

# "Lost" Votes and a Stolen Election

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*Elections officials in Republican-controlled Florida counties omitted potentially thousands of votes from their certified totals. The ballot designs in these counties encouraged voters to both mark a listed candidate and write in the same candidate's name. Such votes were rejected as overvotes although they are defined by law as valid votes that should be counted. The Florida Secretary of State failed in her duties regarding the conduct of elections by certifying vote totals that did not include these votes.*

In Florida, hundreds — possibly thousands — of votes for George W. Bush and Al Gore were never counted that under Florida law must be counted. These were not questionable ballots rejected at the legal discretion of county canvassing boards because they could not identify the "intent of the voter." These ballots have nothing to do with dimpled chads. They are clearly valid votes that were illegally excluded from the certified totals of at least four counties in Florida.

When it comes to voting, Florida law recognizes the obvious: We live in a democracy, and democracy is about government by the consent of the people as determined by the exercise of the fundamental right to vote and to have that vote counted.<sup>1</sup> Voting is not a test of one's ability to comprehend instructions that are often complex, contradictory, and confusing in a limited period of time; it is the expression of the will of the people.

One of the most confusing aspects of voting is the "write-in" provision on ballots. A voter who is unfamiliar with election procedures may "make sure" of the vote by writing in the candidate's name as well as filling out an oval or punching out a chad.

Florida law goes to significant lengths to make sure that such voters are not disenfranchised, laying out a series of procedures and standards that are designed to see that the will of these voters is recorded in every canvass of its returns. But some election officials in Florida simply ignored these procedures, violating not only the laws of the State of Florida but their oath of office and every ethical standard that a democracy requires of its elected officials.

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<sup>1</sup> **Division of Elections Advisory Opinion DE 98-12, Duties of the Secretary of State.** [The Florida Supreme Court] stated that the electorate is the real party at interest in an election ... "Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly it is the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. ...By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.."

Votes were left uncounted because Republican county elections officials failed to carry out the procedures clearly outlined in Florida law regarding the canvass of election returns. Ballots that met the specific definition of legal votes were instead ignored as "overvotes" — ballots with more than the legal number of votes for an office (for example, two votes for President). And despite ample time and opportunity to correct the problem, these officials, knowing that legally valid votes had not been counted, did nothing to correct the error.

The Florida Secretary of State ignored her statutory duty concerning the conduct of elections when she included in her certified totals more than 31,000 overvotes from counties that violated Florida law by the way they handled these votes. Most of the ballots certified as overvotes were overvotes in fact. Many, however, were valid votes and **it was illegal not to count them**.

Most people express skepticism when first confronted with these allegations. But the law is crystal clear, and the numbers are beyond dispute.

## Florida Law and Legal Votes

The rules governing Florida elections are recorded in two different places. The Florida Statutes (FS) comprise the laws passed by the state legislature. The Florida Administrative Code (FAC) comprises rules that are established under the authority of the statutes and that have the force of law.

FS 101.5614(4) specifies that every ballot containing a potential write-in vote must be examined by a human being, and that the ballots must be counted separately from the machine-counted ballots.

...For each ballot or ballot and ballot envelope on which write-in votes have been cast, **the canvassing board shall compare the write-in votes with the votes cast on the ballot card;** if the total number of votes for any office exceeds the number allowed by law, a notation to that effect, specifying the office involved, shall be entered on the back of the ballot card or in a margin if voting areas are printed on both sides of the ballot card. Such votes shall not be counted. All valid votes shall be tallied by the canvassing board. *[emphasis added]*

FS 101.5614(8) makes it clear that write-in votes, and manually counted votes, are to be tallied separately from machine tabulated votes.

The return printed by the automatic tabulating equipment, **to which has been added the return of write-in, absentee, and manually counted votes**, shall constitute the official return of the election... *[emphasis added]*

If any questions arise regarding the proper interpretation of the statutes, county officials are specifically directed to follow procedures found in the Florida Administrative Code. FS 101.5608(4) states:

In any election in which a write-in candidate has qualified for office, the supervisor of elections shall provide for write-in voting pursuant to rules adopted by the Division of Elections.

These statutes and rules provide precise instructions for counting write-in votes:

- The voter does not have to fill in the oval or punch out the chad to cast a write-in vote, only write in the candidate's name. [FAC 1S-20031(5)]<sup>2</sup>
- A write-in vote is counted only if the person whose name is written in has registered as a write-in candidate. [FS 99.061(3)(a,b)]<sup>3</sup>
- Write-ins other than qualified candidates are ignored: for example, writing in "Mickey Mouse," or marking/punching the write-in hole but writing no name. If the voter both marked a listed candidate and wrote in a name other than that of a qualified candidate, the write-in vote is ignored and the vote for the listed candidate is counted. [FAC 1S-20031(6, 7)]<sup>4</sup>

Under Florida law, in other words, a ballot with *both* a mark by a candidate's name *and* a write-in vote is rejected as an overvote only if the name of a "qualified write-in candidate" is written in. A candidate who is listed on the ballot cannot also be a "qualified write-in candidate" for the same office. If a voter marks a candidate listed on the ballot and also writes the same candidate's name in the "write-in candidate" space, it is not an overvote. The write-in vote is voided, but the vote for the listed candidate is valid and must be counted.

