



## ***Lessons of Election 2000***

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Many people believe that Election 2000 proved only how divided the nation is over politics and policy. In contrast, this study draws six lessons from Election 2000.

- Congress should set up a commission to recommend changes in the electoral system; the states should have the choice of accepting the reforms and the obligation to pay for them.
- The Electoral College should be preserved. The framers designed the Electoral College to limit arbitrary power. Abolishing the Electoral College would weaken the states and damage federalism.
- The United States is a constitutional republic, not a regime based on “the will of the people.” Several politicians have appealed to the will of the people in the Florida struggle. The

will of the people is a concept alien to the American political tradition of limited, constitutional government.

- Underlying public attitudes strongly supported limited government in Election 2000. Both the platforms of the candidates and public opinion polls indicate that the public's skepticism about government remains high.
- Campaign spending enhanced turnout and participation in Election 2000. Both the NAACP and unions spent lavishly on getting out the vote. If campaign spending is restricted, turnout will fall, contrary to the professed desire of advocates of campaign finance restrictions.
- Congress should not hold hearings about media mistakes. Any punishment for errors or bias by the networks on election night should be left to public opinion.

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## **Florida is not the only state that has problems with its election system.**

### **Introduction**

Many people now believe that Election 2000 in the United States yielded no clear guidance for the world's leading democracy. The grounds for this view are not hard to discern: the narrow presidential election and the ensuing struggle in Florida combined with an evenly divided Senate and a small Republican majority in the House of Representatives. Accordingly, many people now predict gridlock and rising partisanship.

We believe that the unrelenting focus on the struggle in Florida for the presidency has obscured the deeper meaning of Election 2000. This paper will explore six important lessons from the election.

### **Congressional Commission**

Congress should set up a commission to recommend changes in the nation's electoral systems; the states should have the choice of accepting the reforms and the obligation to pay for them.

Florida is not the only state that has problems with its election system. Other states have reported claims of multiple voting, multiple voter registrations, voting by unqualified persons (including legally disenfranchised felons), and other problems with their voting systems and procedures.<sup>1</sup> Although Article I, section 4, of the U.S. Constitution vests the power to prescribe the times, places, and manner of holding elections for senators and representatives in the state legislatures, it also states, "but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators." The power to make or alter regulations certainly encompasses the power to make recommendations to the state and local governments on the holding of elections.

It should be borne in mind, however, that Article II, section 1, of the Constitution vests the power to appoint electors for the office of

president exclusively in the state legislatures. Article IV, section 4, of the Constitution also guarantees "to every State in this Union a Republican Form of Government," which certainly grants to Congress the power to commission a report containing detailed advice on how presidential elections should be carried out.

We call, therefore, upon Congress to appoint a commission for the purpose of examining the procedures for the popular election of electors in the several states and to make recommendations in at least four areas:

#### **Registration Procedures**

Reports of legally disenfranchised citizens or of noncitizens casting ballots indicate that additional safeguards may be necessary to protect the integrity of the ballot. In some cases, unqualified persons may believe that they are in fact qualified to vote; in other cases, they may intend to corrupt the process. In either case, such "voting" cannot be tolerated in a constitutional republic based on the concept of citizenship.

#### **Voting Technology**

Many American citizens were startled to learn that the technology for casting and recording votes in many areas of the country is twice as old as some of the voters. As Florida proves, such technology can become an issue when the vote totals are extraordinarily close. Antiquated technology can lead to both possible voter confusion and subjective judgments by canvassing officials, who are called upon to "divine" the intent of the voters in the cases of disputed ballots. Aged technology thus brought us the "dimpled chad," a term that should be dropped from the vocabulary of American elections. The commission should examine the potential of voting by computer and, more cautiously, the prospects of Internet voting.

#### **Identification of Qualified Voters**

The process of receiving and casting ballots is absurdly lax and must be reformed. In most areas, people wishing to cast ballots

need give the local election workers only a name and an address to be issued a ballot. No identification is requested. One could quite easily vote a number of times merely by giving the names and addresses of registered voters at a number of polling places. Further, giving only a name and an address would allow one to cast the ballot of another person who might come in to vote later, only to find that his or her ballot had already been cast.<sup>2</sup>

### **Absentee Ballots**

The drive in recent years to increase the use of absentee ballots has both diminished the significance of a major act of citizenship and opened many opportunities for electoral fraud. Absentee ballots should be available only to those who cannot go to a polling place because of disability or absence. The absentee system opens up great opportunities for dirty tricks and effective disenfranchisement of voters. For example, such ballots in Oregon may have been collected by strangers posing as election workers, who then may or may not have mailed the ballots. This form of voting should receive heightened scrutiny.

We wish to stress, however, that the running of elections is the proper province of the states and localities, as prescribed in each state by its legislature. Accordingly, the report of a congressionally appointed commission should be advisory only.

