Federal appeals court overturns postponement of California recall election

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In a cynical and politically motivated decision, eleven judges of the Ninth Circuit of the United States Court of Appeals on Tuesday unanimously ruled that the California recall election should go ahead as scheduled on October 7.

The ruling effectively nullified a September 15 order by a panel of three other Ninth Circuit judges, who had postponed the election until March 2004. The American Civil Liberties Union (ACLU), which brought the lawsuit seeking to delay the election, announced soon after Tuesday's ruling that it would not appeal the new decision to the US Supreme Court. This means the recall election will be held in two weeks time.

The effect of Tuesday's ruling—of which everyone on and off the court was fully aware—is that tens of thousands of voters in some of California's most populous counties will be disenfranchised on October 7 because their counties will still be using outmoded and unreliable punch-card voting machines. These counties, which include Los Angeles, Santa Clara, San Diego and Sacramento, together account for 44 percent of the voting public and have some of the heaviest concentrations of working class, minority and immigrant voters in the state.

The political motivation of the decision could not be more transparent. The "en banc" ruling by the eleven Ninth Circuit judges has one thing plainly in common with the December, 2000 US Supreme Court decision (*Bush v. Gore*) that halted the vote recount in Florida and installed George W. Bush in the White House: in both cases the federal courts intervened to sanction the unequal treatment of voters and the discarding of tens of thousands of ballots cast primarily by working class citizens.

There was another outstanding aspect of Tuesday's ruling. It effectively upheld the absurd contention of the right-wing majority on the Supreme Court in *Bush v. Gore* that its invocation of the principle of equal protection of the law—seized upon for the most cynical and anti-democratic of purposes—could be applied only to that one unique case. In other words, the equal protection clause of the US Constitution could be invoked only to steal elections for right-wing Republicans.

The California Secretary of State had agreed in 2001 to a court judgment that required all California counties to replace punch-card voting systems, which he officially categorized as archaic and unacceptable, no later than March 2, 2004, the scheduled date of California's Democratic primary election. There followed the unanticipated recall drive to unseat Governor Gray Davis, a Democrat who was elected for a second term in November of 2002.

In July of 2003 recall petitions bearing the names of hundreds of thousands of California voters—obtained through the intervention of multi-millionaire businessman and right-wing Republican Congressman Darrell Issa—were certified and the election to recall Davis was set for October 7, as required by the California Constitution. The ACLU then filed the current law suit challenging the use of punch-card voting in six counties that said they would be unable to install more modern and reliable voting machines by the October 7 election date.

In the suit, the ACLU presented evidence that over 40,000 votes would likely be invalidated in those six counties because of the high rate of error of punch-card machines compared to newer voting technologies. To support its legal claim, the ACLU relied mostly on the decision of the Supreme Court in the *Bush v. Gore* case, where the court refused to permit Florida to continue recounting ballots in the 2000 presidential election, on the grounds that the use of differing criteria by Florida counties for counting ballots violated the equal protection of the law guaranteed by the Constitution. The ACLU asked the federal court to issue an order postponing the recall election until March, 2004, by which time punch-card systems were to be replaced throughout California.

In deciding whether to immediately issue such an injunction, a court is obliged to consider how likely it is that the party seeking the order will win the case at trial, and also weigh the relative hardships to each side in the law suit if immediate relief is or is not granted, a process known as balancing the equities. The public interest in the outcome may also be considered.

On August 20, US Judge Steven Wilson denied the ACLU's injunction request. Wilson ruled that it was unlikely the ACLU would prevail at trial on its claim that equal protection would be violated by punch-card voting. He also found that California's interest in holding the election in October outweighed the interest of assuring that votes would not be counted unequally.

The ACLU then appealed Wilson's ruling denying the election postponement. The appeal was assigned to three judges on the Ninth Circuit Court of Appeals who had been appointed by President Clinton, at least two of whom have a liberal reputation on civil rights issues. On September 15 this three-judge panel reversed the lower federal judge in a lengthy written opinion and ordered the recall election postponed until March 2, 2004, the date of the upcoming California primary election.

These judges ruled that the likelihood the ACLU would win the case was very high because there was no reason the one-man one-vote constitutional principle stated in *Bush v. Gore* should not apply to invalidate use of a voting system that threw out votes at a rate at least double that of other voting technologies. They found that compared to the strong interest in counting votes equally, California's interest in having the recall election in the time frame called for by its Constitution was not significant, and that the public interest otherwise favored postponing the election until March, when another election was scheduled anyway.

The court's ruling delaying the recall election provoked a political and media uproar, particularly in California. Republicans charged that judges were defying the will of the people. The *Los Angeles Times*, California's leading newspaper, led a general press outcry against extending an already chaotic situation.

Leading Democrats, including Lieutenant Governor Cruz Bustamante, who is running to replace Governor Davis if the recall vote passes, and Davis himself, came out publicly in favor of going forward with the election in October, even though the conventional wisdom was that Davis would fare better in March when more Democrats would turn out for the

presidential primary. Longstanding charges by the Republican right wing that the Ninth Circuit Court of Appeals was an intolerably liberal, activist and partisan court were trotted out.

The September 15 ruling opened up a hornet's nest with the most far-reaching implications for a political system already in deep crisis. By invoking the equal protection argument of the Supreme Court in *Bush v. Gore* and ignoring that ruling's assertion of unique application, the three-judge panel highlighted pervasive inequities in the American electoral system and opened the way for vastly expanded legal challenges to all future elections, including the 2004 presidential election.

