MEMORANDUM

TO: **HJR 8 Subcommittee on Voting Systems**

FROM: **David S. Niss, Staff Attorney**

RE: **Bush v. Gore and the Montana Statutes Governing Voting Equipment, Counts, Recounts, and Determination of Voter Intent**

DATE: **November 13, 2001**

I
INTRODUCTION

At the September meeting of the Subcommittee, Committee staff presented a memorandum entitled "Meaning and Implementation of George W. Bush v. Albert Gore, Jr."(Bush v. Gore).[1] As part of that presentation, Committee staff pointed out that the Supreme Court opinion was difficult to interpret and apply because of the language of the opinion and the context in which it arose. Nevertheless, Committee staff noted that if the opinion means anything to a legislative committee studying voting reforms, Bush v. Gore means that there must be some rough equivalency in the manner in which votes are cast and counted in those counties using the same or similar voting technology.

The purpose of this report is to take the next step. This memorandum compares the language of the Supreme Court's opinion to Montana statutes in the same subject matter areas as were addressed in Bush v. Gore. Again, caution must be exercised in viewing the Supreme Court's opinion as establishing "requirements" for voting systems and the counting and recounting of ballots. Because of the statement in the opinion that the opinion is limited to the facts of the case, the context in which the opinion was written (applying due process and equal protection standards to the Florida Supreme Court opinion rather than to statutes passed by the legislature), and the vagueness of the opinion language itself, the most that can be said of the clarity of the due process and equal protection "requirements" for voting systems outlined in the Supreme Court's opinion is that some of those "requirements" are clearer than others. Because of that factor, the requirements have been presented below from the clearest (as to the analysis and conclusion that a constitutional requirement has been violated) to the less clear. Those requirements are then compared to the Montana statutes and administrative rules to see how

[1] 531 US 98 (2000).

those statutes and rules measure up to the Bush v. Gore opinion. Existing case law is also reviewed.

II
DISCUSSION

A. Standards for counting a vote to determine voter intent
1. The opinion

The Supreme Court noted that the Florida command to those tallying the votes was that the "intent of the voter" must be determined. The opinion noted that this phrase is fine as a general proposition, but the Court said:

> The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these reoccurring circumstances is practicable and, we conclude, necessary.
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> The want of those rules here has led to unequal evaluation of ballots in various respects.
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> As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.
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> The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. . . . And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a per se rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

2. Montana statutes and rules
a. Voter intent

The general command of Montana statutes, in 13-1-103, is that "[t]he individual receiving the highest number of votes for any office at an election is elected or nominated to that office", but the statute is silent on just what exactly constitutes a "vote". The Montana statute approximating

the Florida Supreme Court's command is 13-15-202(3), which provides:

> A ballot or part of a ballot is void and may not be counted if the elector's choice cannot be determined. If part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part. Except as provided in 13-10-211(5), a write-in vote may be counted only if the write-in vote identifies an individual by any of the designations filed pursuant to 13-10-211(1)(a).

Other statutes specifying the counting of votes by the election judges (13-15-101 and 13-15-103), the canvass of votes by the board of county canvassers (13-15-402 and 13-15-403), and the state canvass (Title 13, chapter 15, part 5) are not nearly so specific as to the duty to determine what the elector intended when the elector marked the ballot, but use more general phrases such as "[t]he counting board shall proceed by counting all the ballots", "[t]he board of county canvassers shall immediately canvass the return", and "shall meet as a board of state canvassers. . . . and determine the vote".

b. Method of balloting

Of course, one of the ways of achieving a uniform ballot would be to require the use of a uniform voting technology. The Montana Legislature has not chosen a uniform technology but rather has specified certain characteristics for all ballots (Title 13, chapter 12, part 2), specified certain characteristics for voting machines and devises (13-17-103), required the Secretary of State to prescribe the form of the ballot (13-12-202), given the Secretary authority to authorize experimental machines or devices (13-17-105), given the Secretary authority to adopt rules regarding the submission of voting devices to the Secretary for approval and approval of the devices themselves (13-17-107(1)), and required the Secretary to adopt rules governing the use of voting machines and devices by the voters (13-17-107(2)).

Of all of the available methods of casting a ballot, the Legislature itself has required the manner in which a ballot will be voted only for the paper ballot. Section 13-12-209(3) provides:

> (3) Upon the face of the stub shall be printed the following:
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> This ballot should be marked with an "x" in the square before the name of each individual or candidate for whom the elector intends to vote. The elector may also write in or affix a preprinted label in the blank spaces or over any other name, the name of an individual for whom he wishes to vote and vote by marking an "x" in the square before the name. If a ballot contains a constitutional amendment or other issue to be submitted to a vote of the people, it is voted on by marking an "x" in the square before the amendment or issue.