Some observers agree with Sen. Charles E. Schumer (D-N.Y.), who has called for federal matching grants to pay for changes in voting systems.<sup>3</sup> We disagree. The funding of elections, including voting technology, election staffing, and the like, should be left entirely to states and localities. The running of elections is a legitimate function of state and local governments, and the temptation of a federal budget surplus should not entice Congress to relieve states and localities of their obligation to fund their own elections. In addition, there is no power enumerated under Article I, section 8, of the U.S. Constitution or elsewhere in the Constitution that would authorize federal funding of elections held at the state or local level.<sup>4</sup> Finally, we

know from experience in other policy areas that federal funding rarely comes without strings and that a new federal presence could expand in the future. A permanent commission funded in part by the federal government would push us onto a slippery slope toward much greater national control over all elections. State and local governments alone have this constitutional responsibility.

## **The Electoral College**

The disputed election of 2000 has brought many calls for changes in the way we elect our presidents. Shortly after election day, Senator-elect Hillary Clinton (D-N.Y.) proposed abolishing the Electoral College; Sen. Arlen Specter (R-Pa.) had already introduced a constitutional amendment to that end. No doubt the Electoral College may produce a president-elect who did not win a plurality of the popular vote. No doubt that's unfortunate. Is it enough to justify getting rid of the Electoral College? Hardly. The Electoral College still has several advantages over direct election of the president.

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### **Restraining Power**

The framers of the U.S. Constitution were worried that, like the republics of antiquity, the new nation could degenerate over time into a political tyranny. They sought to constrain and limit the exercise of arbitrary political power through constitutional checks and balances. Their debates about how to elect the president focused primarily on limiting power. They worried that if the president were too strong, he might threaten individual liberty. They knew also that the power of Congress needed to be checked by the president. As Gouverneur Morris noted, if the president were not independent of Congress, “usurpation and tyranny on the part of the Legislature [would] be the consequence.” The state legislatures at the time had, in Madison’s words, “betrayed a strong propensity to a variety of pernicious measures,” a tendency that should be checked by

## The Electoral College helps to unify the United States.

Congress. The framers' search for a way to elect the president while limiting the exercise of arbitrary power led to the Electoral College.<sup>5</sup>

How does the Electoral College limit the abuse of power? The framers fully considered direct election by the people. In 1789 and today, direct election would mean election by the great population centers, now mostly found along the two coasts. The framers feared that the populous states would abuse this power and mistreat smaller states. By allocating electors partly on the basis of statehood (each state gets at least three), they created an Electoral College that provides some protection for small states.

We should also keep the larger constitutional picture in mind. The Constitution sets up a system of federalism in which power is shared by the national government and the states. Just as the three branches limit and check each other's ambitions, federalism sets up a separation of powers between the states and the national government.<sup>6</sup> In our time, the states provide few constraints on a national government that has become an overweening force. The representation accorded the states in the Electoral College gives them some weight in the constitutional balance and reinforces their role in our federal system. Abolishing the Electoral College would weaken the states and make the national government more capable of abusing its augmented power.

### Preserving Unity

The close outcome of Election 2000 and the ensuing partisan bitterness indicate the importance of a certain kind of national unity. The United States has prospered as a diverse society tied together by a "civic patriotism" based on common laws, not on a common language, religion, or ethnicity. Such unity is not natural; many large, diverse nations like ours have come apart over regional and ethnic rivalries. Our "civic patriotism" is the foundation of American liberty, peace, and prosperity. We should not take our "from many, one," our *E Pluribus Unum*, for granted.

The Electoral College helps to unify the United States. Once again, consider the alternative of direct election. Some presidential candidates would probably try to roll up large majorities in the metropolitan areas of the two coasts and make some effort in the Midwest. Others might focus on the rest of the country. Both candidates and parties would repair to their fiefdoms seeking as many votes as possible in "their" regions. Presidential elections could become a battle between cities and rural areas, large states and small, and the two coasts and Middle America.

The Electoral College and the "winner-take-all" rule adopted in almost all states force candidates to think more broadly.<sup>7</sup> Imagine how a candidate might plot his or her strategy to win a majority of the Electoral College and thus the White House. The candidate knows every vote in a state in excess of 50 percent plus some padding is superfluous. Since electors lead to victory, the candidate will devote scarce resources of time and money to potentially competitive states anywhere in the nation. Why should he or she focus on a few safe states and regions running up ever-larger majorities? The candidate receives the same number of electoral votes from a state won with 51 percent as from a state won with 90 percent.

The Electoral College thus rewards candidates who move beyond their power base and punishes those who run purely sectional campaigns. Indeed, the winner of the Electoral College conflicts with the popular vote winner only when one of the candidates runs a sectional campaign (e.g., Grover Cleveland in 1888). The Electoral College makes presidential candidates broaden their support whereas direct election encourages regional fiefdoms. Abolishing the Electoral College in favor of direct election of the president would run the risk of exacerbating regional and other tensions.

The close outcome of Election 2000 revealed an unexpected advantage of the Electoral College. Under direct election, Al Gore would have initially won the presidency by 250,000 or so votes. The recounts, the litigation, and the uncertainty we saw in Florida

would have been repeated nationwide. For that reason, historian Alan Brinkley noted, "Perhaps there will now be second thoughts about changing the system."<sup>8</sup> National unity would certainly be tested by a national recount and its attendant struggles.

