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Keynote Address

David Boies

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DAVID BOIES

Dean Paul Verkuil's Introduction

I've had the grace of the faculty and the president of the University, Donna Shalala, who asked me to step in for a year, and I'm pleased and proud to do so. I should tell those of you who are not from our community that my activities really have been very much rewarded. I've had the pleasure of helping this dynamic law school do some good things, and it's been a great treat. I think the symposium really is a good example of the kind of high-quality and intellectual work that's going on at the University of Miami, and I'm proud of the students for bringing this all together and for of all of you for attending because you are people obviously who have plenty of other places you could be on a weekend like this, and we are happy to have you with us. It's my pleasure to introduce our keynote speaker, David Boies.

David and I go way back to the beginning of our practice of law at the Cravath law firm so many years ago. I will not mention them. And since then, watching him and really knowing him, and being friends for many years, seeing him in action has been quite a treat. David is unique, in my view, among American lawyers, maybe for a variety of reasons, but certainly one is his ability to combine the skills of a practitioner with the talents of an academic. At one point in his life he could have easily gone into a law-school setting. He had plenty of offers, but he stuck with the practice, even as I defected myself, and built a remarkable career at the Bar. The cases start with *General Westmoreland v. CBS* and with *United States v. IBM* and of course move forward down a list of not always wins, but always great shows and high-quality litigation. During the *Microsoft* case, you know after *IBM*, Mr. Boies being on the defense side, got invited by the Antitrust Division to become a plaintiff, and Joel Klein, then head of the Antitrust Division, said "You know I need a lawyer who actually has tried the § 2 case." There aren't any many major antitrust § 2 cases that have ever been brought, and *IBM* was one

of them, now we have Microsoft. He was brought in, and I think was paid \$50 an hour to try the *Microsoft* case—which isn't his usual fee, I should tell you. Just in case you want to hire him after the meeting.

I went to several of the trials. The classic cross examination that I remember in that case, which makes my point about academics and practitioners being joined in one, is the cross examination of Dean Schmalensee of MIT who was the chief antitrust economic witness in the case for Microsoft. You may have even known about this, but the cross examination ensues, right? It goes on for maybe a day, maybe more. Finally—and this is a quote, it's in the record—Schmalensee, no slouch himself in economics, says, “What was I thinking?” when he was asked to say did he really stand behind what he had written down. “What was I thinking?” In other words, he was totally perplexed by the questions of our friend Boies. Pretty remarkable. So he could be an economist as well as a lawyer, and he's got some good ideas about how to solve problems that we now face, but he's not going to talk about those today. He's going to talk about the case, of course, *Bush v. Gore*—that may be, but not necessarily is—how we all know him.

In 2000, he was runner-up for the *Time* Magazine Person of the Year. You know who was the person of the year? George Bush. So it could have easily been the other way, right? Anyways, it's a great pleasure to introduce David Boies, my friend.

David Boies

I'd like to recount that decision in terms of what we now know. I think that in thinking about how far we've come in election law since 2000, it's useful to reflect on a couple of the overriding policies that have existed, not just since 2000, but going all the way back in terms of when we talk about election law in general and voting law in particular. Election law really has two different components to it. One is campaign law, particularly campaign finance law, and one is voting law. I think there has been a lot of attention to both of those issues since 2000, but I think that it has been particularly in the area of voting law that we have fermented since 2000. But that ferment has occurred in the context of policy issues that long predate 2000. The first issue, and one we talk a lot about, is how do you balance two conflicting goals? One goal is that everyone who is qualified as a voter should be allowed and indeed encouraged to vote. And second, you ought not to have voter fraud. That is, you ought not to have people voting more than once, and you ought not to have unqualified voters voting at all. And while we can all adopt both of those general principles in theory, in practice, when you begin to implement voting law, what happens is that those two sometimes come

into tension. Because some of the very ways in which you encourage people to vote and you try to ensure that everybody who wants to vote can run into conflict or tension with the principle that you also want to be sure that unqualified voters are not voting and that nobody is voting more than once.

A second policy issue that is less talked about, but which I think also underlies some of what is going on and some of what will go on in the future, is What are the relative merits of the secret ballot? We are all, today, so used to the concept of the secret ballot that we forget that the secret ballot is an invention, largely, of the last hundred years. For a large part of our republic, the idea of the secret ballot was quite foreign to the way people actually voted in an election and the way ballots were actually distributed. So that while we have a great deal of allegiance to the concept of the secret ballot, it is in part because it is all any of us have ever known in our adult lives. However, the issue as to the extent to which a voter's decision should be secret, is not something that has been consistently applied throughout our history.