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**2 Florida Administrative Code 1S-20031(5)** An otherwise valid vote cast for a write-in candidate should not be invalid if the voting position on the ballot card marked "WRITE-IN CANDIDATE" for that office has not been punched by the marking device.

**3 Florida Statute 99.061(3)(a)** Each person seeking to qualify for election to office as a write-in candidate shall file his or her qualification papers with the respective qualifying officer at any time after noon of the 1st day for qualifying, but not later than noon of the last day of the qualifying period for the office sought.

**(b)** Any person who is seeking election as a write-in candidate shall not be required to pay a filing fee, election assessment, or party assessment. A write-in candidate shall not be entitled to have his or her name printed on any ballot; however, space for the write-in candidate's name to be written in shall be provided on the general election ballot. No person may qualify as a write-in candidate if the person has also otherwise qualified for nomination or election to such office.

<sup>4</sup> **Florida Administrative Code 1S-20031(6)** A name written on the secrecy envelope or portion of the ballot card in which write-in votes may be cast that is other than the name of the qualified write-in candidate for that office or which is otherwise invalid shall not be considered a write-in vote for the purposes of determining if an office has been overvoted. **(7)** An overvote shall occur when an elector casts a vote on the ballot card and also casts a write-in vote for a qualified write-in candidate for that same office. Upon such an overvote, the entire vote for that office shall be void and shall not be counted. However, an overvote shall not occur when the elector casts a vote on the ballot card but then enters a sham or unqualified name in the write-in space for that same office. In such case, only the write-in vote is void.

Florida county elections officials have some discretion in deciding what constitutes a vote and what does not. The canvassing board could ignore any "stand-alone" write-in vote for George Bush or Al Gore, or they could count it. But according to Professor Joseph Little of the University of Florida, an expert on Florida state and local government law, it was not within their discretion to reject the vote of someone who both marked a name in the list of candidates and wrote in the same candidate's name. "Canvassing boards do not possess discretion to reject [not count] legally prescribed votes.... [A] ballot that votes for a named candidate and writes in the same candidate's name is not an overvote. It is a vote for the named candidate."<sup>5</sup>

That's the law. It was violated in Lake County. It was violated in Escambia County. It was violated in Lee County. And perhaps most significantly, it was violated in Duval County, where nearly 22,000 people had their votes rejected as overvotes. Statewide, more than 31,000 ballots, containing hundreds if not thousands of legal votes, were never counted.

## Lake and Escambia Counties

The *Orlando Sentinel* examined Lake County's ballots rejected by the counting machines as overvotes, and published their findings on December 9.<sup>6</sup> They found that Lake County omitted at least 622 legal votes from its certified total. Although George Bush won Lake County, Al Gore got 130 more of these uncounted votes than George Bush (376 to 246).

Every one of those 622 ballots had a mark by the name of a candidate and the **same name** in the write-in space. By a vote of 2-1, the Lake County elections board decided to ignore the laws of Florida and reject these legally prescribed votes. They did not have the legal authority to do so. But they went ahead and did it anyway.

When asked about these votes, Bush spokesman Tucker Eskew said they were illegal votes. The votes were not illegal. What was illegal was **not counting them**.

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<sup>5</sup> E-mail correspondence, 28 February 2001. Professor Little teaches local government law, workers' compensation, torts, U.S. and Florida constitutional law at the University of Florida (<http://www.law.ufl.edu/faculty/little/index.shtml>).

<sup>6</sup> David Damron, Ramsey Campbell and Roger Roy. "Gore would have gained votes in Lake." *Orlando Sentinel*, 19 December 2000.

Much the same thing happened in Escambia County, which recorded 121 write-in votes improperly tabulated by machine, and 3,489 overvoted ballots according to Joan King of the Escambia County Division of Elections. Unlike Lake County, where ballots were tabulated in the central elections office, Escambia's ballots were tabulated in the precincts when the votes were cast. But unlike in the vast majority of "precinct-scanned counties," in Escambia the elections officials did not tell voters when they had overvoted their ballots.<sup>7</sup> As a result, Escambia County had an overvote rate (2.99%) well over **ten times** the median rate of the other precinct-scanned counties (0.23%).

