

Shutting the Door

For the Bush team, the first news Saturday was bracing: The recount nightmare was upon them, yet reports from the field suggested that their candidate was at least holding his own, even gaining a vote here and there. It was hard to put too much credence in the reports because a fair number of ballots were being contested by both sides, but there was a tinge of irony to Gore's developing predicament. Gore was being injured in the Florida election battle by friendly fire.

Tempering that good news was word that the 11th Circuit Court of Appeals in Atlanta, a body dominated by conservative jurists, had refused to come to the rescue, holding 8–4 that the recount could continue and denying Bush's request for an emergency hearing on the constitutionality of the manual recounts being conducted. However, the court had cushioned the blow, enjoining Florida officials from certifying any new results until the Supreme Court of the United States had accepted or rejected the opportunity for review.

Lawyers in Tallahassee who had worked on the U.S. Supreme Court brief or participated in the strategy surrounding it thought there was a good chance the Court would take the case, but they considered the chance of the Court staying the count no better than 50–50. For one thing,

the burden of “proving irreparable” harm to support the stay was not easily shouldered. Bush had led wire to wire, and Lewis’s order had barred the release of partial tallies. True the “spin-meisters” from both sides would be claiming big gains, but even if they had suddenly chugged gallons of truth serum, their estimates would be next to meaningless until ballot challenges, certainly to run into the hundreds if not thousands, were resolved. Also, as the most radical step the Court could take, a stay order would likely fracture the unanimity the Court had achieved in the counting deadline case handed down just days ago. In a constitutional issue of this sensitivity, the justices might still wish to speak with one voice. The High Court might well want to see how Judge Lewis handled the problem of diverse standards before tinkering with a stay order. Finally, any stay order would be far from procedural. It would almost certainly make it impossible for Florida to meet its deadline of December 12, even in the unlikely event that it later prevailed on appeal. For that reason, the lawyers thought that if the Court did order the counting stopped, it would almost be, in words shortly to be used by dissenting justices, “tantamount to a decision on the merits.”

Shortly before 3 P.M., the stay order came down. The vote was 5–4 and both the majority and dissenters took the unusual step of venting their differences publicly. Dissenting were the four more-liberal members of the Court. Justice John Paul Stevens, writing for himself and Justices Souter, Ginsburg, and Breyer, argued that “counting every legally cast vote cannot constitute irreparable harm. On the other hand, there is a danger that a stay may cause irreparable harm to the respondents—and, more importantly, the public at large—because of the risk that ‘the entry of the stay would be tantamount to a decision on the merits in favor of the applicants.’” The Florida court’s ruling, said Stevens, “reflects the basic principle, inherent in our Constitution and our democracy, that every legal vote should be counted.”¹

While only four votes were needed for certiorari to be granted, the stay required a majority, and here one was pro-

vided by the five reliable conservatives, Chief Justice William H. Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas. Responding to Stevens, Scalia wrote, "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires." Further, said Scalia, the standards varying from county to county may well be unconstitutional. If it is, "permitting the count to proceed on that erroneous basis will prevent an accurate recount from being conducted on a proper basis later, since it is generally agreed that each manual recount produces a degradation of the ballots, which renders a subsequent recount inaccurate."

The majority vote to stay the count set off a cheer at GOP headquarters in Tallahassee. Knowing the historic import of the occasion, lawyers asked colleagues to sign their copies of the stay order. The event also triggered shocked cries of concern among Democrats. Boies, who had been as responsible as anyone for turning December 12 into the fail-safe date, conceded that there was now a "very serious issue" as to whether any procedure could be completed by that date even if the vice president managed to turn around a justice and prevail on the merits. Still he, like the Bush team, would pile the now familiar arguments into a brief required by 4 P.M. the following day and, by virtue of Gore's personal decision, replace Laurence Tribe at the oral argument on Monday morning. Chartered jets would take Evans, Rove, and the senior Bush lawyers to Washington for the argument, but Olson and the ubiquitous Joe Klock, still representing Katherine Harris, would present the case for the petitioners.

