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## Unequal Protection: Disenfranchisement in the 2000 United States Presidential Election

by Erin Chlopak\*

The controversy surrounding the November 2000 United States presidential election was underscored by a range of voting irregularities, particularly prevalent in the African-American community. In the months leading up to the election, the National Association for the Advancement of Colored People (NAACP) conducted a massive voter mobilization campaign throughout the United States, focusing on a number of targeted states, including Florida. The campaign was successful, and African-American voter turnout was extraordinarily strong. Despite this ostensible triumph, many polling sites were ill-equipped to manage the heavy turnout, and problems were especially profound at sites located in low-income, minority communities. Pervasive disparities between the voting equipment in minority communities and wealthy, white communities were compounded by administrative mistakes preventing registered voters from voting. These factors, in conjunction with a record turnout of black voters, resulted in the disproportionate exclusion of votes cast by African-Americans and other low-income minorities.

In light of such consequences, civil rights organizations have filed class action lawsuits on behalf of African-American voters in three states—Georgia, Illinois, and Florida—alleging a common violation of the fundamental right to vote. The plaintiffs in each case allege African-Americans were disproportionately subjected to inferior voting equipment, resulting in the exclusion of votes legitimately cast by African-Americans. The plaintiffs contend these irregularities constituted a violation of their constitutionally recognized rights to equal protection and due process of the law, as well as a violation of the federal Voting Rights Act, 42 United States Code (U.S.C.) §1973, and the federal Civil Rights Act, 42 U.S.C. §1971. In addition, though not invoked in any of the cases, the alleged violations may not be in accord with international human rights law, in particular the International Covenant on Civil and Political Rights (ICCPR). This article focuses exclusively on the irregularities alleged in Florida, as their egregiousness warrants special attention.

### Voting Irregularities in the 2000 Election: Florida

The most pervasive irregularities in Florida resulted from the use of polling equipment of varying quality in racially disparate communities. A December 3, 2000, *Washington Post* survey found that heavily African-American precincts in Florida were subject to more ballot disqualifications than heavily white precincts. In Duval County, for example, 1 in 14 ballots were invalidated in mostly white precincts, whereas 1 in 5 ballots were disqualified in mostly black precincts. The *South Florida Sun-Sentinel* similarly found one-third of the 22,807 disqualified votes in Broward, Miami-Dade, and Palm Beach counties were cast in predominantly black voting precincts. In particular, it found that votes cast in largely African-American areas of Palm Beach and Broward counties were more than twice as likely to be disqualified than votes cast in other counties throughout the state.

These irregularities resulted from vote tallying mechanisms. A December 1, 2000, *New York Times* report focusing on 70 percent of Florida's 68 counties found 1.5 percent of the ballots cast on the punch-card machines failed to register a vote for president while 0.3 percent of the optical scanning machines made such errors. The use of punch-card machines by two-thirds of black Floridians, as opposed to 56 percent of white Floridians, suggests that their uneven use in racially disparate communities contributed to the racial discrepancies noted above.



AP Photo/Victoria Arocha

Demonstrators protest disenfranchisement of African American voters.

Compounding these discrepancies was the wrongful purging of voters from official lists, which had a particularly detrimental effect on the African-American vote in Florida. This dilemma was, in many instances, a function of election officials' failure to process voter registration applications properly. African-American voters in low-income communities who had been purged improperly from voter lists were less likely to have the mistake remedied than were white voters in wealthier areas, because there was no effective way to verify their eligibility to vote. In wealthier, predominantly white precincts, election officials often had access to laptop computers to confirm a voter's registration. In heavily black precincts, the use of such technology was less prevalent. The absence of laptops in these precincts was particularly damaging to African-American voters, whose turnout in Florida increased by 65 percent from the 1996 election. A December 6, 2000, *Boston Globe* article reported that in one instance, a poll worker at a predominantly African-American precinct in Fort Lauderdale admitted denying 100 people the opportunity to vote—despite their claims of being registered—because their names did not appear on voter lists, and she had no other available means of confirming their registration.

Florida's law disenfranchising convicted felons also contributed to voting irregularities. In an effort to implement this policy, a list of 8,000 "possible felons," generated by Choice Point, Inc., a state-employed private corporation, was circulated before local election officials had investigated and confirmed whether "possible" felons were "definite" felons. Because the majority of the names on the list consisted of African-Americans, its circulation amplified the already disproportionate likelihood that black voters would be purged from official voter lists.

The underlying consequence of these irregularities was the manifest inequality in the voting rights of citizens who cast their vote by using the punch-card technology, or who never cast their vote because of the state's administrative negligence. The fact that such disparities fell largely along racial lines raises further concern. Indeed, the consequences constitute more than a dilemma injuring a random sample of Americans, rather they constitute violations of the civil rights of African-Americans.

