

Vacating the Florida Court

On the afternoon of Friday, November 24, the U.S. Supreme Court surprised constitutional scholars throughout the country, including several on the Bush team, by granting the Bush petition for certiorari in the deadline extension case. The Bush petition had argued that the Florida Supreme Court had violated federal guidance (3 U.S.C. § 5) by changing the certification deadline, and that in doing so the state court had also violated Article 2 of the U.S. Constitution, which gives state legislatures the authority to determine how presidential electors are chosen. Tantalizingly, the Court had directed the parties to brief and argue an additional question: “What would be the consequences of this Court’s finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?”¹ The implication was that the statute that dealt with adjudication of challenges to state electors in the Congress was meant to explain how states could find a safe harbor against challenges rather than providing an avenue for judicial review.

The Bush petition had also raised with the Court the issue of whether the combination of selective recounts and seemingly random counting rules violated the First and Fourteenth Amendments, but the Supreme Court denied certiorari on that

series of issues. Weeks later, liberal critics would suggest that the partisan court had mouse-trapped Gore by postponing consideration of the issue until there was no time to remedy the problem. But with the matter still before the Eleventh Circuit and Florida still having the opportunity to cure the problem during its contest period, a compelling case can be made that the issue was simply not ripe for adjudication.

Olson, Carvin, and the other appellate lawyers were now predicting victory before the U.S. Supreme Court. They believed that even the four needed votes to grant certiorari wouldn't have been there had an incipient majority for reversal not been there. But coming as it did after Miami-Dade County had abandoned its recount and Palm Beach, facing its own deadline crunch, had adopted standards minimizing the Gore pickup, the victory at the Court presented as many complications as potential benefits. Certification of the Bush Florida victory was expected Sunday evening. How could a win in the U.S. Supreme Court help? What might it do to options of the state legislature, which had retained counsel and was preparing to file an amicus brief? Further, Gore had already announced plans to contest the election following certification, thus assuring a critical role for the Florida courts. What impact could a U.S. Supreme Court decision have there? As Baker, Ginsberg, Zoellick, Terwilliger, Bolten, and others discussed the event, some in the room began to argue that the Supreme Court case should be dropped. Bush could continue to press his Due Process and Equal Protection claims with the federal courts, but this case now risked too much for too little. Zoellick in particular argued that nothing the Florida Supreme Court could do would enable Gore to overtake a Bush lead of 537 votes, soon to be augmented by additional military absentee ballots.

Baker disagreed. He wanted a win over the Florida courts in the Supreme Court of the United States. But when Zoellick pleaded that the issue should be presented to Bush in the form of a decision memo, Baker agreed. Entitled "Background on Post-Recount Options," the paper emphasized that dropping

the case should only be considered if Bush won certification Sunday night, and that “the window to drop the case is *only* immediately after certification of the recount results (Sunday evening or Monday morning). The paper continued:

Reasons for dropping the case

- Our prospects for winning the case, while better than even, are highly uncertain. If we lose the case after eking out a narrow win in the vote count, Gore will be seen as scoring a big victory, which he will use to lend momentum and legitimacy to his contest challenges in Florida courts.
- If we lose the case, the ruling could backfire on us by posing major political and/or legal impediments to any action by the Florida legislature to overturn Florida court decisions for Gore in the contest proceedings.
- Dropping the case would remove a Gore excuse for continuing to litigate and would reinforce a Bush call to rely on the numerous counts of the voting results rather than litigation.

Reasons for continuing the case

- A Supreme Court win might remove the basis for Gore’s election contest. At a minimum, it would create enormous public pressure for Gore to drop his contest.
- It would look bad to drop the case now. Furthermore, as long as the case is pending, the Florida Supreme Court is likely to be more careful in ruling on contest proceedings.
- It makes more sense to maintain the Supreme Court route if we are not absolutely determined to use the legislative route.
- Our supporters in the Florida Legislature would probably not look kindly on our dropping the case.

In terms of Sunday night options, the memo listed dropping the Supreme Court case and all other litigation and urging

Gore to do the same, continuing the case and all other litigation, and:

“Offer to drop the Supreme Court case and all litigation if Gore drops all litigation. Emphasizes that it’s time to draw a line under all the counts and recounts. ‘Offer’ loses nothing, but public will recognize that it’s really a rhetorical tactic, because if Gore accepts he loses.”²

Soon after receiving the memo, Bush replied, choosing to stay with the case. “Bush and Cheney wanted legitimacy,” Zoellick later suggested. “They never felt they could get it from the legislature. So they stayed with the Court.”