No sooner did Olson step forward to begin his presentation than he found himself on the defensive due to yet another inexplicable and shameless about-face engineered by the battery of Bush lawyers. Just as they had stunned the Florida Supreme Court by seeking to claim after oral argument that Florida's

contest statute had no applicability to presidential elections, now they urged the U.S. Supreme Court that the Florida Supreme Court had been without jurisdiction to review the decision of the Florida circuit court where Judge Sauls had found on their behalf. Michael Carvin, who had worked on the brief, had advocated the position, but it had been rejected until after Chief Justice Wells raised it during the Florida Supreme Court argument.

“We were down to the wire and were not anxious to reject any argument that might possibly work,” one Bush lawyer later recalled. “And because Chief Justice Wells in Florida had spent so much time suggesting a lack of jurisdiction, I guess someone figured, why not?” He might have added that so long as the Martin and Seminole County cases were before the Florida Second Circuit Court, no Bush lawyer in his right mind would have endorsed an argument against state supreme court review.

In fact, the election laws passed by the Florida legislature, which had plenary power over presidential selection in the state, bestowed enormous prerogatives on the circuit court, but made no mention of the state supreme court. Was the court simply assuming ordinary judicial review, as the Bush lawyers had suggested during the Florida Supreme Court argument? Or must the laws be interpreted literally and narrowly?

The naked Bush reversal impressed none of the justices, and when even O’Connor and Kennedy showed little patience with it, Olson was forced to concede, “It may not be the most powerful argument we bring to the Supreme Court.”²

“I think that’s right,” replied Kennedy.

With this issue that never should have been before the Court wasting precious minutes of his time, Olson could only deal briefly with issues at the center of his case. One of the more vital ones was the importance of the December 12 deadline. As in the first Supreme Court argument, the issue was whether it was merely a “safe harbor” guideline for Congress, or whether it somehow assumed greater importance because it drew so much attention in the courts below.

Here Olson was able to make his point, telling Justice Souter, “Well, I believe that the Supreme Court of Florida certainly thought that it was construing—it certainly said so this time—that it was construing the applicability of Section 5 and it was expressing the hope that what it was doing was not jeopardizing the conclusive effect.”³

That point was critical. If the Florida Supreme Court had effectively ruled that its solution to the contest was of no standing unless fully implemented by December 12, then Gore’s case was constructively lost because the stay had already preempted the long-shot possibility that affairs could be settled by then.

The second critical issue grew out of what was clearly widely shared judicial concern about the Equal Protection argument. Yes, some of the Court liberals conceded, the different county standards raised that issue. But the Florida contest statute provides the presiding circuit court judge, now Terry Lewis, with the power “to fashion any order he or she deems necessary to prevent or correct any wrong, and to provide any relief appropriate under the circumstances.”⁴ Thus, in sorting out objections to the way the counties had recounted the votes, Judge Lewis could apply a uniform statewide standard. “I couldn’t imagine a greater conferral of authority by the legislature to the circuit judge,” Justice Ginsburg observed. That issue too would divide the conservative justices even from the liberals who recognized an equal protection problem with the Florida decision.

Olson was also able to get before the Justices an argument that, quirky and convoluted as it sounds, somehow would provide the five-justice majority with a way to keep the case from going back to the Florida Supreme Court in any meaningful sense and to justify that appropriation of state prerogative as an essential implementation of the will of the state. In a lengthy colloquy with Justice Souter, Olson found himself pushed to explain why the Court should be overly concerned about the ability of the state to meet a December 12 deadline upon remand when no such timetable or deadline is

set forth in Section 168 of the Florida Election Code, the provision governing contests.

Olson: It isn't just the timetable. The fact that there are timetables, which are very important in a presidential election, we are today smack up against a very important deadline and were in a process where . . .

Souter: Yes, you are, but that is a deadline set by a safe harbor statute for the guidance of Congress and it's a deadline that has nothing to do with any text in 168.

Olson: Well, I believe that the Supreme Court of Florida certainly thought that it was construing—it certainly said so this time—that it was construing the applicability of Section 5 and it was expressing the hope that what it was doing was not risking or jeopardizing the conclusive effect.⁵

Justice Souter then asked why, if the Bush people were so concerned with meeting the December 12 deadline, they sought a stay from the Supreme Court. Olson replied that with all the changes made in the election law through Florida Supreme Court decree, “that process had already violated Article 2 of the Constitution.”