For all other forms of voting technology or methods of voting other than the paper ballot, the Secretary of State has adopted rules pursuant to 13-17-107(2) specifying the manner in which a

ballot will be cast. Pursuant to this section, the Secretary has adopted rules specifying how each type of machine or device is to be used by the voter and how the vote is to be received, screened, and scored by various boards operating under the supervision of the county election administrator.[2] For the most part, the rules applicable to punch cards do not address in detail how punch card votes are to be scored.[3] Because standards of the type envisioned by Bush v. Gore do not strictly involve the "use" of the machine itself and may result in the disenfranchisement of a voter, the Subcommittee may wish to consider strengthening 13-17-107(2) to specifically include the types of standards contemplated by Bush v. Gore for appropriate voting technologies.

c. Recounts

Title 13, chapter 16, concerns recounts and tie votes. Part 2 allows a candidate defeated by a specified margin[4] to file a petition with the election administrator requesting a recount. Once the petition is filed, the recount is mandatory. Part 3 allows an unsuccessful candidate to petition the District Court to request a recount. Under 13-16-301, if the judge finds there is probable cause to believe that the votes for the unsuccessful candidate were not correctly counted, the court must order a recount. Section 13-16-303 creates a presumption of an incorrect count of the votes if the applicant submits a verified application stating that the requirements of 13-15-202 (requiring the election judges to disregard that part of a ballot for which the "elector's choice" cannot be determined) were not complied with. Recounts are conducted by three members of the county governing body sitting as the county recount board. Following the recount by the county boards, certificates of the result of the recount are then sent to the Secretary of State, who reconvenes the board of state canvassers, which recanvasses the state totals and issues any new certificate made necessary by the recount.

3. Montana case law

Montana case law generally supports the position that election judges must determine the intent of the elector, considering all of the circumstances of how the ballot was marked, both for the office or issue in question and other offices or issues appearing on the same ballot. See, Spaeth v. Kendall, 245 M 352, 801 P2d 591(1990), and Marsh v. Overland, 274 M 21, 905 P2d 1088 (1995). Older opinions of the Montana Supreme Court took a more narrow view, holding, for example, that a statute requiring that an "x" be placed in a square on a paper ballot meant an "x"

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[2]Title 44, chapter 3, subchapter 17, ARM.

[3]ARM 44.3.1744(1)(c)(ii) provides "hanging chad - remove chad".

[4]For example, the margin for those voting for a candidate for the Legislature requiring a mandatory recount is 1/4 of 1% of the total votes cast for all candidates for the same position. 13-16-201(2), MCA.

of some form and not any other mark. More recent case law holds that the same statute requiring that an "x" be placed in a square is not mandatory, but is directory only, and that if the elector has expressed an intention by making another mark inside the box, the elector should not be disenfranchised for using a mark other than an "x". Compare, Carvile v. Jones, 38 M 590, 101 P 153 (1909), with Peterson v. Billings, 109 M 390, 96 P2d 922 (1939).

No Montana case law was located requiring one precinct or county to determine an elector's intent in the same manner as another precinct or county.

B. Persons conducting the recounts and their training to apply the standard.

1. The opinion

Another of the difficulties discussed in Bush v. Gore with regard to the order of the Florida Supreme Court was that the Florida Court's order required the use of untrained ad hoc recount teams. The U.S. Supreme Court said:

> In addition to these difficulties the actual process by which the votes were to be counted under the Florida Supreme Court's decision raises further concerns. That order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams comprised of judges from various Circuits who had no previous training in handling and interpreting ballots.

2. Montana statutes and rules

Under Montana law, it is the county recount board that is required to conduct any recount, whether mandatory under the margins specified in 13-16-201 or ordered by a court pursuant to Title 13, chapter 16, part 3. Montana statutes designate members of the county governing body to serve as the county recount board. Section 13-16-101 provides:

> **13-16-101. County governing body as county recount board.** (1) The county recount board shall consist of three members.
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> (2) Three members of the governing body shall be appointed by the chairman if there are more than three members of the governing body.
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> (3) If three members of the governing body cannot attend when the board meets, any vacant place shall be filled by one or more county officers chosen by the remaining members of the governing body.
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> (4) If a member of the recount board is a candidate for an office or nomination for which votes are to be recounted, he shall be disqualified.
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> (5) The election administrator is secretary of the recount board, and the board may hire any additional clerks as needed.
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> (6) The board may appoint county employees or hire clerks to assist as

needed.

Whether or not additional recount boards within the same county could become necessary in Montana is open to question. The reason why so many "ad hoc teams" were required to be mobilized in the presidential election in Florida was because of the deadline for the recount imposed earlier by the Supreme Court, at least in part because of the time period requirements imposed upon states participating in a federal presidential election.[5] The teams were also made necessary because of the huge number of votes to be recounted in the very urban counties to which the Supreme Court's order applied. In any event, there is no provision in 13-16-101 for the employment of any more than three members of a recount board or the use of more than one board per county. Subsection (6) applies only to clerks employed to assist the members of the board.

