

Butterflies, Chads, And History

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STANFORD, Calif. - One clear victor has emerged in the Florida ballot wars: the chad has beaten the butterfly. Al Gore's strategists, challenging George W. Bush's narrow lead, chose to demand a recount, where chads would be decisive, rather than appeal for a revote of the muddled election in Palm Beach County, home of the improperly designed butterfly ballot.

The Gore team knew a recount in three solidly Democratic counties might deliver the necessary votes, while serious legal obstacles militated against the revote: last week, Judge Jorge LaBarga of Palm Beach County dismissed a voters' suit seeking it. Democrats still view the pending appeal of that ruling to the Florida Supreme Court as secondary to their demands for completing recounts.

Whether this is the right tactical decision remains to be seen, but Palm Beach County voters have a case worth pursuing. Judge LaBarga said a revote was impermissible because "it was the clear and unambiguous intention of the framers of the Constitution that presidential elections be held on a single day throughout the United States." This is a misreading of the Constitution and of history.

The Constitution authorizes Congress to "determine the time of choosing the Electors" for president and empowers it to designate "the Day on which they shall give their votes; which day shall be the same throughout the United States." The Constitution did not require that the states all choose their electors on the same day.

In 1792, when Congress set the first Wednesday in December as the day for the electors to vote, it also required that states select them at any time within the preceding 34 days. It wasn't until 1845 that Congress adopted the current regulation that the electors be chosen on the Tuesday after the first Monday in November.

Was that reform intended to prevent one presidential candidate from gaining advantage over another, as the reasoning underlying Judge La Barga's opinion implies? Consider the history. The principal mover of the 1845 act was Alexander Duncan, nicknamed Bully, a Democratic congressman from Cincinnati who had lost his seat in the hard-fought Log Cabin campaign of 1840. When he returned to Congress in 1843, he set about to prevent the recurrence of the tricks he believed had cost him re-election in 1840. Duncan charged that voters from other Ohio districts and even Kentucky had been brought in to cast illegal votes against him, with the tolerance of election officials. By requiring same-day election of both representatives and presidential electors throughout the nation, Duncan hoped at least to curtail the corrupt practice of moving voters from district to district to vote more than once.

Congress enacted Duncan's bill, but restricted it to presidential electors, probably dropping the requirement about House elections because it was embroiled in another

dispute over requiring that House members be elected by district.

This historical evidence demonstrates that Judge LaBarga is simply wrong in claiming that it was the original intention of either the Constitutional Convention or Congress to hold the election of electors on the same day in order to avoid bestowing advantage on one candidate or another, as good a rule as that might be.

The true purpose of Bully Duncan's bill was to prevent the corruption of the ballot. Allowing voters to cast ballots in more than one district is one way to corrupt the result of an election. But so, arguably, is a decision that disenfranchises or effectively distorts the choices of thousands of citizens, like those in Palm Beach County whose votes were seemingly nullified by an improperly and even illegally designed ballot.

Of course, considerations of time, practicality and law weigh against the idea of a revote. But should the recount strategy fail, we will be left to wonder whether the Gore team erred in not giving the butterfly equal attention with the chad. And should Mr. Gore's current "contest" of the certified vote fail, historians will certainly conclude that that was where the election was really lost.

Drawing (Warren Linn)

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