Justice Souter also drew a response from Olson that would go to the heart of the debate among justices who would agree that Florida procedures needed fixing to avert an equal protection problem, but who would disagree on the feasibility of trying to fix things at this late date. Asked by Souter what he thought would be a reasonable standard for counting undervotes, Olson replied that a starting point would be those with a complete puncture. Beyond that, he suggested that the secretary of state had the requisite expertise to determine which votes reflected voter intent sufficiently to be counted.

Souter: If this were remanded to the Leon County Circuit Court, and the judge of that court addressed the secretary of state . . . and said, “Please tell us what the standard ought to be. We will be advised by your opinion,” that would be feasible, wouldn't it?

Olson: I think it would be feasible.⁶

Klock handled himself capably on the single issue of substance the justices chose to discuss with him: whether the

Florida Supreme Court had changed established Florida law, in effect legislating judicially, by declaring improperly executed ballots “legal votes” capable of triggering a recount rather than counting them incidental to a recount triggered by other, long-established causes, such as the malfunction of voting equipment. Klock pressed the latter interpretation with skill and command of the subject, but the later majority opinion, limited to equal protection, would ignore this issue. Rather, the question of change would find its way into the concurring opinion of three justices, led by Chief Justice Rehnquist, and the dissenting opinion filed by Justice Ginsburg.

Alas, Klock’s time before the Court was made memorable by his sudden inability to distinguish one justice from another, not even the living from the dead:

Stevens: What standard would you use . . .

Klock: Well . . .

Stevens: . . . in the situation I proposed then?

Klock: Justice Brennan, the difficulty is that under—I’m sorry.
(Laughter)

And, moments later:

Klock: What I’m saying is . . .

Souter: They have to throw their hands up.

Klock: No, Justice Breyer. What I’m saying is . . .

Souter: I’m Justice Souter. You’ve got to cut that out.
(Laughter)

And, moments later:

Scalia: Mr. Klock? I’m Scalia.
(Laughter)

Klock: I’ll remember that.

Scalia: Correct me if I’m wrong . . .

Klock: It will be hard to forget.⁷
(Laughter)

As the attorney seeking to defend what the Florida Supreme Court had done, Boies at times found himself a mere conduit

for scolding directed at the high-handedness of the state tribunal. Justice Kennedy, for example, got Boies to admit that had the Florida legislature extended the protest period from seven to nineteen days, it would have changed the law, thus flouting federal law. Yet, Boies maintained, when the Florida Supreme Court did the same thing, it was merely interpreting rather than changing an existing law. Kennedy remained unconvinced. "I'm not sure why if the legislature does it, it's a new law, and when the supreme court does it, it isn't," he grumbled.⁸

Justice O'Connor had her own peeves, two of them to be precise. One was the fact that, without revising its earlier vacated decision, the state supreme court had essentially ignored the U.S. Supreme Court's action by continuing to include in its vote totals ballots that had been counted in Broward, Palm Beach, and Miami-Dade Counties after the initial certification date. "That's, I think, a concern that we have," she complained. "And I did not find, really, a response by the Florida Supreme Court to this Court's remand in the case a week ago. It just seemed to kind of bypass it and assume that all those changes in deadlines were just fine, and they'd go ahead and adhere to them. And I found that troublesome."⁹

Justice O'Connor seemed equally annoyed by the Florida court's tortuous efforts to manipulate the state's protest and contest periods to accommodate voters who had ignored simple instructions on how to mark their ballots. "Well, why isn't the standard the one that voters are instructed to follow, for goodness' sake? I mean, it couldn't be clearer. I mean, why don't we go to that standard?"¹⁰

Boies parried these questions as best he could, neither advancing his case nor suffering disaster. But when the argument finally turned to equal protection, the issue on which the outcome of the case would turn, Boies seemed to lose the invisible yet palpable advantage that had carried him through two arguments in the Florida Supreme Court: the notion that he was just a little bit smarter than anyone else in the room.

His problem began when Justice Kennedy asked him whether, “from the standpoint of the equal protection clause, each—could each county give their own interpretation to what ‘intent’ means, so long as they are in good faith and with some reasonable basis for finding intent? Could that vary from county to county?”

“I think it can vary from individual to individual,” Boies replied.¹¹ He compared the situation to a criminal trial or administrative practice hearing, where triers of fact may differ among themselves on who has satisfied what burden of proof. That wouldn’t fly because, as Justice Kennedy promptly reminded him, “But here you have something objective. You’re not just reading a person’s mind; you’re looking at a piece of paper.”