### Possible Reform

Overlooked strengths notwithstanding, the Electoral College as it currently functions is not exempt from criticism. The framers of the Constitution intended for the electors to exercise a *measure* of independent judgment in selecting the president.<sup>9</sup> That independence disappeared after the emergence of political parties. Today when we vote for a candidate, we actually select a slate of electors chosen by the party and bound, morally and sometimes legally,<sup>10</sup> to vote for their party's candidate in the meeting of their state's electors.

Would a "faithless" elector present a problem for the nation? The faithless elector poses two risks familiar to the framers of the Constitution: corruption and disorder.

The framers fretted much about preventing corruption and disorder in selecting a president. In a close election, the temptation to corrupt an elector would be overwhelming. Would an elector be corruptible? Consider the situation and the likely sums involved. With the presidency in the balance, \$20 million or more would be a small sum to pay for an electoral vote. Extortion of electors could also be a problem, again given the stakes of the election. As for disorder, imagine that a faithless elector changes his or her vote and thereby the outcome of a presidential election.<sup>11</sup> No one on the losing side (and perhaps in much of the nation as a whole) would believe the elector exercised independent judgment aimed at the common good. The "disorders and tumults" feared in Philadelphia in 1787 might well become real in our time.

We should act now to preclude the possibility of faithless electors in the future. We could amend the Constitution to remove the "human factor" from the appointment of electors. States could automatically cast their

electoral votes once the results of the election were certified by the proper authorities. Under this plan, there need be no human electors at all.

## The "Will of the People"

The United States is a constitutional republic, not a regime intended to embody "the will of the people." After a bitter and acrimonious election campaign and a crisis that threw the election of the president to the House of Representatives, Thomas Jefferson was elected president after 36 ballots. In his First Inaugural Address, after a magnanimous appeal to Americans of both parties, he exhorted his fellow citizens to rededicate themselves to the principles of our government: "Let us, then, with courage and confidence pursue our own federal and republican principles, our attachment to our union and representative government." Jefferson rightly emphasized the republican and representative nature of American government, founded on respect for law rather than on arbitrary power, whether popular or autocratic.

In sharp contrast, we have heard much about "the will of the people" in recent weeks. Vice President Gore appealed to "the will of the people" in his interview with CNN's John King on November 29, 2000, and his campaign manager, William Daley, even went so far as to state on November 11 that "if the will of the people is to prevail, Al Gore should be awarded a victory in Florida and be our next president."<sup>12</sup> The normal rule, of course, is to first determine who received the most votes before talking about awarding victories, but talk of the will of the people naturally lends itself to declaring that a preexisting "will" must determine who should be awarded a victory. And that will, as we have learned, may be conjured through the divination of the intent of voters, whether or not they actually cast valid ballots.

But such talk was not limited to leaders of the Democratic Party. Their Republican opponents responded in kind, as Rep. Curt

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Weldon (R-Pa.) did when he stated that he would “use every ounce of energy I have to deny the electors being seated if I believe the political will of the people was thwarted by the son of Mayor Daley of Chicago.”<sup>13</sup> And arguing before the U.S. Supreme Court on behalf of George W. Bush’s campaign, Theodore Olson stated, “What the court was bound and determined to do was to get to a consequence that the court determined was consistent with the will of the people, irrespective of what the statute was.”<sup>14</sup>

Talk of the will of the people is profoundly misleading. Indeed, the idea of the will of the people is a deeply authoritarian idea completely at odds with the idea of government under law.<sup>15</sup> It derives, not from the American Founders or from any “Whiggish” antecedents in Britain’s constitutional history, but from the radical authoritarian and anti-liberal philosopher Jean-Jacques Rousseau, who postulated a “general will” of the people as the foundation of the state. According to Rousseau in *The Social Contract*: “[T]he general will is always right, and always tends to the public good; but it does not follow that the deliberations of the people will always have the same rectitude. We always desire our own good, but we do not always recognize it. You cannot corrupt the people, but you can often deceive it; and it is then only that it seems to will something bad.”<sup>16</sup>

As political historian J. L. Talmon noted in his classic study of the playing out of Rousseauian politics, “The very idea of an assumed preordained will, which has not yet become the actual will of the nation . . . gives those who claim to know and to represent the real and ultimate will of the nation—the party of the vanguard—a blank cheque to act on behalf of the people, without reference to the people’s actual will.”<sup>17</sup> And, of course, the natural spokesperson of such a will must be the one person who receives the votes of the entire nation, that is, the president. In contrast, each member of Congress represents only a part of the nation. Therefore, only the singular national leader can articulate the will of the people and announce it to them.

The United States is not based on some grand notion of the will of the people. American government depends on the more modest idea that the people may delegate certain limited powers to a representative government operating on principles and procedures set out in our the Constitution. In the words of our Declaration of Independence, “to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.” Government does not derive total power but only a limited set of “just powers.” Our consent by its nature creates a limited government under law.