That issue is going to, I think, become increasingly important as we look at some of the reforms that are being adopted in order to make it easier for people to vote and easier for states to administer the voting process. Take, for example, early voting or, very much related to early voting, absentee balloting where you do not have to even say that you aren't going to be present in your precinct on Election Day. In a number of states, you can now get an absentee ballot just by requesting it; it does not make any difference where you are going to be on Election Day. Obviously, once you have a large number of absentee ballots out there, there is no guarantee that the same secrecy protections that exist in the voting booth, where they close the curtains and you go in and nobody can see how you vote, are going to apply. In addition, there are increasingly organized efforts to get large numbers of people to collect absentee ballots, and under the present law there is nothing to prevent a campaign from getting a lot of its supporters to get absentee ballots and all come to a hall like this and fill them out all together. In this context essentially everybody is looking over everybody else's shoulder and knows how they're voting. Now, whether that's a good thing or a bad thing, depends a lot on what you think about the importance of secret ballots and a lot about what you think about in terms of the potential for voter intimidation by peer pressure or otherwise.

As you look at the kinds of developments in the voting law area it's important to keep in context these two principles. One is balancing the desire to get everybody to vote, but only to have proper people voting,

and second the policy is what the extent of the importance is of the secret ballot.

Within the area of voting law, you have basically three subsets. First, you have the law that relates to what happens before Election Day, very much the law of who can be registered and the like. Second, you have the law of what happens on Election Day. Which is, how do you demonstrate that you're qualified to vote? If you have a dispute, how do you resolve it? Issues relating to provisional ballots and the like. Third, you have the law of what happens after Election Day. How do you count disputed ballots? How do you resolve disputes about the counting of votes?

Bush v. Gore dealt by its terms only with the last issue, the issue of counting the votes. But it has had an impact much broader than just its effect on post-Election Day vote counting. And the reasons I think are two. First, *Bush v. Gore* put a spotlight on the electoral process. Although the precise thing that it was spotlighting was vote counting, in fact it caused the whole country to focus on the importance of the electoral process and the importance of the electoral process not only in the post-Election Day scenarios, but in the much more common preelection and Election Day context. Most controversies, most debates, most litigation that relates to election law, relates to pre-Election Day and Election Day, not post-Election Day. Post-Election Day is sometimes the most dramatic, and it is sometimes the most covered because it has a focus, but in terms of what the disputes actually are, most of those disputes occur pre-Election Day and on Election Day. However, by shining a spotlight on how important the electoral process was, I think it has caused people to think about election law generally, voting law generally, not merely the narrow issues of *Bush v. Gore*.

The second reason why I think *Bush v. Gore* has had an important effect over the last eight years and will have one going forward is because of the tendency of the decision, to the extent you take it as a serious judicial decision, to federalize voting law. Prior to *Bush v. Gore*, there were arguments about federal equal protection and due process considerations that were applied to elections, but they were few and far between. The vast majority of election law decisions were election law decisions in state court, relating to state-court issues.

In *Bush v. Gore*, the five justices in the majority had two competing theories by which they could decide in favor of George Bush. One of those theories was based on a peculiarity of the constitutional law applicable to presidential elections, which said that only the state legislators get to decide how state electors are going to be selected, and the argument was that the Florida Supreme Court had made new election law