Justice Souter leapt in. “Why shouldn’t there be an objective rule for all counties?” he inquired. “And if there isn’t, why isn’t it an equal protection problem?”¹²

Here, the Bush lawyers sitting hushed in the courtroom feared, was a point where Boies could have offered a strong counterargument. It is not an equal protection problem because, for one thing, it does not work to the advantage or disadvantage of either candidate. Both are subject to identical standards within every county even if those standards differ from county to county. Second, no county is disadvantaged because each is free to adopt any reasonable standard it may wish for determining voter intent. Third, we are now at the stage where any material disparity creating unfairness can be reconciled by the single circuit court judge who must ultimately rule on every unresolved objection.

But Boies did not respond in anything like that fashion. Instead, in a stumbling retreat, he conceded that “maybe if you had specific objective criteria in one county that says we’re going to count indented ballots, and another county that said we’re only going to count the ballot if it’s punched through, if you knew you had those two objective standards and they were different, then you might have an equal protection. . . .”

Justice Souter said, that being so, the Court would have to send the case back, “and I think we would have a responsibility to tell the Florida courts what to do about it. On that assumption, what would you tell them to do about it?”¹³

Boies: Well, I think that’s a very hard question.

(Laughter)

Souter: You’d tell them to count every vote.

(Laughter)

Souter: You’d tell them to count every vote, Mr. Boies.

Boies: I’d tell them to count every vote.¹⁴

(Laughter)

Finally Justice Stevens came to Boies’s rescue, asking, “Does not the procedure that is in place there contemplate that the uniformity will be achieved by having the final results all reviewed by the same judge?”

Boies took the life raft and agreed.

Scalia then jumped in, reminding Boies that the Florida Supreme Court had ordered election officials to accept the recounts from both Broward and Palm Beach Counties despite the differing standards.

Boies corrected Scalia, noting that Broward had been certified and was not at issue at the time of the second Florida Supreme Court decision and that Palm Beach and Miami-Dade were the two counties involved.

Boies continued: “And, with respect to Miami-Dade and Palm Beach, I do not believe that there is evidence in the record that that is a different standard. And there’s no finding of the trial court that that was a different standard. Indeed, what the trial court found was that both Miami-Dade and Palm Beach properly exercised their counting responsibilities.”¹⁵

This response stretched the truth. True, the Palm Beach County recount had been approved by Judge Sauls, but Miami-Dade’s liberal method was before the court only as an example of ballots degraded by careless counting practices. The “counting responsibilities” endorsed by Judge Sauls in-

volved the canvassing board's decision to *stop* counting because of an inability to meet the deadline, not, as Boies suggested, approval of the standards used in counting the votes.

Boies also misled the Court during further discussion with Scalia about the decision by the Florida Supreme Court to include in Gore's total the votes of Broward County recounted in a procedure ordered by the Florida Supreme Court but vacated on December 4 by the U.S. Supreme Court. "I think what the Supreme Court is saying is you've got a certification," said Boies. "That certification shows a certain vote total. Now, you take that certification until it is contested, and it can be contested by either or both parties. You do not have, until it is contested, you do not have contested ballots."¹⁶ Certainly when he made that statement, Boies knew that under Florida law, only the loser, not "either or both parties," can bring an election contest lawsuit.

The Court briefly visited the omission of overvotes—ballots disqualified because at least two votes were punched for the presidency. They exceeded twice the number of remaining undervotes, but generally raised fewer questions of interpretation. The Bush brief noted, however, that a voter punching "write-in" and George W. Bush would have his vote disqualified, though he might well have written in for Bush, thus making clear his intent. The issue was unlikely to prove determinative, but a sympathetic justice seeking to marshal every argument he could might well have referred to it.

Boies made one fleeting effort to salvage his position by reminding the court that differences in voting equipment have a more profound impact on the number of voter errors than do differences in counting methods. Justice O'Connor presented the issue to Olson during his rebuttal argument. "How can you have one standard when there are so many varieties of ballots?" she asked.

This time Olson's response was crisp and precise: "Certainly the standard should be that similarly situated voters and similarly situated ballots ought to be evaluated by comparable standards."¹⁷

Moments later, the Chief Justice announced, “This case is submitted,” and the courtroom emptied. Later in the day, the Florida Supreme Court issued a revised opinion in the first *Gore v. Harris* case, reaching the identical result on extending the certification deadline from November 14 to November 26, but purporting to do so purely on the basis of statutory law.