In contrast to the desire for a good and wise ruler, whether ideologically clothed in the divine right of kings or the will of the people, James Madison described in *Federalist* no. 10 “a republic, by which I mean a government in which the scheme of representation takes place.” Madison argued against the search for wise rulers because, as he observed, “enlightened statesmen will not always be at the helm.” He also advised against “pure democracy,” on the grounds that a system of delegating powers to elected representatives would “refine and enlarge the public views” and allow the public good to encompass much larger and more diverse bodies of citizens.<sup>18</sup>

Our Constitution is based on delegated, enumerated, and thus limited powers. It mixes elements of popular representation (the House of Representatives), indirect representation (the Senate, representing the states, and the president, elected by the states), and restraints on popular sentiment through the rule of law (the federal judiciary). Our Constitution is not a mechanism to articulate the will of the people, unless by that vague phrase one means the Constitution itself, including all of its limitations on the powers of majorities. Our Constitution was ordained and established “in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the popular defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” It was not established to secure the will of the people.

The phrase “the will of the people”—along with “dimpled chad”—has no place in a system of equal liberty under law. Instead of confusing ourselves with airy metaphysical talk about the will of the people, we should, with Jefferson, “with courage and confidence pursue our own federal and republican principles, our attachment to our union and representative government.”

## **Support for Limited Government**

Support for limited government remains strong. Many pundits and some politicians are now saying that President-elect Bush should try to govern through a bipartisan consensus incorporating the ideas of his erstwhile opponent. Is this conventional wisdom correct? Did the protracted election of George W. Bush produce a mandate for compromising with Al Gore’s agenda? The answer is no.

We should begin by looking at Election 2000 in a larger historical context. Since the tax revolt in 1978, the United States has partially reclaimed its legacy of limited, constitutional government. The public mood has remained skeptical of activist government, and tax cuts have remained popular with the public.

One of the leading candidates for president in 2000 provided a pithy summary of this public mood:

I don’t ever want to see another era of big government. . . . I’m opposed to big government. . . . I’m for a smaller, smarter government, one that serves people better, but offers real change and gives more choices to our families. . . . I have believed in it long before it was fashionable to do so in the Democratic Party. . . . I don’t believe there’s a government solution to every problem. I don’t believe any government program can replace the responsibility of parents, the hard work of families or the innovation of industry.<sup>19</sup>

That was Al Gore in Shreveport, Louisiana, on October 24, 2000. Oddly, for most of his campaign, the vice president ran on expanding government benefits and entitlements, not on cutting back the state. However, the fact that the Democratic candidate for president felt the need to express his devotion to limited government suggests its continuing hold on the American people.

The two Clinton terms also indicate the strength of this culture of limited government. Clinton’s major domestic achievement was welfare reform, a rolling back of government in social policy. His greatest failure was his plan to centralize and nationalize health care, a mistake that generated enormous opposition and suggests the powerful hold freedom has on Americans.

What about during the 2000 election? Has the “culture of limited government” begun to wane? Didn’t the public want more government rather than less? The preponderance of the evidence shows that the public’s desire for limited government persists.

Start with the programs of both candidates. Bush emphasized across-the-board tax cuts and partial privatization of Social Security. The fact that Bush believed those themes would bring victory indicates the continuing appeal of limited government.

Al Gore, in contrast, ran an old-fashioned “populist” campaign that pitted “working families” against big business, defined as Big Drugs, Big Tobacco, or Big Oil. Gore dallied with the rhetoric of class war, defining himself as the protector of the common man against the depredations of the “wealthiest 1%.” For Gore, government was not a problem but rather a defense against the oppression of working families. The rhetoric of class warfare implied expanded government.

Gore’s ploy failed miserably. He did win the popular vote by a plurality of almost 300,000, a lackluster showing considering that he ran as a virtual incumbent during the best economic conditions since the 1960s. Gore should have received anywhere from 53 percent to 60 percent of the overall vote according to predictive models founded on

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economic data.<sup>20</sup> He thus fell short of this “normal” performance by 3 to 11 percent of the vote. Gore’s class war themes may (or may not) have caused that shortfall. We can say with certainty, however, that his rhetoric did not find a ready audience in an electorate still committed to limited government.

Our analysis of exit poll results and public opinion data also clearly demonstrates that most voters supported George W. Bush’s stated desire for a smaller, less-intrusive federal government. An ABC News poll revealed that 6 of 10 voters prefer “smaller government with fewer services.”<sup>21</sup> During the course of the campaign, 60 percent of voters thought that Bush’s policy prescriptions were either “about right” or “too liberal,” suggesting considerable support for Bush’s limited government stance.<sup>22</sup> A plurality of one-third of voters told exit polls that Bush reflected their own personal view of the role of government in society.<sup>23</sup>

A majority also said that the government currently does things that are better left to businesses and to individuals. Only 4 of every 10 voters said that the government should do more to solve America’s problems.<sup>24</sup> As the *New York Times*’s Robin Toner and Janet Elder reported just after election day: “Mr. Bush’s argument that government’s role in public life needed to be reduced clearly resonated. That philosophy of restricting government was shared . . . by many voters.”<sup>25</sup>

Naysayers may argue that the electorate embraces limited government in the abstract but prefers more government when it serves their interests. However, the data belie this argument in several significant policy areas, including taxes, Social Security, and health care.