and under the Constitution, because the Constitution specifically provides that electors be chosen in a manner determined by state legislators, that this was unconstitutional. That was an argument in the final analysis that convinced only three justices: Justices Rehnquist, Scalia, and Thomas. If the court had decided the case on that narrow ground, its only applicability would have been to presidential elections and to presidential elections in which there had been an alleged departure from past election law by a judicial body. The lawyers arguing for Bush spent the first forty pages of their forty-five-page brief on that argument. That was their primary argument. It was the primary argument in their brief, and it was the primary argument that they argued in the Supreme Court. However, they could not get five Justices to support that argument. Two Justices, Justices Kennedy and O'Connor, were prepared to rule for George Bush but only on an equal protection claim. And so you had, ultimately, a five Justice majority, deciding it for George Bush on the equal protection argument. We can speculate as to why Justices Rehnquist, Scalia, and Thomas (who throughout their judicial careers have tried to limit the application of the Equal Protection Clause) joined in the very expansive interpretation of that clause in *Bush v. Gore*. There is some basis for speculation provided by Jeffrey Toobin's book *The Nine* and a very interesting article written in *Vanity Fair* by David Margolis, who was successful in getting a number of former clerks on the United States Supreme Court who were clerks to the Justices in 2000 to actually talk to him about the decision-making process, a unique journalistic coup. So we have some basis for speculating as to what led Justices Rehnquist, Scalia, and Thomas to join Justices O'Connor and Kennedy so that you had five Justices joining in an Equal Protection opinion. They didn't have to do that. You could have had three Justices reversing on one ground and two Justices joining the reversal on the other ground, but the speculation based on what clerks and others have said is that what those Justices were concerned about were that if you did not have five Justices agreeing on a single basis for reversing, it would have been an even more controversial decision. In making that choice, what they inevitably did was turn the case into one that was not only very important because it decided who was going to be President of the United States, but also important as a precedent that can be used to federalize electoral issues, not just in presidential elections, but in any election, and not just in federal elections, because the equal protection clause obviously applies to state elections as well. So part of what has happened over the last eight years as a result of *Bush v. Gore* has been that the case highlighted the electoral process and potential problems with it generally. And because the basis of the majority decision was a federal claim that applied essentially to every election, including for local school boards as

well as for the President of the United States. There had been some trend, and there is a much greater potential, to federalize election law.

If you ask the question How far have we come since 2000 in improving election law I think you have to look at particular issues. First, take the area of voter registration. I think that there is a developing consensus that the way we need to deal with registration is to have the government take a more proactive role, as the government does in many other countries, in trying to be sure that every citizen is registered to vote. We believe in this country, in voter registration, because we believe that that is a safeguard against unauthorized voting and against multiple voting, but we also believe that you need to have a mechanism for getting everybody who wants to register, registered. We have, of course, moved a long way in terms of how we think about the franchise from the time when the Republic was founded and the goal was not to let everybody vote. In the beginning, we did not want everybody to vote. We didn't even want all white males to vote. We only wanted property owners to vote; we wanted educated people to vote. We now take the view that the broader the franchise, the better. And in that context, there must be a mechanism to get people registered to vote. Although I think the problems with ACORN and the like were greatly overstated, when you have private companies, private organizations, responsible for the registration process, you're always going to have the kinds of arguments that you saw in the last election. Moreover, the government has the resources to do it, and the resources necessary for a comprehensive registration process are trivial compared to the resources that are today devoted to a host of domestic and foreign issues. So we have the ability to do and if we do it, we will have solved a great many of the kind of pre-Election Day issues that exist in terms of registration because we will have a government system for getting people registered and for making sure that there are not abuses, or the fear of abuses, in the registration process. Today, pretty much everybody agrees in principle with the twin goals of getting as many people registered and voting as possible and insuring that only authorized people are registered and able to vote. Although I think there will be and should be more experimentation and more things that we try, I believe we are moving towards a consensus that the best way to balance those two goals is to have the government step in and do what needs to be done to get everybody registered to vote in a fair and neutral manner.

I think we are much farther from a consensus, on how to deal with Election Day issues. How does someone prove that they are qualified to vote and that they are the person who is listed on the voter rolls? What

kind of identification do they need? What kind of provisional ballots or alternatives should there be if somebody is turned down?

There is no doubt, as was discussed in the last panel, that provisional ballots are a potential time bomb. If this election had been as close as 2004, let alone as close as 2000, we conceivably could still be trying to sort our way through those provisional ballots. So there is no doubt that the innovation of provisional ballots, while designed to achieve a very good purpose, has problems. But unlike the last panel, I still think that provisional ballots play, and will play for some substantial period of time, a significant role. I think every campaign is going to make every effort to reduce the number of their potential voters that have to take a provisional ballot. I think both campaigns in the last election and in future elections are going to recognize the danger of having too many of their votes tied up in provisional ballots. At the same time, I have not heard a good alternative for what happens to a voter who is turned away from the polls improperly. We know in 2000, because of the way the voter lists were purged in Florida, that a number of people who were qualified voters had their names removed from the rolls improperly. When those people were turned away, they never had an opportunity to file a provisional ballot, and, after the election, there was nothing that could be done about it. In elections other than Presidential elections, if the problem is sufficiently wide spread, perhaps you can actually have a do-over, but that is obviously very expensive and disruptive, and courts are going to be very reluctant to order them. In a presidential election it is constitutionally impossible. So, particularly in a presidential election, but to some extent in other elections as well, the ability to get a provisional ballot is the last protection for somebody's right to vote. So while I think that we need to try to reduce the use of provisional ballots, and we need to try to make more uniform the way provisional ballot access is implemented at the states, I continue to think that provisional ballots play an important role.