In their role as the recount board, the members of the board serve essentially the same function as the election judges who originally counted the ballots after the close of the precinct polling places. The function of both is to determine the intent of the voter from the appearance of the ballot. Training of the election judges, a concern of the U.S. Supreme Court, is addressed in 13-4-203, which provides as follows:

> **13-4-203. Instruction of judges -- training materials.** (1) Before each election, all election judges who do not possess a current certificate of instruction shall be instructed by the election administrator. In precincts where voting machines or devices are used, instructions shall cover both machines or devices and paper ballots.
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> (2) Chief judges may be required to attend the training session before each election, as well as a special session that may be held for chief judges only.
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> (3) Any individual willing to be appointed an election judge may attend an instruction session by registering with the election administrator. Such individuals may not be paid for attendance unless they are appointed election judges.
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> (4) The secretary of state shall prepare and distribute training materials for election judges. The materials shall include instructions on the use of all machines or devices approved for use in this state, as well as paper ballots. Enough copies of the materials to supply all election judges in the county and provide a small extra supply shall be sent to each election administrator. The secretary of state shall hold at least one workshop every 2 years to instruct election administrators and their staffs in use of the materials. Workshops may be held in various locations around the state. Costs of the materials and workshops shall be paid by the secretary of state.
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> (5) Each election judge completing a training session shall be given a certificate of completion. No individual may serve as an election judge without a

[5] 3 U.S.C. 5.

valid certificate. However, this does not apply to individuals filling vacancies in emergencies.

(6) All certificates of completion expire 30 days before the primary election in even-numbered years.

(7) Notice of place and time of instruction must be given by the election administrator to the county chairmen of the political parties.

Clearly, training of recount boards is not provided for in this section. Testimony before the Subcommittee may indicate whether training similar to that given election judges is necessary for recount boards. Also, testimony before the Subcommittee may indicate whether the foregoing statute is sufficient to provide for training in the use of voting technologies should the Legislature require the use of similar standards for all counties using a particular ballot format or technology.

No administrative rules have been identified specifying training for election judges or recount boards.

C. Recount timing that precludes inclusion of all vote totals

1. The opinion

The opinion notes that only partial vote totals were included in the certified results from several of the counties that determined a recount was necessary. The partial vote totals, the Court believed, resulted "from the truncated contest period established by the Florida Supreme Court" The Court went on, noting that "[t]he press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees."

The timing of the recount ordered by the Florida Supreme Court was based upon the requirement that any recount be completed by December 12, in order to comply with federal law.[6] The timing issue can therefore be seen as limited to presidential elections. Additionally, unlike the urban Florida counties at the center of the Bush v. Gore opinion, recounts in Montana will not have to deal with recounts of so many votes, such as the estimated statewide 110,000 overvotes, that the recount and the time for judicial challenge cannot be accomplished within the timeframes allowed by federal law in a presidential election. Consequently, this area of the opinion probably has little or no practical application to Montana.

D. Allowance of objections by persons observing ballot count/recount

1. The opinion

At one point in its list of defects in the Florida recount process conducted pursuant to the Florida

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[6]Ibid.

Supreme Court order, the U.S. Supreme Court states, after discussing the difficulties with the recount teams, that "while others were permitted to observe, they were prohibited from objecting during the recount". Apparently, this statement was intended to cast doubt upon the legality of a situation in which a person appointed by one of the political parties was allowed to observe the recount process but that if that observer saw a defective recount procedure, such as when a recount team counted a vote in violation of the local standard, the person was not allowed by the Court's order to bring the violation to the attention of local or state authorities.

2. Montana statutes and rules

Montana statutes provide that the process of initial counting of votes by election judges or counting boards is to be a public process (13-15-101 and 13-15-103), as are meetings of the board of county canvassers (13-15-103) and the meeting of the board of state canvassers (13-15-505). No provision is made in any of those statutes for objections by persons observing those public counting sessions. However, as earlier discussed, a judicially ordered recount may be based upon a petition by an unsuccessful candidate if the court finds there is probable cause to believe that the votes were not correctly counted. Obviously, the observations of any persons observing the work of the election judges will be important to unsuccessful candidates. As earlier discussed, failure of an election judge to determine the intent of the elector raises a presumption that the elector's vote was not correctly counted.

No rules have been identified dealing with the ability of persons observing the work of the election judges to make objections to that process.

The Subcommittee should be skeptical of the language in the Supreme Court's opinion concerning objections by persons observing a vote count. This is because the Court's remarks are conclusory and don't contain any true legal analysis of the problem or citation to authority. The Court's comment should therefore be considered dicta, or surplusage, not necessary for the resolution of the larger issues discussed in the opinion.

III
CONCLUSION

This memorandum has examined the language of the U.S. Supreme Court's opinion in Bush v. Gore and compared the basic principles of that opinion to Montana election statutes. While perhaps not directly applicable because that opinion dealt with the constitutionality of the Florida Supreme Court's order requiring that certain recounts be undertaken, the opinion nevertheless does seem to set broad principles of the "one person, one vote" requirement that would appear to apply to both judicial implementations and statutory implementations of that requirement. Two requirements of the Bush v. Gore opinion are more directly stated: the need for equal standards

for votes using the same voting technology and the need for training of election judges to ensure the equal application of those standards to ballots cast by the electorate. Two other requirements of the opinion, that there be sufficient time for accurate recounting and protests and that there be procedures for objections by observers, should not be critical areas of concern in Montana.