In response to a question about what the new president should do first, the second most popular answer (just behind “improve education”) was “cut taxes.” Not only did voters choose tax cutting over strengthening Social Security, but tax cutting also won out (by a five-to-two ratio) over the curbing of prescription drug prices. Similarly, when asked what the top priority for the budget surplus should be, 52 percent of voters said

either that the government should cut the income tax or that it should reduce the national debt.<sup>26</sup> A paltry 6 percent wanted the government to increase the funding of social programs other than Social Security.

Asked about tax plans, a majority chose a larger, across-the-board tax cut rather than a smaller tax cut targeted to lower- and middle-income people.<sup>27</sup> Furthermore, a poll conducted in late October by the *Washington Post* and Harvard University found that a plurality of Americans didn’t view Bush’s tax cut plan as economically risky.<sup>28</sup> Finally, we note that, according to the Center on Policy Attitudes, the public remains steadfastly opposed to the federal government’s undertaking any new program that requires higher taxes.<sup>29</sup>

Perhaps most important of all, we learned that Social Security reform is no longer the “third rail” of American politics. Bush’s proposal for a partially privatized program for younger Americans helped, rather than hindered, his quest for the White House. According to exit polls, 57 percent of voters support a plan under which individuals could invest some of their Social Security taxes in the stock market.<sup>30</sup> By contrast, Gore’s scaremongering on this issue resonated with only 39 percent of the electorate. What’s more, according to a poll conducted in the summer of 2000 by the Center on Policy Attitudes, an overwhelming majority of Americans do not want to save Social Security by increasing taxes or taking on new debt.<sup>31</sup>

Finally, a look at the data (rather than visually arresting and vocal protests) shows that Americans fully support the free market internationally, as well as domestically. According to the *Washington Post*/Harvard University poll, for example, Americans believe that globalization is good for the U.S. economy by a two-to-one margin.<sup>32</sup>

In sum, the presidential election of 2000 was closely split between George W. Bush and Al Gore. The underlying views of the public, however, were not evenly divided. Most Americans remain where they have been since 1978: supportive of limited government and free markets and extremely skeptical of vast

public initiatives. These libertarian attitudes should define the next administration.

## Campaign Spending

Advocates of further restrictions on campaign finance claim to be the true friends of democracy. They argue that campaign donations corrupt and degrade American politics and enforce the rule of a wealthy elite. They propose limits on campaign contributions, bans on soft money (that is, money not regulated by federal law), and new regulations on television and radio advertising by political groups. Are the advocates of restrictions true friends of democracy?

Advocates of strict campaign finance regulation usually believe that the more people are involved in politics, the healthier and better our democracy is. Getting more people involved requires time, effort, and, yes, money. Restricting the flow of money is likely to reduce both public attention to candidates and turnout at the polls. Election 2000 provides strong evidence of how campaign spending boosts turnout. Consider the following examples:

The NAACP funded "Operation Big Vote" with \$9 million in soft money. Tamar Jacoby describes the efforts supported by this money:

Paid staffers and volunteers scoured the country for black voters, targeting the unregistered in shopping malls, nightclubs, black churches, even southern prisons, where they harvested some 11,000. As the election approached, the NAACP's army manned telephone banks and knocked on doors; messages urging blacks to get to the polls aired on BET and in Magic Johnson Theaters.<sup>33</sup>

Heather Booth, director of the National Voter Fund of the NAACP, said the organization's lobbying arm, Americans for Equality, spent an additional \$10.5 million on radio, television, and newspaper advertising; direct mail;

phone calls; and other get-out-the-vote activities, including three bus tours to 10 cities in seven days. She noted that the organization had 80 field organizers in battleground states and dispatched 8,000 volunteers to knock on 40,000 doors in each of 20 targeted cities.

The NAACP's efforts yielded striking results. Ron Lester, a pollster and consultant to the National Voter Fund, argued that exit polls showed that an estimated 925,557 more black Americans voted in 2000 than in 1996 in battleground states targeted by the NAACP. Four hundred thousand of those votes were cast in Florida, with obvious results. The spending by the group also helped register 200,000 in the last two months of the campaign.<sup>34</sup> Massive "soft money" spending played an important part in 1 million more black Americans voting in 2000 than in 1996.

Unions spent more than \$45 million on Election 2000. The AFL-CIO and the American Federation of State, County and Municipal Employees spent \$6 million on phone calls and trucks broadcasting political messages to black and Latino neighborhoods. AFSCME made 850,000 get-out-the-vote calls in battleground states. AFL-CIO operatives handed out 14 million leaflets, mailed 12 million pieces of campaign literature, and made 8 million phone calls. Once again, the results were striking. Exit polls indicated voting by union households rose three percentage points over 1996, which translated into 4.1 million more union votes, according to AFL-CIO political director Steve Rosenthal.<sup>35</sup>

Of course, other groups from across the political spectrum were also active. The Christian Coalition distributed 70 million voter guides, three times the number handed out in 1996. The National Rifle Association spent between \$15 million and \$20 million on mobilizing voters.<sup>36</sup>

Curtis Gans, a leading scholar of the American electorate, noted that overall turnout rose about two percentage points over 1996. Why? Gans explained: "I think it was driven by, indeed, the voter mobilization efforts . . .