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### Civil Rights Violations

The Fourteenth Amendment of the U.S. Constitution prohibits states from creating or enforcing any law which abridges the rights of U.S. citizens or denies any citizen equal protection of the laws. The Fifteenth Amendment prohibits states from denying or abridging the right of U.S. citizens to vote “on account of race [or] color . . . .” Additionally, the 1965 federal Voting Rights Act, 42 U.S.C. §1973(a), forbids any state or political subdivision from imposing or applying a “standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .” Similarly, the Civil Rights Acts of 1957 and 1960, codified at 42 U.S.C. §1971, provide federal guarantees of specific voting rights. In particular, §1971(a)(2)(A) of the Civil Rights Act provides that when determining whether an individual is qualified under state law to vote, persons acting under color of law are prohibited from applying different standards, practices, or procedures to individuals within the same county, parish, or other political subdivision. Section 1971(a)(2)(B) of the Voting Rights Act further prohibits any person acting under color of law from denying any individual the right to vote by erring or omitting any record or paper relating to, *inter alia*, the individual’s registration, when that error or omission materially affects the determination of whether the individual is qualified under state law to vote.

The use of disparate and unequal voting systems in racially distinct communities throughout Florida disproportionately disqualified legitimate black votes, thereby abridging the rights of many African-Americans. Such non-uniform voting practices patently violate §1973(a) of the Voting Rights Act, by abridging the voting rights of citizens who have no alternative but to use inferior voting systems. By creating an environment in which the voting rights of some citizens are more vulnerable than those of others, and particularly when these disparities are infused with racial undertones, the unequal voting practices in the 2000 presidential election also violated Fourteenth Amendment guarantees of equal protection.

Additionally, the administrative errors that prevented many Floridians from exercising their right to vote constituted violations of §§1971(a)(2)(A) and (B) of the Civil Rights Act. The generation of a list of unconfirmed felons, and the failure of election officials to verify that list properly, violated §1971(a)(2)(A) by applying non-uniform procedures and standards for deter-

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mining voter qualification. Specifically, the imprudent attempt to compile a database of convicted felons rendered African-Americans more susceptible to wrongful disqualification because they constitute a substantial portion of the felon population. Compilation of this database also violates §1971(a)(2)(B) because wrongful classification as a felon is an illegal error that materially affects one’s qualification to vote.

The noted discrepancies and inequalities in the voting system indicate that the fundamental right to vote, guaranteed by the Fifteenth Amendment, was not equally protected among

African-Americans and whites. The lack of uniformity in the quality and effectiveness of the different voting machines used to tally the ballots, and the disproportionate distribution of lower qual-

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ity machines in predominantly African-American communities, rendered votes cast by blacks less likely to be counted, and thus unequal to votes cast by whites.

In response to these apparent civil rights violations, a number of organizations have brought lawsuits on behalf of African-American voters against election officials in several states. The various lawsuits allege discriminatory and unequal voting practices, and disenfranchisement. In each case, the African-American plaintiffs claim the rampant disparities in the quality and function of the voting equipment used throughout the state rendered them less likely to have their votes counted.

### NAACP v. Harris

On January 10, 2001, the NAACP, American Civil Liberties Union (ACLU), Lawyers’ Committee for Civil Rights Under Law, Advancement Project, and People for the American Way Foundation filed a federal class action lawsuit on behalf of the NAACP and African-American voters. The named defendants are Florida Secretary of State Katherine Harris, Director of the Florida Division of Elections Clay Roberts, the election supervisors of seven Florida counties, and Choice Point. The lawsuit characterizes Choice Point as an agent of the state of Florida. Harris and Roberts are charged with certifying ineffective punch-card ballot machines; failing to require all county supervisors to adopt effective measures to ensure accurate purging of the names of registered voters on the lists provided by the state; and failing to provide, require, or enforce uniform standards and procedures for processing the voter registration applications. Harris, Roberts, and Choice Point are further charged with failing to exercise appropriate diligence and care in ensuring and verifying the reliability and accuracy of the lists of ineligible voters. The Florida plaintiffs charge that these extensive and widespread irregularities constituted, *inter alia*, violations of the Fourteenth Amendment; 42 U.S.C. §§1971 and 1973; and the Florida Voting Rights Act, Fla. Stat. Ann. §104.0515, which protects the rights of voters “without distinction according to race [or] color” and provides protections similar to those expressed in §§1971(a)(2)(A) and (B). As a remedy, the plaintiffs seek declaratory and injunctive relief to acknowledge the legitimacy of their allegations and to prevent similar violations from occurring in the future. The defendants currently are filing separate answers to the complaint.

