution*, The Ensign, February 1992, at 68.

<sup>3</sup> See Hans von Spakovsky, *Democracy in Danger: What States Can Do to Safeguard America's Election System* (2009) at <http://heritage.org/Research/Lecture/Democracy-in-Danger-What-States-Can-Do-to-Safeguard-Americas-Election-System> (last visited July 22, 2010); See also [www.aceproject.com](http://www.aceproject.com), search term "decentralized", then follow "*The United States: Decentralized to the Point of Being Dysfunctional*" (last visited July 22, 2010).

<sup>4</sup> *Id.*; See Hans von Spakovsky, *Democracy in Danger: What States Can Do to Safeguard America's Election System* (2009) at <http://heritage.org/Research/Lecture/Democracy-in-Danger-What-States-Can-Do-to-Safeguard-Americas-Election-System> (last visited July 22, 2010).

<sup>5</sup> *Id.*

<sup>6</sup> *State of Nebraska v. Gale*, 734 N.W.2d 290, 290-298 (Neb.S.Ct. 2007).

<sup>7</sup> *E.g. Ace, supra.*

<sup>8</sup> *Help America Vote Act*, Pub. L. No. 107-252, 116 stat. 1666 (2002).

<sup>9</sup> *State v. League of Women Voters*, 203 P.3d 94, 94-101 (N.M. S. Ct. 2009).

<sup>10</sup> See *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 42 U.S.C.S. § 1548 (a)(1).

<sup>13</sup> See *Ace, supra.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Charlie Hendrix, *Proposed HAVA Legislation* (June, 2010) (unpublished, on file with author).

<sup>17</sup> See *Ace, supra*; see *Heritage, supra.*

<sup>18</sup> See *Ace, supra.*

<sup>19</sup> *E.g. Black v. McGuffage*, 209 F.Supp.2d 889, (N.D. Ill. 2002).

<sup>20</sup> *Id.*; *Gale*, 734 N.W.2d at 290 (2007).

<sup>21</sup> *Id.*

<sup>22</sup> *Reynolds v. Sims*, 317 U.S. 533 (1964); accord, *Hawkins v. Bunt*, 2004 U.S. Dist. Lexis 21512.

---

<sup>23</sup> *Galvin v. Walker*, 54 P.3d 1069, 1069-1118 (Ut.S.Ct. 2002).

<sup>24</sup> *Bush v. Gore*, 531 U.S. at 104-05 (2002); *Pierce v. Allegheny County*, 324 F.Supp.2d 684, 684-709 (D. Pa. 2003); *Noel v. Robinwood West*, 2009 U.S. Dist. Lexis 36586; see also *Black*, 209 F.Supp. at 889.

<sup>25</sup> *Galvin*, 54 P.3d at 1069; *Pierce*, 324 F.Supp.2d at 684.

<sup>26</sup> *Gale*, 734 N.W.2d at 290.

<sup>27</sup> *Id.*; *Snowden v. Hughes*, 321 U.S. 9, 9-17 (1944); *Black*, 209 F.Supp. at 889; see also *Meyer v. Campbell*, 152 N.W.2d 617, 617-624 (Iowa S.Ct. 1967).

<sup>28</sup> *Id.*; see also *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 200-241 (1995); see *Meyer*, 152 N.W.2d at 617.

<sup>29</sup> *Black*, 209 F.Supp. at 889; *Skinner v. Oklahoma*, 316 U.S. 535, 535-543 (Okla. S. Ct. 1942).

<sup>30</sup> *Allegheny County*, 324 F.Supp.2d at 684; See *Wash. State Garage*, 552 U.S. at 442; see also *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 683-697 (Min. S.Ct. 2009); *Pick v. Nelson*, 528 N.W.2d 309, 309-320 (Neb. S.Ct. 1995).

<sup>31</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 780-788 (1983); *Wash. State Garage*, 552 U.S. at 442; *Minnesota Voters Alliance*, 766 N.W.2d at 683 (Min. S.Ct. 2009).

