Court of appeals to reconsider postponing California recall election

By Don Knowland
22 September 2003

The US Court of Appeals for the Ninth Circuit voted Friday to have an 11-judge panel of the court rehear the case that resulted in a September 15 ruling postponing the October 7 gubernatorial recall election to March 2004. Oral arguments in the case will be televised live on C-Span on Monday at 1 p.m. Pacific Standard Time.

The American Civil Liberties Union (ACLU) filed the case challenging the continued use of punch-card voting machines in six heavily working class California counties because they invalidate votes at a rate two to four times that of newer technologies in place in the rest of California. The three-judge panel on September 15 ruled that use of the punch-card machines would violate the equal protection clause of the US Constitution because voters in those counties would have their votes validated at a significantly lower rate than in the rest of the state.

The Ninth Circuit panel ruling merely followed the legal arguments of the US Supreme Court in the *Bush v. Gore* case in 2000, handing the election to Bush over Gore. In fact, the recall presents a stronger case for asserting violation of equal protection than did *Bush v. Gore*, where the right-wing majority applied the court's prior one-man one-vote decisions in a completely cynical and dishonest fashion.

Bush v. Gore in effect assumed that voting personnel in a recount could not be trusted to honestly discern the "intent of the voters," a standard long employed in Florida and many others states, when faced with hanging and dimpled chads and the like. Although no prior court had ever suggested that equal protection outlawed anything other than intentionally giving votes in some geographic areas less weight than those in other locations, the Supreme Court ruled that uniform standards were required between and within counties for counting "undervotes" generated by punch-card machines.

The Supreme Court then refused to give Florida time to do the recount using uniform standards, an act that even most conservative legal commentators and scholars have been unwilling or unable to justify. The result was that many thousands of ballots were not counted in the cliffhanger Florida election, the antithesis of a democratic result.

In contrast, the September 15 ruling of the three-judge Ninth Circuit panel rested on the fact that at least 40,000 votes in the punch-card counties would be invalidated. The ruling maximized the chance that all votes would be counted in a critical election.

Weighed against that basic democratic consideration was California's interest in having the recall election held in the timeframe called for by its own constitution. The recall provision arguably embodies a conception of democratic rights, at least in the abstract. But the September 15 ruling gave short shrift to that interest, pointing out that had supporters of the recall submitted the required signatures six weeks later the recall election would have been placed on the March 2004 primary ballot anyway.

That court was well aware that the recall was initiated by the extreme right wing of the Republican Party and financed by multimillionaire reactionary Darrel Issa, precisely to overturn the November 2002 election of Democrat Gray Davis. Moreover, it is conventional wisdom that the Democratic turnout will be much higher for the March primary election than in October, to Davis's benefit.

The three judges who halted the October 7 election were all appointed by Democratic presidents and are generally considered liberal, at least on civil rights. Whether any or all of them were seeking to turn *Bush v. Gore* into a weapon against the Republicans or were merely carrying out their judicial duty to implement "the law" as established in that case cannot be ascertained. Such processes are not always fully conscious in any event.

Much more significant is the fact that the ruling delaying the October 7 recall has touched off a political firestorm. The right-wing supporters of the recall charged that the judges acted for political reasons rather than to uphold the law, a charge the media did little to dispel. The right wing has long alleged that the Ninth Circuit is a liberal court off the edge (most recently in its rulings that the Pledge of Allegiance is unconstitutional and vacating dozens of deaths

sentences imposed by judges rather than juries), which is routinely reversed by an eminently sensible Supreme Court.

The 11 judges randomly drawn from the entire 25-judge Ninth Circuit to rehear the matter did not include any from the three-judge panel. They are widely viewed as much more conservative than the three-judge panel that ruled on September 15, even though eight of them were appointed by Democratic presidents, almost all by President Clinton. The panel includes three hard right-wing Reagan/Bush appointees (two with a supposed libertarian streak), two liberal Democrats, five centrist Democrats and a moderate Republican appointed by Clinton.

The 11-judge panel can affirm the September 15 equal protection ruling, overturn it outright, or decide to hold off hearing any equal protection challenges until after the October 7 election. Overturning it outright would require either a ruling that *Bush v. Gore* does not apply, or a finding that the facts do not establish the likelihood that votes will be more fairly counted if the recall occurs in March. In that vein, some efforts have been made by pro-recall lawyers in the last week to make a factual showing that combining the recall election with the primary election in March will cause confusion and problems, despite the use of newer technologies.

The leading legal newspaper in California, in an article to run Monday, says it is almost a certainty that the decision delaying the recall election will be overturned. That may be the likely result, but the calculations are not so simple. Some of the following considerations do suggest a reversal:

* The Ninth Circuit can spare the Supreme Court doing its own dirty work by reversing and permitting the recall to proceed on October 7.

* Over a half dozen states still use punch-card systems. Upholding the September 15 result will automatically support legal challenges to punch-card systems in those states and further complicate upcoming elections.

* The presiding judge of the Ninth Circuit supposedly is on a mission to undo the Ninth Circuit's reputation as a group of judges that has lost its legal moorings.

But it will not be easy to square a decision that permits an election with glaring punch-card discrepancies with the decision in *Bush v. Gore*. Such a result will itself strongly suggest naked partisanship, while reminding all of the blatantly political nature of the latter decision. Distinguishing *Bush v. Gore* on technical legal grounds will convince few.

Regardless of the judicial result, it is undeniable that the courts, like the election system, have become a highly charged and unstable arena. Deepening social polarization has led to a breakdown of the old mechanisms by which political and class conflicts were mediated.

This process is increasingly recognized by prominent legal commentators. Edward Lazarus, himself a former law clerk on the Ninth Circuit and the Supreme Court, and author of a well-known book on the current Supreme Court, on September 18 produced a column on the decision to postpone the recall on the leading US Internet legal site Findlaw.com. According to Lazarus:

"*Bush v. Gore* was a tragedy. In one of the most nakedly partisan opinions in Court history, a narrow five-Justice conservative majority handed the presidency to a political compatriot. It did so by jerry-rigging an analytically indefensible argument that the Florida Supreme Court's approach to the hand recount of punch card ballots violated the Equal Protection Clause of the federal Constitution.

"Now the farce is in full swing. Three quite liberal judges from the Ninth Circuit, the most liberal court of appeals in the country, have taken *Bush v. Gore's* much-criticized principles for judicial intervention into elections and applied them in the California recall....

"There is, of course, a delicious political irony in watching judicial liberals hoist the conservatives on their own petard. But the intellectual amusement just isn't worth the price. Our judicial branch is suffering an integrity meltdown. And that meltdown could not come at a worse time....

"Th[e judiciary's] job will be all the harder if the judicial branch continues to undermine its credibility by issuing a decision such as *Bush v. Gore*, and the recent recall decision. These decisions are plainly little more that political tit-for-tat, dressed up in supposedly august judicial robes, and the public will doubtless perceive them as such....

"If this decision were an isolated incident, perhaps it would not matter except to Californians. But it is not, and it should matter to every American—for it occurs at a time when ideological divisions have already seriously eroded the integrity of the judicial branch."

In fact, Lazarus here bemoans a development that can only continue to accelerate. Political tensions and social polarization have become so intense in the United States today that the courts are no longer capable of playing a mediating role and preserving an image of standing above the fray.