

Federal appeals court postpones California recall election until March

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A three-judge panel of the Ninth Circuit Court of Appeals on Monday ordered postponement of the California gubernatorial recall election scheduled for October 7 until March 2, 2004. According to the federal appellate court, the use of inherently unreliable punch-card voting machines in six California counties would likely disenfranchise at least 40,000 voters and thereby violate the constitutionally protected right of those citizens to have their votes counted equally with the votes cast by others.

It is expected that the ruling will be appealed, possibly ending up in the US Supreme Court.

Disputes arising from counting votes on punch-card machines in Florida in the 2000 presidential election culminated in the decision of the Supreme Court halting the Florida vote recount and awarding the presidency to George W. Bush. In 2001, Common Cause and other groups sued the State of California in federal court challenging the use in California of punch-card machines because they produce error rates two to four times that of other available voting technologies, such as optical scanners and touch-screens.

Soon after that suit was filed, the California secretary of state, who is charged under California law with regulating the use of voting machines, issued a proclamation that decertified the use of the antiquated punch-card technology as "deficient" and "unacceptable." The Common Cause plaintiffs and California settled the suit on the basis that the machines would be replaced no later than the California primary election, scheduled for March 2, 2004.

In November 2002, Gray Davis was re-elected as California's governor. The Republican right refused to accept the result. They spent millions of dollars to mount a petition campaign, headed up and funded by multi-millionaire Congressman Darrel Issa, to recall Davis. In July 2003, California Secretary of State Kevin Shelley certified that sufficient signatures had been received to hold a recall election. As required by the recall provision of the California Constitution, Lieutenant Governor Cruz Bustamonte set the recall election for October 7, within 80 days of the date of certification of the recall petitions.

Secretary of State Shelley then advanced to the October 7 election date two ballot initiatives that had been scheduled previously for the March, 2004 election—Proposition 53 (requiring that a set percentage of state funds be spent on infrastructure) and Proposition 54 (banning governmental collection of data regarding race and ethnicity).

Six California counties with 44 percent of the electorate, including the large counties of Los Angeles, Santa Clara, San Diego and Sacramento, said they could not replace punch-card machines by the October 7 election. The American Civil Liberties Union filed another law suit on behalf of Common Cause and other groups, such as the National Association for the Advancement of Colored People, asking the federal court to delay the recall election until March 2004, by which time all counties would have replaced the punch-card systems.

A lower federal judge denied the plaintiffs' request for an injunction postponing the October 7 election. Judge Steven Wilson ruled that California's interest in having the recall election held in the time frame provided by its constitution outweighed the interest in reducing the substantial risk that voters using punch-card machines would have their votes counted at a significantly lower rate than other voters.

In its ruling on Monday, the Court of Appeals disagreed and reversed the lower court ruling. In its written opinion, the court cited a long line of US Supreme Court cases dating back to 1915 which established the right to vote and have one's vote counted equally with the votes of others as among the most fundamental liberties of a democratic system of government. These cases established that governmental infringement of these voting rights without a compelling justification violated the equal protection of the law principle guaranteed by the 14th Amendment to the US Constitution.

The Ninth Circuit decision relied heavily on expert testimony showing that punch-card systems are significantly more prone to errors, resulting in at least twice as many votes not being counted as other California voting systems. It emphasized that the 40,000 votes that likely would not be

counted in the punch-card counties could make the difference in a close recall election, or in the election for a successor governor, should the recall of Davis pass. The court placed great evidence on the fact that the California official charged with regulating voting systems, the secretary of state, had decertified punch-card machines as unacceptable and thus inherently unreliable.

The decision of the court of appeals also highlighted the fact that the six punch-card counties had a larger percentage of minorities (46 percent) than non-punch-card counties (32 percent). This meant that working class, poor and immigrant voters would bear an unequal burden of vote disqualification from the use of punch-card machines merely because of where they live. The court also noted that 25 percent of normal polling places would not be ready for use by the October 7 date of the recall election, further compounding the potential dilution of votes cast by people in punch-card counties.

Other important considerations in the decision were the fact that postponing the special recall election would not result in any offices being vacant, and that California would not be unduly burdened financially, since an election was already scheduled for March 2004.

As for propositions 53 and 54, the court found it highly significant that they were originally scheduled for the March 2004 election. The court also ruled that permitting these initiatives to go forward on the October 7 ballot would violate timing requirements of California's Constitution that apply to initiative elections.

Summing up, the Ninth Circuit concluded that a short postponement of the recall election to assure a fair process "free of chaos," with each citizen's vote counted equally, furthered the interests of democracy, outweighing any interest California might have in implementing the earlier election date called for by its constitution. The court wrote: "The choice between holding a hurried, constitutionally infirm election and one held a short time later that assures voters that 'the rudimentary requirements of equal treatment and fundamental fairness' are satisfied is clear."

To buttress its conclusion, the court twice quoted language from the Supreme Court's December 2000 decision in *Bush v. Gore*, the ruling by the right-wing majority on the high court that halted the recount of votes in Florida and handed the presidency to George W. Bush. The Ninth Circuit judges cited constitutional language that was used, cynically and dishonestly, by the Supreme Court justices in 2000 to provide a legal cover for a ruling that attacked the right to vote and have one's vote counted. This included the assertion: "[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 Ninth Circuit judges are well aware that the Supreme Court in *Bush v. Gore* used the principle of equal protection of the law as a pretext for tossing out thousands of valid votes in the presidential election. They are quite consciously turning the words of the high court majority decision against the authors of that decision, and using them to justify a ruling that goes in the opposite direction of *Gore v. Bush*.

In delaying the recall election, these appellate judges have ignored the statement of the right-wing majority in *Bush v. Gore* that its ruling applied only to the circumstances of the Florida recount, and should not be applied to other voting disputes.

The Ninth Circuit Court of Appeals has stayed its order for a week in order to give California until September 22 to appeal to the US Supreme Court. The Supreme Court can then decide to hear the case, or refuse to do so, in which case the delay would be permanent.

The Ninth Circuit's ruling and the resulting uncertainty over the date of the California recall election underscore a significant political reality. In the United States today the very conduct of elections has become problematic. The usual rules for holding elections are breaking down, so that the timing of elections is no longer certain, and the results are no longer conclusive.

Behind this development is the refusal of a significant section of the US ruling elite, represented most clearly by the Bush administration and the Republican right, to accept the finality of elections whose results cut across their political agenda. The impeachment conspiracy sought to overturn the election of Clinton. In 2000, the presidential election was stolen for Bush. Now the attempt is to recall the governor of the nation's largest state only months after his re-election. Powerful forces within the political and corporate establishment no longer feel constrained to abide by democratic procedures. They have no compunction in turning to illegal, conspiratorial and criminal means to achieve their ends.

At the same time, there is no constituency within other sections of the corporate and political establishment for a serious struggle against the Republican right and defense of democratic rights. This indifference and prostration is expressed most clearly by the Democratic Party.

Only the working class, acting independently in pursuit of its own political and social interests, can defend basic democratic rights.



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