By specifically asking for guidance on 3 U.S.C. § 5, the Court had confronted Olson, Carvin, and others who worked on the brief with the distinct possibility of having the court declare the issue non-justiciable. On its face, it seemed to offer guidance to the states and direction to the Congress but nothing further. Yet the Bush brief argued that if the Court found the Florida Supreme Court had changed the law either by using its equitable powers to organize a new certification schedule or by allowing the introduction of new counting standards, it should vacate the Florida decision. “The resulting consequences are twofold. First, the executive officials in Florida would be able to discharge all of their duties imposed by federal law in place on Election Day. Second, Congress would be able to give conclusive effect to the official certification of the Elections Canvassing Commission regarding the appointment of Florida’s electors made pursuant to the carefully crafted scheme put in place before the election to apply equally to all voters and candidates.”³ A nice try, certainly, but not even faintly responsive to the question the court had asked. The question Olson answered was, what effect would vacating the Florida decision have? What the U.S. Supreme Court wanted to know was, where from the language of the code do we get the power to vacate in the first place?

Here Olson missed an opportunity to drive home what should have been the central Bush theme: the distinction be-

tween the legislature changing the law after the election, and the court doing so. When the legislature flaunts 3 U.S.C. § 5, it loses for its state the “safe harbor,” which protects the electoral delegation of the state from challenge. But when a court changes the law, it is violating Article 2 of the U.S. Constitution, which assigns the power to determine election procedures to the various state legislatures. That means its actions are reviewable and reversible by the U.S. Supreme Court, while a legislative action that, say, extends a recount deadline, would not be.

Representing Gore in the Supreme Court was Laurence Tribe, the gifted Harvard constitutional scholar whose credibility had been compromised only marginally by his rush to endorse the butterfly ballot challenge. Reduced to basics, his brief maintained that rather than changing laws helter-skelter, the Florida Supreme Court had employed four time-tested techniques of statutory construction: where laws conflict, the more specific rule controls the less specific one; in cases of conflict, the more recent law controls the more distant one; statutes should be interpreted so as to avoid making any particular provision meaningless or absurd; and, the court will try to interpret a series of laws as a coherent whole. Every one of its actions could be explained by one or more of the traditional approaches to the law, Tribe maintained.

Unable to join the lawsuit as a party because it was not in session and thus could not get the authority to do so, both houses of the legislature joined in an amicus brief authored by former Solicitor General Charles Fried and Einer Elhague, both of Harvard Law School. Their central argument was that the entire issue was non-justiciable in that the power to determine presidential electoral college selection rested with the state legislature, and hence the right to judge whether the Florida Supreme Court had ordered procedures compatible with its direction rested first with the legislature and finally with the Congress, which had to approve elector slates sent by the states.

As he read the legislature's brief, Frank Donatelli realized that he had to navigate a complex course to convert the great theoretical advantage of an overwhelmingly Republican institution into a practical one. Here, for example, was a clear disparity of interest. The Bush team was asking the Supreme Court to intervene and vacate a decision by the Florida Supreme Court. At the same time, the legislature was saying that neither court had any business in the case, that interpreting the law should be up to the state legislature with the final imprimatur applied by the United States Congress. Maybe in theory that case is strong, but in practice it assumed that Bush would want to be declared president by the Florida legislature, perhaps after losing one of the recount battles. And it assumed that a scenario like that could play nationally.

Nor was this the only difference of emphasis. Bush was looking for a quick legislative finding that by tampering with the recount deadlines and permitting wildly divergent counting standards, the Florida Supreme Court had changed the rules of the election after the election. The legislature, on the other hand, viewed the potential failure to achieve a safe harbor as its trigger for selecting the electoral college slate, something which would not be known with certainty until December 12.

The Bush lawyers examined Florida's history and found that back in the 1872 Hayes-Tilden contest the legislature had designated its electors for Hayes by passing a bill. The Bush team saw no constitutional precedent to support a joint resolution. However, House Speaker Tom Feeney and his advisor, a former Oklahoma state legislator named Don Rubottom, didn't want to consider legislation. First, they said it would take too long. Second, a bill would require the governor's signature, something they felt undermined the constitutional sanctity of their plenary power.