An issue that is related to the issue of provisional ballots is how do you implement the ability of a voter to come to the polls and to actually be identified as somebody who is properly entitled to vote. The studies that exist suggest that the number of people who actually show up at voting polls and try to vote when they are not authorized to vote is quite small. But the threat, psychological and otherwise, that that prospect poses to our faith in the democratic process is sufficiently great that we want to have some ability to regulate that. We therefore need to grapple with what kind of identification should be required, what kind of identification is permissible. This, of course, relates in part to how provisional ballots are used. If somebody shows up without the proper identification,

if that person has the ability to file a provisional ballot and then come back and show the identification, that is something that has both the protection that we are looking for, and it doesn't bar somebody from voting. One of the problems with the Indiana law that was at issue in *Crawford* is that it is arguable that if you do not have your government-issued identification with you, you are not entitled to vote, even if you left it at home. If you are not entitled to vote, you may not be entitled to a provisional ballot. While we want to encourage voters to bring to the rolls whatever identification is required, I think we are moving in the direction of a consensus that the issue of identification should be used only to prevent voter fraud and not to prevent eligible voters from voting.

With respect to the issues on Election Day and after Election Day in terms vote counting, the ostensible issue in *Bush v. Gore*, I think we are again moving in the direction of a consensus. I think that consensus is less a legal one, than it is a technological one. We have the ability to have uniform voting that is accurate, easily counted, and verifiable. There are voting machines, including in particular certain optical-character-recognition machines that both have a paper trail and count the ballots with great accuracy. If anybody wants to recount them it is easy to go back because you have the paper record there. Such machines which tabulate votes at the precinct level can also have the capacity that when you put the ballot in it will tell you if you have overvoted, that is voted for more than one person and hence your ballot will be improper, or undervoted, that is failed to vote for a particular race. So that you have a prompt to the voter which warns them they may have made a mistake. Very few voters intentionally overvote. When somebody votes for two people for a race and hence renders their ballot unusable, very few people intend to do that, and I think that if you have a prompt that warns them of what is being done you have an opportunity to correct that on Election Day. We have already made considerable progress in terms of reducing the number of undervotes and overvotes from where it was in 2000, but I think the widespread adoption of this kind of technology can even further increase the confidence that people have that the process that they are going through in terms of elections means that the votes will be accurately counted, and that all the votes are going to be accurately counted.

I think that the process that is going on in Minnesota right now shows us two things. One, it shows us that assuming that the judicial branch doesn't stop a state from vote counting, even without the most advanced technology a state has the capacity to count the votes in a careful, fair, and accurate way. Second, I think it shows how long it can

take. It is one thing to have uncertainty this long about what the result is in a race as important as the race for United States Senator, but think of the consequences of having this prolonged uncertainty in terms of who was elected President of the United States. In any era that would be difficult; in an era of crisis, that could be intolerable. So we have to have mechanisms that allow us not only get the right result, but to get that right result in a timely way. And that is why I say I think technology should be more of an answer than law in terms of what happens after the Election Day in terms of counting votes. We have the technology; we certainly have the money; and I think that if we make this the kind of a priority that it should be, I think we can easily solve this issue.

There are many things negative that I could say about *Bush v. Gore*, which I won't because I've said them before. But I think the two positive things that I can say about it is that it has drawn attention to electoral issues in a way that I think has had positive results, and I think it has provided precedential support in terms of how equal protection law can, over time, be used to guarantee important voting objectives. The *Bush v. Gore* majority tried to stamp their opinion, "good for this time only." But that is a decision for future majorities to make, and it may well be (and there are even some early indications that it will be) that *Bush v. Gore* actually ends up in the long-term advancing the goal of free and fair elections.

Perhaps the most interesting issue that we face, and one that neither *Bush v. Gore* nor other case law provides an answer for, is to what extent are we willing to compromise on our modern day allegiance to the secret ballot in order to make voting easier. It may be hard to vote on a single Election Day. It is particularly hard to vote on an Election Day that is held on a week day, a work day. Trying to get everybody to the polls on one day where most people work is always going to be challenging. Early voting, and readily available "absentee" ballots, are ways in which you make it more practical for more people to vote. And yet those processes inevitably begin to raise questions as to what kind of protection you can have in those contexts for the secret ballot.