The ruling brought to the fore the protracted decay and crisis of American democracy, something that was already manifest in the drive by the Republican Party to leverage a sex scandal into a political coup against the Clinton administration, and the ensuing campaign to override the popular vote in favor of Democratic candidate Al Gore and hijack the 2000 presidential election—an effort that culminated in the judicial coup carried out by the right-wing majority on the Supreme Court in its *Bush v. Gore* ruling.

The September 15 ruling of the three-judge panel, which sought on firm constitutional and legal grounds to redress a flagrantly undemocratic aspect of the California recall election, brought into relief the degree to which the holding of elections had itself become problematic in contemporary America.

Underlying this crisis of the political system are profound and malignant social processes which the courts—themselves institutions of the capitalist state—cannot address. Chief among these is the concentration of wealth and growing polarization of society between a financial oligarchy and the vast majority of the people.

For the American ruling elite as a whole, the reversal of the September 15 ruling by the three-judge panel became a matter of great urgency. The political establishment had, moreover, a major stake in keeping the US Supreme Court out of the case and letting the Ninth Circuit itself do the job of nullifying the ruling by three of its more liberal members.

This is because the US high court, already widely discredited as a result of its intervention to install George W. Bush in the White House, stood to lose whatever remnants of legitimacy it retained in the eyes of the public if it was compelled—in order to safeguard the stability of the existing political system—to contravene its own evocations of equal protection in *Bush v. Gore* and overturn a ruling based precisely on those evocations. Had the case gone to the Supreme Court, and the high court reversed the three-judge panel, the cynical, partisan and anti-democratic character of its ruling in the 2000 election would have been confirmed and the entire judiciary further discredited.

Hence the enormous political pressures that were placed on the full membership of the Ninth Circuit to intervene and nullify the September 15 ruling of three of its colleagues. The Ninth Circuit judges wasted no time and took extraordinary measures to provide the desired outcome and staunch, at least for the present, the hemorrhaging of the political and electoral system.

It took only four days for a majority of the judges on the Circuit to vote to review the ruling by the three-judge panel in a procedure known as "en banc." Such a review is highly unusual in itself, and the eleven judges on the "en banc" panel moved with unprecedented speed to hold oral arguments on Monday (which they allowed to be televised) and issue a unanimous ruling the following morning.

In contrast to the September 15 ruling delaying the recall, which explained its reasoning at great length over dozens of pages, the new ruling was abrupt and cursory. It devoted a mere eight short paragraphs to a discussion of the reasons for its result.

The ruling contained virtually no meaningful discussion as to whether equal protection and the one-man one-vote principle would, in fact, be violated by the use of voting machines that the state of California had officially acknowledged to be unreliable. In this regard the ruling made only two superficial and dubious legal points.

First, it cited prior Supreme Court cases that, it claimed, argue for interfering with a pending election only in extremis, when such intervention cannot be avoided. But the cases cited say no such thing. Rather, they stipulate that all circumstances and hardships should be considered in determining a cutoff date for ending a constitutional violation in the voting arena.

In fact, the Supreme Court has on many occasions, when faced with election changes with a discriminatory effect on minorities, invoked the Voting Rights Act of 1965 to enjoin state elections from going forward, including elections in which absentee voting had commenced.

The Ninth Circuit judges ignored the precedent of *Bush v. Gore* itself, which halted for all time, not just a few months, Florida's vote recount, itself indisputably part of the election process. As *Bush v. Gore* said, and the September 15 ruling repeatedly quoted, but Tuesday's ruling ignored: "The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees."

Second, Tuesday's ruling claimed that because the decisions of lower court judges on injunctions should not be reversed unless they are clearly wrong, Judge Wilson's ruling denying a delay of the election should stand. Why? Because, said the court, reasonable judges can differ as to whether it is likely equal protection is violated by the continued use of punch-card ballots. This is a classic circular argument, in which the conclusion is already present in the premise.

The judges were clearly at pains to steer clear of the mine field of *Bush v. Gore* in their ruling nullifying the September 15 decision. They cited only one sentence from that December, 2000 Supreme Court decision, but their choice of sentence was revealing. They quoted the following: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop systems for implementing elections."

This choice was obviously intended to bolster the Supreme Court's assertion that its ruling installing Bush in the White House could not be used as a precedent to challenge inequities arising from the chaotic and irrational hodgepodge of procedures that vary from one electoral jurisdiction to another, both between and within the various states of the US.

In its discussion of balancing the relative hardships if the election proceeded in October as opposed to March, the Ninth Circuit ruling did arguably cite some legitimate issues that would arise from a delay of the election, such as the fact that over 500,000 voters have already cast absentee ballots.

However, absentee voters would have the opportunity to vote again were the recall election to be delayed until the new voting equipment was installed—as ordered on September 15. And other potential problems claimed by voting officials, such as confusion that would allegedly arise from combining the March 2 primary and the special recall in one election, could be resolved by holding the recall election on a separate date.

From the standpoint of basic democratic principles—above all, the right to vote and have one's vote counted—such countervailing issues are of secondary consequence. In Tuesday's ruling, the Ninth Circuit judges did little more than pay lip service to the fundamental constitutional question of voting rights.

The ruling demonstrates again that there is no significant constituency in the ruling elite, including the Democratic Party, for defending democratic rights. The defense of democratic rights, including the right to vote and have one's vote counted, cannot in the end be secured through the courts. It can be secured only through the independent political struggle of the working class.

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