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Rise of the Machines

By **DAVID BOIES**

The 2000 election left many voters feeling disenfranchised, frustrated millions more and tarnished the image of American democracy at home and abroad. The United States Supreme Court's decision to intervene (for the first time in history) in a presidential election, ordering Florida election officials to stop counting votes and effectively determining the winner, troubled legal scholars and average citizens alike.

No one wants a repeat of 2000 this year. Unfortunately, many of the same conditions that led to the events of 2000 are present today - a close election, the likelihood that Florida will prove decisive, partisan election officials trying to use the power of their office to help their party, and armies of lawyers poised to plead their candidate's claims in court.

One way of avoiding a repeat of 2000 is beyond our control: we cannot know whether the margin of victory this year will be larger than the number of disputed ballots. Another way is unrealistic: we cannot expect that no one will try to break or bend the rules for partisan advantage.

There are, however, some hopeful signs. Election officials are working to avoid debacles like the confusing "butterfly ballot" of 2000. And because of a law passed by Congress in 2002, voters who show up at the polls and are told they are not eligible to vote must now be given a provisional ballot, with officials determining their eligibility afterward. If this law had been in effect in 2000, thousands of eligible voters improperly struck from the rolls would have been able to vote.

But we can do more. First, officials should fix (and publicly declare) the rules before Election Day - when it is less certain who will benefit. Issues like whether a person voting by provisional ballot must vote in his home precinct, whether faxed absentee ballots will be accepted, whether manual recounts will be permitted and how many days will be allowed for the receipt of absentee ballots should be determined now.

Second, any disputes over what election officials are doing or planning need to be resolved now, again before Election Day. In 2000, thousands of eligible (mostly African-American) voters were struck from the rolls at the behest of Katherine Harris, then Florida's secretary of state, because their names were similar to those of convicted felons, who are ineligible to vote in that state. This year a comparable plan by Ms. Harris's successor was blocked. An effort in Ohio to invalidate new registrations based on the weight of the paper that voters used to register was likewise blocked.

Third, any problems on Election Day itself must be detected and dealt with before the polls close. In most elections, abuses on Election Day could lead to a new election. However, since selection of presidential electors must, under the Constitution, be done on the same day in every state, and since it is unrealistic to expect all 50 states and Congress (which under the Constitution must select the day) to agree to a "do-over," a new presidential election is not practical. Consequently, if voters are intimidated or prevented from getting to the polls on Election Day (as happened to African-American voters in some northern Florida counties in 2000), their votes are lost forever.

It is too late, unfortunately, to take one important step toward avoiding a repeat of 2000 this year. If anyone took Bush v. Gore seriously as legal precedent, uniform voting machines in each state would be constitutionally required.

As the dissenting opinion in Bush v. Gore emphasized, voting machines are much more likely to affect the chances of whether a vote is counted correctly than the different standards used to assess ballots by local officials. Optical-character-recognition voting machines that include a paper trail, and which warn voters of overvotes or undervotes so they can be corrected, have been in operation for years in several counties in Florida and elsewhere. They have been recommended by both Republicans and Democrats - including the bipartisan commission appointed by Gov. Jeb Bush of Florida after the 2000 election.

Thus Florida's recent installation of less reliable alternative devices that lack a paper trail, many in heavily Democratic counties, is incomprehensible. O.C.R. machines cost a little more, but the difference is trivial compared to the billions being spent for elections in Iraq or even the millions spent by the state of Florida to ensure that felons (and those with similar names) are not eligible to vote. Whether the uniform use of these machines is constitutionally required or not, their extra cost is a small price to pay for making democracy more effective at home.

David Boies, author of "Courting Justice," represented Al Gore before the Supreme Court in 2000.