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from the NRA to the labor unions to the blacks to the Christian Coalition, because the difference between the other states whose turnout averaged downward and these states was indeed these mobilization efforts. They didn't exist in those other states.<sup>37</sup>

Election 2000 suggests the contradictions of campaign finance "reform." If the NAACP, the NRA, the unions, the Christian Coalition, the two parties, and others had not spent more than \$100 million informing voters and getting out the vote, the participation rate would have been much lower than the 50.7 percent achieved. Those who plump for restrictions on campaign contributions and spending would really encourage lower turnout and less participation. Of course, higher turnout and more participation are the professed goals of those who would restrict the role of money in politics. Turnout rose because money flowed into our political system in 2000, a fact that should not be forgotten as Congress once again considers new regulations on campaign finance.

## **Media Mistakes**

Congress should not hold hearings about media mistakes, even though election night 2000 was a disaster for the TV networks. They early on announced that Al Gore had won Florida, retracted that call a couple of hours later, awarded Florida and the election to George W. Bush around 2 A.M., and finally withdrew that call as the sun rose on November 8. The TV networks turned in their worst performance in the era defined by exit polls.

The first call for Gore came about 10 minutes before the polls closed in the western Panhandle of Florida, which is in a different time zone than the rest of the state. The 10 Panhandle counties are heavily Republican. To some Bush supporters, the early call seemed aimed at suppressing mostly Republican votes in the Panhandle and elsewhere by causing late voters not to vote.<sup>38</sup> After all, if Al Gore had won Florida already,

why should a Republican bother to vote?

Republicans were outraged. Rep. Billy Tauzin (R-La.) said that because broadcasters were making early calls on states going to Gore and delaying calls on states Bush was carrying, "you receive a picture of America believing that Al Gore was sweeping the country, that George W. Bush was having trouble carrying his states." The situation suggests, he said, a "very disturbing picture, I think, of probable bias."<sup>39</sup>

Representative Tauzin later cited a large survey of Republican voters in the Panhandle; that survey suggested that the early call had cost George W. Bush some 17,000 votes, or 6 percent of his overall total, in those counties. Tauzin also cited a study by John Lott Jr. based on a model predicting Bush's share of the vote in the Panhandle. The Lott study suggested the early call caused a 4 percent suppression of the Republican turnout in those counties.<sup>40</sup> According to the *Washington Post's* Howard Kurtz, a majority of Americans believe that calling Florida early may have affected voting elsewhere.<sup>41</sup>

Never great believers in the fairness or accuracy of the news media, Republicans may now assume that network bosses sympathetic to Gore boldly sought to influence the Florida election. Republican lawmakers may be tempted to act on that assumption and perhaps punish the networks for what they see as political meddling and biased projections.

Attacking the news media may find favor with the public. According to a survey taken just after the election by the Pew Research Center for the People and the Press:

Media miscalls of the outcome of the presidential race on Tuesday have only intensified voters' long-standing criticisms of press performance. Seven-in-ten voters (69%) voice anger or disappointment with the networks' premature calls that George W. Bush had won the presidency. More than half of voters (52%) believe the networks' earlier mistake of calling

Florida for Gore may have had an effect on how people in other parts of the country voted (with as many as 58% of those in the West supporting this view). Little wonder that the perception that the media had too much of an influence on the outcome climbed to 53% in the current survey from 47% in 1996 and 46% in 1992.<sup>42</sup>

The data suggest that a government assault on the news media would be popular, especially among Republicans, more than half of whom believe Bush was treated unfairly in general by the media.

You don't have to believe that the news media avoid all bias to worry about public officials regulating the news media. Certainly any government regulation of when and how the media report the results of exit polls would contravene the prohibitions explicitly stated in the First Amendment. The freedom of the press protected by the Constitution includes a freedom to make mistakes, including errors that harm political interests, a view sanctioned long ago by the Supreme Court in *New York Times v. Sullivan*.<sup>43</sup>

A case could be made that government could legitimately shame the networks by calling them to account for their decisions, especially if they sought to influence the outcome of an election. According to this view, government cannot censor the news media, but it can hold the networks up for public condemnation, thereby increasing accountability. Increasing accountability, in turn, might lead to more fair and balanced reporting and thereby improve democratic choice.

This argument assumes government should try to improve communication in our democracy by pushing the news media to do a better job. This premise shows up in other policy areas. It leads campaign finance reformers to denounce the "negativity" of campaigns and to urge government to regulate their content to improve political dialogue.

Government should not try to improve political dialogue in a free society. That job properly belongs to the free marketplace of

ideas. Government should remain neutral toward speakers in that marketplace. After all, should a government run by incumbent officeholders decide if a political ad is "too negative"? Do we trust public officials to select and enforce "true religion"? And finally, does anyone think politicians have any worthwhile insights about "better speech"? Our system of government answers no to all three questions. The First Amendment protects several aspects of civil society—religion, association, speech—from government intervention.