Then too there was the question of direct versus contingent appointment of the elector slate. Donatelli and the Bush lawyers liked the idea of contingent appointment because the

legislature could act immediately to name a Bush slate contingent on matters not being resolved by December 12. Legislative leaders, on the other hand, felt they could step in under Florida law only if the dispute had not been finally resolved by the deadline. That meant there would be no safe harbor and even a Bush legislative victory could be challenged in the Congress. In formulating the question of whether or not to stay with the Supreme Court case, Bob Zoellick had made the point that the legislature offered greater certainty but the Supreme Court of the United States offered greater legitimacy. To Donatelli, the closest thing to a certainty was that December 12 was going to arrive without anyone knowing with certainty who the next president would be.

In the end, neither side walked away from the December 1 U.S. Supreme Court argument with very much confidence. The justices did everything but tweak the noses and cuff the ears of the arguing counsel like so many errant schoolboys. Olson never seemed to clear the hurdle of Article 3 U.S.C. § 5 being a matter dealing with the states, allowing the Congress no judicial function. Justice Scalia memorably compared the statute to a law granting federal funds to states that maintain a 55-mph speed limit. If the state court interprets state law as permitting a 65-mph speed, the state simply does without the money; it does not invite federal court intervention.

Nor did Olson appear to satisfy the court on what practical difference it would make if the Justices found an Article 5 problem with the state supreme court ruling, because that section was there principally to guide the Congress. He seemed to do better when the question turned to whether the Florida Court had changed the law, arguing to Justice Kennedy at one point, "But what it did was supplant a set of rules enacted before the election to govern the election for a set of rules made up after the election."⁴ Though temperate and professional in explaining his problems with the decision below, Olson may also have paid a price with one justice for

Baker's indelicate reaction to the Florida decision. At one point Justice Ginsburg remarked, "I do not know of any case where we have impugned a state supreme court the way you are doing in this case. I mean, in case after case, we have said we owe the highest respect to what the state supreme court says is the state's law."⁵ The Justice's vex could better have been directed at the Florida court whose unrestrained activism had produced the legal train wreck.

Joe Klock, representing Katherine Harris, tried to persuade the Court that, even in the wake of Bush' certification, their decision could be of critical importance to the outcome of the election. "Your Honor," said Klock, "if the law is returned to the point it was on November 7, there is no right to a manual recount to correct voter error, and that will end the litigation that currently exists in the state of Florida."⁶ Given the low bar the Florida Justices would erect for initiating a recount during the contest period, Klock's prognosis was probably optimistic.

The court pursued the point with Paul Hancock, who was representing the state attorney general as he had in the Florida court. He was asked if "you know of any other elections in Florida in which recounts were conducted, manual recounts, because of an allegation that some voters did not punch the cards the way they should have through their fault?

Hancock: No, Justice—

Question: Did that ever happen—

Hancock: No, I'm not aware of it ever happening before . . .⁷

The admission would prove harmless to the case at bar. But less than two weeks later it would be one of a number of factors noted by the majority as reflecting the overreaching of the Florida justices.

Tribe had one serious problem and one fatal problem. The serious problem was that the Florida court, despite its lip service to statutory construction, had in fact changed the law, particularly in revising the recount deadline. At one

point an exasperated Justice Kennedy fumed, “And if the legislature had jumped into the breach and said this same thing, would that be a new statute or new enactment under 5 U.S.C.?”⁸ Tribe had no credible answer.

Tribe’s fatal problem was that the state supreme court had held that the Florida constitution venerating the right to vote made it impossible for the secretary of state to impose the rigid statutory deadline on manual recounts. That ran counter to the U.S. Supreme Court’s 1892 ruling in *McPherson v. Blacker*, which held that federal law granted plenary power to state legislatures to determine the selection of presidential electors, a power that could not be constrained even by the state constitution. When Tribe suggested that the state court had merely used the Florida constitution as a means of interpreting how the legislature intended the deadline law to work, Justice Scalia challenged Tribe to “give me one sentence in the opinion that supports . . . the proposition that the Florida Supreme Court was using the constitutional right to vote provisions as an interpretive tool to determine what the statute meant. I can’t find a single sentence for that.”⁹

Tribe did his best, suggesting that the structure of the opinion suggested the court engaged first in ordinary games of statutory construction before invoking the state constitution to support an interpretation already reached. But it was no use. Even Justice Ginsburg was ready to give some ground, saying, “I suppose there would be a possibility for this court to remand for clarification.”¹⁰

That road could at least preserve the appearance of unity on a Court already divided on the question of deference to the naked activism of the Florida tribunal. The price of unity was at this point cheap because George W. Bush had already achieved certification and two of the three remaining recount counties had failed to meet even the extended deadline. Further, it was not clear what impact an alternative course would have. Reversing the Florida court by, for example, holding the seven-day period sacrosanct would temporarily deprive Gore of the 567 votes he had picked up in Broward County,

but with the contest period now in full swing, the state court could issue a ruling putting those votes back in his column and authorizing recounts elsewhere. Holding for Gore, on the other hand, would not change the totals but would send a nod of approval in the direction of the Florida court just as the critical contest issues were ripening.