<sup>32</sup> *Id.*

<sup>33</sup> *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); accord *Sheehan v. Franken*, 767 N.W.2d 453, 453-471 (Minn. S.Ct. 2009).

<sup>34</sup> *Id.*

<sup>35</sup> *Bush v. Gore*, 531 U.S. at 104; *Pierce*, 324 F.Supp.2d at 684.

<sup>36</sup> E.g. Daniel Lowenstein, *Election Law and the Roberts Court: Election Administration: The Meaning of Bush v. Gore*, Ohio State Law Journal (2007).

<sup>37</sup> See [www.lexisnexis.com/lawschool/research](http://www.lexisnexis.com/lawschool/research), follow “natural language” then search term “Bush v. Gore” (last visited July 22, 2010).

<sup>38</sup> See *Id.*

<sup>39</sup> *Hendrix*, *supra*.

<sup>40</sup> See *Ace*, *supra*.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; see *Black*, 209 F.Supp.2d 889 (Ill. U.S. Dist. 2002).

<sup>43</sup> *Explaining the Gap in Pay Between Rural and Urban Work*, <http://www.dailyonder.com/explaining-gap-pay-between-rural-and-urban-work> (last visited July 22, 2010); see also Cornelia Butler Flora, *Rural Communities: Legacy and Change*, [www.books.google.com](http://www.books.google.com), search term “rural counties political influence” (last visited July 2010).

<sup>44</sup> See *Id.*

<sup>45</sup> See *Id.*

<sup>46</sup> See *Id.*

<sup>47</sup> See *Id.*

<sup>48</sup> Lowenstein, *supra*.; *League of Women Voters*, 203 P.3d at 94.

<sup>49</sup> *Bush*, 531 U.S. at 104.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; see also *Black*, 209 F.Supp.2d 889.

<sup>52</sup> *Black*, 209 F.Supp.2d 889 (Ill. U.S. Dist. 2002).

<sup>53</sup> E.g. *Pierce*, 324 F.Supp.2d at 684; see also *Black*, 209 F.Supp.2d at 889; *League of Women Voters*, 203 P.3d at 94.;

<sup>54</sup> *Pierce*, 324 F.Supp.2d at 684; see also *Bush*, 531 U.S. at 104; *Black*, 209 F.Supp.2d 889.

<sup>55</sup> *Id.*

<sup>56</sup> Daniel Lowenstein, *supra*.

<sup>57</sup> *Galvin*, 54 P.3d at 1069; *Pierce*, 324 F.Supp.2d at 684.

<sup>58</sup> *Black*, 209 F.Supp.2d at 889; *Galvin*, 54 P.3d at 1069; *Lowenstein*, *supra*; *Meyer*, 152 N.W.2d at 617; *Minnesota Voters Alliance*, 766 N.W.2d at 683; *Pierce*, 324 F.Supp.2d at 684; *Preisler v. Secretary of State*, 257 F. Supp. 953 (D.Mich. 1966); *League of Women Voters*, 203 P.3d at 94 (citing numerous cases where rights were applied to varying circumstances).

<sup>59</sup> Neb. Rev. Stat. §32-202.

<sup>60</sup> See [www.ago.ne.gov/agopinions](http://www.ago.ne.gov/agopinions) search term “election” (last visited July 21, 2010).

<sup>61</sup> See *Id.*

<sup>62</sup> See *Id.*

---

<sup>63</sup> Neb. Rev. Stat. §32-202(2), (5).

<sup>64</sup> *Collins*, at 503 U.S. 115 (1992); *Parrish v. Ball*, 594 F.3d 993, 993-1003 (8th Cir. 2010).

<sup>65</sup> *Black*, 209 F.Supp. at 889.

<sup>66</sup> Telephone interview with Karen Osborne, Maricopa County Elections Director (June, 2010);

Telephone interview with Craig Stender, Arizona Secretary of State's Office (June, 2010).

<sup>67</sup> Osborne, *supra*.

<sup>68</sup> *Pheps Roper v. Nixon*, 509 F.3d 480, 480-485 (8th Cir. 2007).