In both Lake and Escambia counties, Bush won by a large margin. Based on the "lost votes" in Lake County, however, by a conservative estimate Gore would have received at least 100 additional net votes in Escambia if the law had been obeyed, and the write-in votes had been counted using the process and standards mandated by Florida law.

## Duval and Lee Counties

Both Duval and Lee Counties used punch-card ballots. Unlike the vast majority of voters who used punch-card ballots in Florida last November, however, Duval and Lee voters were able to punch the hole next to the write-in instructions.

In both counties, elections officials claim that not one single write-in vote tabulated by machine represented a vote for a qualified write-in candidate. And in both counties, ballot cards with holes punched in the "write-in instructions" space were not examined to determine if the ballot represented a legal vote as defined by Florida law.

Lee County recorded 2,550 overvoted ballots in November. Mary Pat Lanman of the Lee County Division of Elections acknowledged that Lee County changed its ballot before this election. The change made it possible to cause an overvote by punching a hole next to the instructions, "To vote for a write-in candidate, follow the directions on the long stub of your ballot card." In previous elections going back to at least 1994, it was not possible to have a write-in ballot rejected as an overvote for this reason.

The most significant county is Duval, where a horrendously designed two-page ballot resulted in 21,942 certified overvotes; and where, according to Assistant Supervisor of Elections Richard Carlberg, not one of the 81 machine-counted write-in votes yielded a vote for a qualified write-in candidate.

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<sup>7</sup> From the Escambia County Division of Elections web site (<http://www.webintellects.net/~www/ve.htm>):

***What happens when you receive your ballot?***

The pollworker [*sic*] gives you your ballot (which has a stub with a red number attached) and tell's [*sic*] you to take it to the booth where you mark it. You locate the candidate or issue you wish to vote for and connect the center part of the arrow next to the item or candidate you wish to vote for (Using [*sic*] the marking device in the booth). You then take your marked ballot to the Eagle, where the tabulator operator instructs you to remove and give them the stub. You then insert the ballot into the Eagle where it is counted and votes tabulated. **Ballots will be rejected back to you if you do not mark at least one position. If you vote for more than the number of votes eligible for an office the ballot is accepted but that office is not counted.** [*emphasis added*]

In Duval County, the sample ballots included incorrect instructions to vote on every page — without making an exception for the two-page list of presidential candidates. The major-party candidates were listed on the first page. The "write-in" hole was on the second page.<sup>8</sup> An inexperienced voter might, therefore, satisfy the instructions by marking a candidate's name on page 1 then punching a hole next to the write-in instructions on page 2.

To make matters worse, unlike Lee County and the vast majority of Florida counties, Duval County did not include legally mandated [FAC 1S-20031(4)]<sup>9</sup> instructions to the voter on its ballot. Those instructions should have told voters where to write the name for a write-in vote. Instead, in the second page of the ballot, next to a hole waiting to be punched, appeared only the words "Write-In Candidate." An inexperienced voter might think it was necessary to punch the hole and write the candidate's name in addition to marking the candidate in the list. Duval even included an arrow showing people where to punch a hole, thus increasing the odds that when the ballot was improperly counted by a machine, the legal vote that had been cast would go uncounted.

**Despite being legally required to do so, Duval County never examined the punch-card ballots themselves for possible write-in votes.** For example, if there was no write-in vote on the "secrecy envelope" of an absentee ballot, it was assumed that no write-in vote was cast.

It is impossible to know for certain the number of legal votes that were lost because Lee and Duval counties violated the procedures mandated by Florida law. Estimating, however, from the numbers in Lake County, approximately 4,900 legal votes were never counted. And estimating from the percentage of votes for each candidate, Al Gore would have received a net gain of 980 votes — almost three times Bush's statewide lead after the mandated recount.

In these counties, the people running the elections are all highly experienced. They are all legally required to know and enforce the relevant Florida laws.

The Supervisor of Elections for Duval County, John Stafford, is a perfect example. A computer programmer who began his career working for the City of Jacksonville (the Duval county seat), he joined the Duval Division of Elections in 1989 as Data Processing Coordinator. In 1993, he became second in command. And in May 1999, he was elected Supervisor of Elections. Is it credible that John Stafford did not know a ballot that encouraged people to punch a hole next to the words "Write-in Candidate" would increase the risk of overvoting?

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<sup>8</sup> A sample ballot can be seen on the Duval County Division of Elections web site, [http://duvalelections.coj.net/balpage\\_01.html](http://duvalelections.coj.net/balpage_01.html).