In spite of these suits, the allegations of civil rights abuses in the 2000 U.S. presidential election have been disparaged by many as a desperate partisan attempt to facilitate a specific outcome in the final determination of the election. Such a characterization fails to acknowledge the nature and extent of the inequalities that pervaded many communities throughout the United States, notably in Florida. Unequal voting procedures constitute discernible violations of both the express language in federal and state provisions guaranteeing the right to vote

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regardless of race or color, and ensuring the equal protection of that right. Moreover, the right to vote, and its equal protection, are not merely local and federal guarantees. Indeed, they are international human rights guaranteed to citizens of democracies throughout the world.

### International Human Rights Implications

Although the Florida plaintiffs raise their complaints of disenfranchisement under domestic law, their allegations also relate to rights protected by international legal instruments. Article 25 of the ICCPR, for example, which the United States ratified in 1992, preserves the right of all citizens to vote. Article 2(1) of the ICCPR prohibits, *inter alia*, distinctions between citizens on the basis of race or color. The General Comments to Article 25 (General Comments) further define the elements of the right to vote. The General Comments maintain that States Parties must take “effective measures” to protect the ability of all persons to exercise the right to vote on equal grounds. The sanctioning of voting mechanisms of disparate quality, however, prevented all voters from equally exercising their right to vote. Furthermore, the General Comments explain that where registration of voters is required, “obstacles to such registration should not be imposed.” In Florida, however, voting officials wrongfully purged registered voters from official voter lists and failed to remedy such errors in time to permit wrongfully disqualified voters to cast their ballots.

The General Comments to Article 25 also requires that any electoral system operating in a state “must be compatible with the rights protected by” this article, including the equal right to vote. They further explain that the method of allocating votes “should not distort the distribution of voters or discriminate against any group” and “should not restrict unreasonably” the right of citizens to vote. Florida, however, used differing voting procedures that impeded the right of all citizens to vote and to have their votes counted on equal grounds. In addition, Florida used voting mechanisms of varying quality in racially distinct communities that produced such distortion and discrimination. By disproportionately disqualifying votes legitimately cast by African-Americans, the inconsistent use of punch-card ballot machines plainly discriminated against black voters.

The voting procedures that characterized the 2000 presidential election effectively denied equal protection of the right to vote, as protected by U.S. domestic law and the ICCPR. Although U.S. courts have held that the ICCPR is not self-

executing and thus does not create a private right of action, scholars argue the U.S. ratification of the ICCPR gives the Covenant domestic legal force. The Florida plaintiffs, therefore, could enhance their domestic legal argument by incorporating Article 25 of the ICCPR.

### Conclusion

The ultimate resolution of the 2000 U.S. presidential election provoked widespread discussion of the fundamental right to equal protection. In spite of the discourse regarding standards that should have been implemented to determine which votes would be counted, a thorough application of the right to equal protection was ignored. The failure of officials to meet the obligation to determine which votes were valid disproportionately affected African-American and low-income minority populations. Moreover, the legislated use of disparate voting mechanisms in African-American communities, proven to generate substantially unequal rates of error, caused these communities to be statistically more prone to having their legitimate vote disqualified. In the most distressing circumstances, black voters were further encumbered by the negligence of election officials, who failed to properly oversee the purge of disqualified voters from official lists, or to confirm the legitimacy of any such disqualification. In many instances, this negligence was compounded by the disproportionate absence in predominantly black precincts of adequate technology to remedy errors at the polls. In providing unequal protection, the state government violated the local and federal civil rights of its constituents. ☹

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Kambale explained that the international community must work to bridge the division between international and domestic human rights law. According to Mr. Kambale, many francophone African countries devalue the utility of international law, believing it comparable to diplomatic law and, therefore, inapplicable to ordinary citizens.

The two remaining panels discussed U.S. accountability mechanisms for violations of international law and the future role of ad hoc criminal tribunals and the recently established International Criminal Court. Shawn Roberts, an international human rights lawyer and Legal Director for the Center for Justice & Accountability in San Francisco, California, outlined various strategies that may be used in the United States to protect victims of torture, summary execution, forced disappearances, crimes against humanity, and war crimes. Besides extradition for pros-

ecution and deportation, Ms. Roberts suggested U.S. lawyers pursue civil remedies under the Alien Tort Claims Act or under the Torture Victim Protection Act.

Although conference participants made it clear the legal community has made dramatic advances in overcoming the obstacles first presented by the *Letelier-Moffitt* case 25 years ago, the common theme invoked at the conference was that impunity for gross human rights violations continues today. WCL Professor Diane Orentlicher, currently on leave as a visiting scholar at Princeton University's Program in Law and Public Affairs, reminded the audience that forcing accountability by ending impunity for gross human rights violations in part relies on the will of the people and the will of the political process to persuade governments to respect and ensure human rights. ☹

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