Supporters of a free society should also worry that congressional hearings would have a chilling effect on the news media. While we assume that members of Congress would start such hearings with the best of intentions, congressional investigations have a way of going beyond their original aims. If the hearings did intimidate the news media, free speech would be chilled, and the precedent would be troubling. Democrats might hear a lot about "liberal bias" in the next few months, but future elections could lead to Democratic majorities who would hold hearings about "conservative bias" in the media. Intimidating the media is a game no one wins over the long run. It's a game that should not be played at all.

None of this means the news media and the networks should be exempt from criticism. But civil society—the private sector—should be both judge and jury in the case of the news media and Election 2000.<sup>44</sup> Without congressional hearings, we have already seen the public humiliation of powerful people like news anchors and network presidents followed by contrite apologies. Further investigations by the press and by private political groups are entirely in order. As ever, more speech, not congressional investigations, is the best response to the mistakes made by the news media in Election 2000.

**Government should not try to improve political dialogue in a free society.**

## Conclusion

Election 2000 has ended in confusion and considerable political conflict. Troubles

# Election 2000 shows the continuing vitality of the American political tradition of limited government and individual liberty.

notwithstanding, we can see several important implications for public policy in the United States over the next four years. Significant majorities of Americans want less government and lower taxes. That concern for limited government should also lead us to preserve the Electoral College, to leave the news media alone, and to cease all talk about the will of the people. Election 2000 also gave us some reason to believe that additional regulation of campaign finance is likely to belie the intentions of its advocates. In sum, Election 2000 shows the continuing vitality of the American political tradition of limited government and individual liberty.

## Notes

1. See David Kidwell, Phil Long, and Geoff Doughterty, "Hundreds of Felons Cast Votes Illegally," *Miami Herald*, December 1, 2000; Bill Theobald, "Bogus Names Jam Indiana's Voter List: Invalid, Repeat Entries Damaging Credibility," *Indianapolis Star*, November 5, 2000; and Kara Blond and Liam Pleven, "Motor-Voter Traffic Jam? Hundreds Complain DMV Delayed Their Registrations," *Newsday*, November 14, 2000.
2. These concerns should not lead to mandating a national identification card, a step fraught with dangers for privacy and, perhaps, liberty. However, states could require proof of voter registration or some other valid form of identification.
3. Matthew Vita and Helen Dewar, "Congress Debates Electoral Reform," *Washington Post*, November 17, 2000. David Broder provides the rationale for federal action: "Such a commission could document what it would take—in money and equipment—to give this country a 21st-century voting and vote-counting system. That burden should be shared between state and federal governments, because, as we've all learned to our sorrow, defects in just a few counties can cause a national migraine headache in a close election." David Broder, "In Need of an Overhaul," *Washington Post*, December 6, 2000, p. A35.
4. We do not believe that funding of state and local elections by the federal government is "necessary" (Article I, section 8) to guarantee a republican form of government to the states (Article IV, section 4).
5. A concern about limiting power occupied the framers. The reader can test this assertion by reading the debates at the Constitutional Convention over the Electoral College, which can be found in *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1987), vol. 3, pp. 534–61. The quote from Gouverneur Morris appears on p. 438 and that from Madison on p. 540.
6. See James Madison in *Federalist* 51: "This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state." *The Founders' Constitution*, vol. 1, p. 330.
7. The exceptions to the "winner-take-all" rule are Maine and Nebraska, which allocate their electors by districts except for two that are awarded on the basis of the statewide vote. According to the Constitution, state legislatures have the power to determine how electors are selected. Most have chosen and stuck with the winner-take-all rule. Why? In general, the winner-take-all rule makes a state more desirable to presidential candidates than it would be under some system of proportional allocation. Winner take all makes each state a bigger prize. States where the same party holds the legislature and regularly wins the presidential race are not likely to move away from winner take all. States where one party holds the legislature and the other party regularly wins the presidential election might move away from the winner-take-all rule. The fact that few states do so suggests that parties within states are highly uncertain about which party will dominate their presidential elections or that the cases in which one party holds the legislature and the other regularly wins the presidential election are rare.
8. See "Dialogue between Alan Brinkley and Michael McConnell," *Slate*, November 16, 2000, <http://slate.msn.com/dialogues/00-11-15/dialogues.asp?iMsg=4>.
9. Lucius Wilmerding Jr., *The Electoral College* (New Brunswick, N.J.: Rutgers University Press, 1958), p. 21. See evidence of the views of other important figures of the Founding era on pp. 19–21.
10. Many states bind their electors by law or by pledges. Currently, the following states do one or the other: Alabama, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana,

Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Vermont, Virginia, Washington, Wisconsin, Wyoming. For more information, see the Web site of the National Archives and Records Administration, <http://www.nara.gov/fedreg/elctcoll/pledges.html>. The constitutionality of those laws is open to argument. See *Ray v. Blair* 343 U.S. 214 (1952) 232–33. None has been definitively tested in court.