On December 4, hours before Circuit Court Judge Sanders Sauls would strike down the Gore contest challenge unequivocally, the U.S. Supreme Court issued a unanimous per curiam ruling vacating the Florida Supreme Court decision, finding “considerable uncertainty as to the precise grounds for the decision.” The court said it was “unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority.” It was also “unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5.” Although declining to resolve the federal questions pending clarification from the court below, the U.S. Supreme Court warned the Florida Supreme Court that “a legislative wish to take advantage of the ‘safe harbor’ would counsel against any construction of the Election Code that Congress might deem to be a change in the law.”¹¹

This unanimous warning regarding the sanctity of the December 12 date would prove critical one week later when a bare majority of justices—after finding that Florida’s procedures violated Equal Protection and Due Process—held that there was no reason to permit the state Supreme Court to attempt to refine those procedures as they could not possibly meet the December 12 deadline.

The Florida Supreme Court asked both sides to file briefs by the following day on how the U.S. Supreme Court remand should affect the Court’s decision. The ambitious deadline seemed to indicate that the Court would quickly take advantage of the road map provided by the U.S. Supreme Court and announce a decision consistent both with its earlier result and with what it hoped the U.S. court would accept. For inexplicable reasons, that never happened. To the obvious an-

noyance of at least one U.S. justice, Florida would not send a revised opinion to the U.S. Supreme Court until its more definitive ruling in the contest case had been argued. For that indiscretion, Justice Sandra Day O'Connor would deliver a rebuke from the bench during oral argument on the case that would decide the presidency.

In Tallahassee, the Bush team had expected victory in the U.S. Supreme Court and their irritation at gaining something less was compounded as they watched David Boies spinning the press with suggestions that the decision changed nothing and merely required clarification that the state could easily provide. That was surely not true, the lawyers felt. The Supreme Court had not merely remanded the Florida decision, which it clearly could have done, but vacated it as well. In the short run, this meant that anything Gore might have gained from Broward, Miami-Dade, or Palm Beach was wiped from the slate. And to get those numbers back, the Florida Supreme Court would have to persuade five Justices in Washington that it had acted within the law.

Terwilliger felt the decision had changed the landscape. "What the Supreme Court did was to put a very hot round close to the bow of the Florida Supreme Court," he said. They will have to walk carefully in the contest case if that goes our way, he thought. This will not again be the feisty group that two weeks ago was busy rewriting the Florida election law. Later Baker would tell the press, "We are gratified by the U.S. Supreme Court decision today. Let me be clear. This decision was *unanimous*. This decision *vacated* the Florida Supreme Court ruling. And it did so on the reservations we've expressed about this decision in the past."

That may have been true, but the decision was by no means conclusive. Vacated or not, the Florida Supreme Court was essentially invited to do a little patchwork here and there and return something that could be accepted upon review. Perhaps that was a good indication of where the Justices stood at this moment. Still, neither in brief nor in argument had Olson answered the Supreme Court's basic question in a

way that would have framed the issue perfectly for the Bush side. Yes, it makes a difference for the Court to find that the Florida Justices, in changing the dates of the protest period, had violated 3 U.S.C. § 5. And the difference is critical. Had the legislature made such a change, the only consequence would have been to deny the state the benefit of the statutory “safe harbor” provided by Congress. But where the change is made by the state judiciary, that violates Article 2 of the Constitution as well, because that article reposes plenary power for fashioning presidential election procedures to the various state legislatures. And the only cure for the violation is to make Florida adhere to the original deadlines. That would not only have restored the Bush margins to the pre-recount period, but it would likely have preempted recounts during the contest period because Gore would have had no basis on which to challenge the certified returns.

There was little time, however, to dissect the Supreme Court decision or the legal arguments that had influenced it. By early afternoon, word had come from the circuit court that Judge Sauls was ready to deliver his decision.