

OPINION

LITIGATING THE

VOTE

Could there be another
'Bush v. Gore' this year?

BY ANN M. LOUSIN

In 2008 Barack Obama won 52.93 percent of the popular vote in the presidential election and 365 of the 538 votes in the electoral college. Because 270 votes is a majority in the electoral college, he won the election. Can he carry both the popular and electoral vote again in 2012? If the popular vote in only a few states is close, the result of the election in the electoral college will hang in the balance. Will we have another scrap in the U.S. Supreme Court, as we did in 2000 with *Bush v. Gore*?

As an incumbent, Obama must try to keep as many of the states that awarded him 365 votes in the electoral college as he can. He can afford to lose only 95 votes. In 2008 16 states awarded him their electoral votes based on popular votes of less than 58 percent.

Obama's task is harder in 2012 than in 2008 because the 25 states and the District of Columbia that gave him 365 votes in the electoral college now account for only 359 votes. Much of Obama's strength in 2008 came from Northern and Midwestern states; his weakest showing came in the South and the West. The 2010 census showed



a shift in the country's population from the North and Midwest to the South and West.

In 2008, eight states gave Obama between 51 and 55 percent of their popular vote. These are the states, virtual "cliffhangers" in 2008, where he is most vulnerable in 2012. They are Florida (51.0 percent in 2008), Ohio (51.5 percent), Virginia (52.6 percent), Colorado (53.7 percent), Iowa (53.9 percent), Minnesota (54.1 percent), New Hampshire (54.1 percent), and Pennsylvania (54.5 percent). Together these states gave Obama 111 votes in the electoral college in 2008. Thanks to the 2010 census, these states, as a group, account for two votes fewer, 109 electoral votes. If all eight of these states defected, Obama would lose in the electoral college.

Now let's look at the second-most vulnerable group of states, the eight that Obama carried by at least 55 percent, but less than 58 percent, of the popular vote. These are Nevada (55.1 percent in 2008), Wisconsin (56.2 percent), Oregon (56.7 percent), New Mexico (56.9 percent), New Jersey (57.3 percent), Michigan (57.4 percent), Maine (57.7 percent), and Washington (57.7 percent). Together these states gave Obama 74 votes in the electoral college in 2008. They account for 74 votes in the electoral college in 2012.

Which of these combined 16 states is Obama likeliest to lose in 2012? Six states have a particularly strong Republican base: Florida, Virginia, Colorado, Nevada, Wisconsin and Michigan. Together, they total 83 electoral votes in 2012. He won Florida and Virginia by the slimmest of margins in 2008. Add a few more vulnerable states to the mix, and we could very easily see Obama winning a majority of the nationwide popular vote and yet losing in the electoral college.

Let's assume that on the night of November 6, there is a dispute over the popular vote in, say, Iowa, which has six

electoral votes. Then the election would come down to the state where the tall corn grows. It would be a repeat of the 2000 election, which came down to the sunshine state, Florida, with its 27 electoral votes.

In 2000, the presidential election dispute culminated in the Supreme Court, which decided *Bush v. Gore*, 531 U.S. 98 (2000). The court held that the manner in which Florida was conducting the recount of the popular vote was a violation of the equal protection clause of the 14th Amendment. Then five of the justices voted to order Florida to stop the recount, effectively handing the presidency to Bush. The remaining four justices presumably would have preferred to wait until Congress received Florida's electoral votes and then let Congress decide whether to accept them.

ANOTHER SUPREME COURT CASE?

Will we see *Romney v. Obama* in 2012? In 2000 the court suggested that its decision in *Bush v. Gore* was not a precedent. But will the present court, of which only five members sat during *Bush v. Gore*, hear a 2012 challenge?

It is possible that the current court will feel duty-bound to take the case and resolve a dispute of such monumental importance. But will the present court, remembering the withering criticism it received for "electing a president by five votes" in 2000, decide a presidential election again?

The present court could avoid this dilemma by refusing to take the case. Then Article II, Section 1 of the U.S. Constitution would establish the means of deciding the question. Cut to the chase: The House of Representatives would choose the president, with each state's delegation being able to cast one vote. According to federal statutes, the representatives elected on November 6 and seated on January 3, 2013, constitute the "House" that decides who will be inaugurated on January 21, 2013.

What have we learned from the presidential election in 2000 that could help us in 2012? First of all, there is a very real possibility that Obama will win the popular vote and yet lose the electoral college vote. Second, if we are faced with such a dilemma, we may well see one candidate seek recourse in the Supreme Court, while the other takes the election dispute to Congress. Obviously, each candidate will pursue the course he thinks most likely to favor him. The members of the Supreme Court are known, although their votes in a replay of *Bush v. Gore* cannot be predicted. Nobody knows which party will control the U.S. House of Representatives in January 2013. However, within hours after the election for members of Congress next November, the makeup of the House will be clear.

The two candidates would then decide whether to replay *Bush v. Gore* or to let Congress make the decision. Either way, we would have a new chapter in American constitutional history.

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