11. Abstaining would be enough in a close election. Robert Beckel, a Democratic consultant, tried to get electors, who would otherwise vote for Bush, to abstain. Consider his response to a question posed by Paula Zahn on "The Edge with Paula Zahn," FOX News Network, November 30, 2000, Transcript no. 113001cb.260:

ZAHN: Well, that's important. Now let me ask you this. Once you got this information out to these electors, what did you want them to do with it? Were you trying to convince them to abstain from voting or were you actually trying to flip votes with this information? Because I know you passionately feel that Al Gore got ripped off in Florida.

BECKEL: I do think he got ripped off in Florida, but I did not believe there was a possibility that an elector would switch from Bush to Gore. So I was hoping that a possibility, however thin, that they would abstain and that would change the math on it. But, you know, if there's one thing that's happened in all this—and I think maybe I've been able to contribute to this—is that people now know, I think, that electors are people that they can express themselves too. So if we've accomplished that in this, then maybe that's not such a bad thing.

12. Quoted in Ceci Connolly, "With New Resolve, Gore Returns to Capital," *Washington Post*, November 10, 2000, p. A28.

13. Quoted in Bill Lambrecht, "Gore-Bush Contest Could Become an Eternal Campaign," *St. Louis Post-Dispatch*, November 26, 2000, p. A1.

14. Quoted in Tamara Lytle, "High Court Hears Historic Appeal," *Orlando Sentinel*, December 2, 2000, p. A1. In a later case concerning absentee ballots, Bush lawyer Daryl Bristow argued, "This case is being brought for one reason, to change the outcome of the election, to change the will of the people in Seminole County." See <http://www.cnn.com/2000/ALLPOLITICS/stories/12/06/president.election/index.html>.

15. Political economists have realized for some

time that "the will of the people" defined as a transitive social welfare function does not exist except in a dictatorship. See Michael Munger, *Analyzing Policy* (New York: Norton, 2000), pp. 175–78.

16. Jean-Jacques Rousseau, *The Social Contract*, in Jean Jacques Rousseau, *Political Writings*, trans. and ed. Frederick Watkins (Madison: University of Wisconsin Press, 1986), p. 29.

17. J. L. Talmon, *The Origins of Totalitarian Democracy* (London: Sphere Books, 1970), p. 48.

18. James Madison, "Number 10, The Same Subject Continued," in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Isaac Kramnick (New York: Penguin Books, 1987), pp. 125–26.

19. Quoted in Kevin Sack, "The 2000 Campaign: The Vice President; For Limited Government? That's Me, Gore Says," *New York Times*, October 25, 2000, p. A23.

20. See James Warren, "Scholars Hardly a Model of Certainty This Election," *Chicago Tribune*, November 8, 2000, p. 1; and David Stout, "The 2000 Campaign: Prognosticators: Experts, Once Certain, Now Say Gore Is a Maybe," *New York Times*, November 7, 2000, p. A23. Not all economic models of Gore's share of the vote were so far off, Ray Fair predicted Gore would receive 50.8 percent of the vote. See Fair's Web site, <http://fairmodel.econ.yale.edu/>.

21. ABCNews.com, October 10, 2000.

22. Voter News Service exit poll, November 7, 2000.

23. Ibid.

24. Ibid.

25. Robin Toner and Janet Elder, "An Electorate Largely Split Reflects a Race So Very Tight," *New York Times*, November 8, 2000.

26. Voter News Service.

27. Ibid.

28. *Washington Post/Harvard University* poll, as reported in Dan Balz and Richard Morin, "Gore Has Yet to Make Sale on Economy," *Washington Post*, October 27, 2000.

29. Center on Policy Attitudes, "Americans on Health Care Policy: Executive Summary," August 30, 2000.

30. Voter News Service.

31. Center on Policy Attitudes. "Americans on the Federal Budget," September 2000.

32. *Washington Post*/Harvard University poll.

33. Tamar Jacoby, "Voters and Victims: How Blacks Lost—No Matter What," *National Review*, December 4, 2000.

34. Larry Bivins, "NAACP Says 1 Million More Blacks Cast Ballots This Year," Gannett News Service, November 29, 2000.

35. Kathy Barks Hoffman, "Labor and Black Votes Made Difference for Democrats," AP Online, December 2, 2000.

36. John Sherry, "105 Million Voters Set Turnout Record," *The Hill*, November 9, 2000.

37. National Public Radio, *Talk of the Nation*, November 15, 2000, <http://www.npr.org/programs/totn>.

38. The Republicans argue that the early call led Bush voters in line at their polling place to go home.

39. Eric Schmitt, "Counting the Vote: House Republicans; G.O.P. Lawmakers See Bias by Networks in Calling Races," *New York Times*, November 17, 2000, p. A32.

40. John R. Lott Jr., "Media Suppressed the Bush Vote," *Philadelphia Inquirer*, November 14, 2000.

41. Howard Kurtz, "The Results Are Finally In: We Lost," *Washington Post*, November 20, 2000, p. C1.

42. See <http://www.people-press.org/post00rpt.htm>.

43. Thus the Supreme Court noted "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) 271.

44. James Madison said before the House of Representatives: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." Quoted in *New York Times Co.* at 275.

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