<sup>9</sup> **Florida Administrative Code 1S-20031(3)** The location of the write-in positions on the ballot shall be clearly marked by the words "WRITE-IN" directly below the candidates whose names appear on the ballot in each office for which a write-in candidate has qualified or, when the write-in positions are on the secrecy envelope or extended ballot, should be marked in substantially the following form: "TO VOTE FOR A WRITE-IN CANDIDATE FOLLOW THE DIRECTIONS ON THE SECRECY ENVELOPE OR EXTENDED BALLOT." The secrecy envelope or extended ballot should also provide space whereby the elector may write in the name of the office and the name of the candidate who has qualified for that office as a write-in candidate. *[caps in original]*

As both a computer programmer and a veteran elections official, he had to know the software would read the punched write-in hole as a vote, and would therefore reject the ballot as an overvote if the voter followed the (incorrect) instructions and voted on every page. Having worked in the Division of Elections for more than a decade, Stafford also had to have known the law concerning write-in votes and overvotes. And as the former Data Processing Coordinator, Stafford had to know which precincts would most likely have a high rate of "voter error" (and how the people in those precincts generally voted).

In each of these counties, elections officials acted in a way that is consistent only with deliberate fraud. The fact that minority voters, less educated voters, and new voters all make more mistakes on ballots is common knowledge among election officials. It is also common knowledge that these voters tend to vote for Democratic candidates far more than for Republican candidates.

There is no good reason for Duval and Lee county officials to have permitted voters to punch out a chad to cast a write-in vote, because under Florida law all write-in votes have to be counted by hand and an otherwise valid write-in vote cannot be disqualified if the chad is not punched. Allowing voters to punch out a "write-in chad" and then counting these ballots by machine caused far more votes for Democratic candidates to be rejected than for Republican candidates. The elections officials in these counties are Republicans.

This same situation occurs in Lake County, which tabulated its optically scanned ballots in a central location. Lake County printed instructions on the ballot that the oval **must** be filled out when state law makes it clear that voters are under no such obligation to do so.

The only reason to fill in or punch a hole for a write-in vote is so ballots can be scanned as soon as they are cast and people who overvoted can receive replacement ballots to correct the mistake. But Escambia County does not provide this overvote protection. Escambia's election officials used a procedure that would disenfranchise those citizens most likely to "make sure" that their intention was recorded by both marking a listed candidate and writing in the candidate's name.

## **Who Really Won Florida?**

These four counties are by no means unique within Florida. Analysis of Florida election data indicates that many, if not the vast majority, of Republican-controlled counties violated Florida laws when counting votes — laws that were obviously enacted because certain "errors" by voters were so common. Many voters, especially those who are unfamiliar with the voting technology, "make sure" their votes are counted by writing in a candidate's name in addition to marking the circle or punching the hole next to that candidate's name. Florida law specifies that this particular voter error should not invalidate the vote, and mandates procedures to prevent the vote from being rejected.

By violating election laws, Republican officials in Republican-controlled counties ensured that the certified totals included an illegitimate net loss of votes for Al Gore. It is possible (if difficult to imagine) that these violations during the initial canvass were "innocent" mistakes. But by deliberately not fixing the mistakes, they stole the election. They may have been directed by Republican state officials, or state

officials may have just allowed the problems to occur by neglecting their statutory duties. These state officials are ultimately responsible for ensuring that Florida election laws are followed, and they must be held accountable for the violations of the law.

The Florida Secretary of State is responsible for how elections are conducted. Florida law [FS 101.015] mandates that the Secretary of State create regulations to ensure proper, fair elections in which every valid vote is counted:

(3) The Department of State shall adopt rules to achieve and maintain the maximum degree of correctness, impartiality, and efficiency of the procedures of voting, including write-in voting, and of counting, tabulating, and recording votes by voting systems used in this state.

(4)(a) The Department of State shall adopt rules establishing minimum security standards for voting systems.

(b) Each supervisor of elections shall establish written procedures to assure accuracy and security in his or her county, and such procedures shall be reviewed in each odd-numbered year by the Department of State.

During their tenures, Secretary of State Katherine Harris and Division of Elections Director Clay Roberts have done virtually nothing to ensure that elections were conducted fairly and accurately. They did not provide new rules when needed to define and enforce proper procedures. They made no effort to enforce existing rules.

In the days following the election, George W. Bush was clearly in a position to ensure an accurate count of the votes. He not only resisted every attempt to identify and count erroneously rejected votes, he also allowed his representatives to misrepresent what was actually happening in Florida. His claim that the votes were counted and recounted is completely false. Because of his supporters' efforts, thousands of legal votes were never counted in Florida.

George W. Bush was awarded Florida's electoral votes and the Presidency because of negligent, unethical, and illegal behavior by Republican officials and politicians. The crucial question is whether these people will get away with Grand Theft Nation.

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