Belying profound differences in philosophy and assessment of the law, the Florida House and Senate now moved in lockstep toward the appointment of the same slate of Bush electors that had been chosen prior to the November 7 election. Committees of both the House and Senate passed joint resolutions to that effect on December 11, balking at a legislative bill in order to save time and avert a gubernatorial signature, which they feared would have compromised their plenary power in this area.

The House planned to vote on the resolution the following day, the Senate later in the week. For House Speaker Tom Feeney, a hard-charging, highly intelligent conservative activist from Pennsylvania, the moment was sweet. Still smarting from past state supreme court rebuffs—that court had declared two of his most important criminal law reform bills unconstitutional and had kept some of his pet antitax initiatives off the ballot—Feeney now felt they were playing on his home court. “I felt that after the Florida Supreme Court changed the law by extending the protest period, that any count as a result of that was fabrication and extra-constitutional and was meaningless,” he later recalled. “Don Rubottom and my other legal advisers told me we could have acted any time after they changed the law. I also felt they acted illegally in stopping the secretary of state from exercising her discretion under the law. Her guidelines were reasonable. The court mistakenly invoked its so-called equitable powers to overturn what it called her ‘hypertechnical’ enforcement of the law.”

If Feeney had his way, the legislature would have taken matters in hand early on. “We didn’t see a constitutional problem

acting after the twelfth,” he recalled, “but we wanted to move fast because we didn’t want to wake up to see a headline saying, ‘Gore ahead by 5,000 votes.’ The way we ended up doing it gave us a lot more cover on TV. It would have been a dramatically different situation had Gore taken the lead.”

Feeney had been among the Florida Republicans urging Bush to resist a statewide recount at all costs. “We thought we might get hurt,” he recalled. “For example, Bush won Duvall County, but our experts said the undercounted ballots had been disproportionately in Democratic precincts.”

Feeney’s Senate counterpart was the cautious, courtly, and collegial John McKay. While the two men get along reasonably well, they could hardly be more opposite. Feeney jogs to stay lean and mean for his legislative donnybrooks; McKay golfs because he worships the game and believes that any difference that can’t be worked out by the fourth hole probably is insoluble.

McKay believed that the Florida Supreme Court, by legislating from the bench, had placed the state’s electoral college votes in jeopardy and that, unless the dispute was settled by December 12, six million Floridians could have been disenfranchised. “My primary responsibility was not to Bush, the Republican Party, or the Senate,” he later recalled. “It was to Florida. I would have elected a slate of Gore delegates had that been in Florida’s interest.”

McKay’s in-house counsel, Steve Kahn, took a cautious approach. There was no legal basis for the legislature to move prior to December 12, he concluded. “Steve felt that was dropping the checkered flag,” McKay recalled. “He also felt the eighteenth, when the states met to cast their ballots, was the really important date. If the Florida combatants could resolve their dispute by that date, the safe harbor provisions of federal law would be irrelevant because there would be no slates competing with the one to emerge from the lengthy battle.”

Despite bravado, no one in the Bush camp felt particularly sanguine about relying on the Florida legislature to

determine the next president. What would happen if the legislature moved on the twelfth or thirteenth to appoint a slate of Bush electors and on the sixteenth a completed recount had Gore in the lead? Suppose the state supreme court sanctioned the result with Gore in the lead and issued a writ of mandamus commanding the governor to sign that result and forward it to the National Archives, the repository for election documents? The legislature was given power to determine presidential elections in Florida, but it would certainly be argued that the legislature had exercised that power by setting up the Election Day vote plus the series of protest, contest, and appellate procedures now in full movement.

Federal law was not much help. It provided that the electors of each state meet “on the first Monday after the second Wednesday in December,” which fell on December 1 in the year 2000, to determine that state’s vote for president and vice president. But it is not until January 6 when Congress counts the electoral votes. If there are competing slates from a particular state, the two Houses of Congress meet separately to decide which one is entitled to be counted. If they disagree, “the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.”¹⁸ But was the Governor of Florida, Jeb Bush, an independent actor in this process? Or was his role purely ministerial, to be determined ultimately by one supreme court or another?

On January 6, 2001, Republicans would control the U.S. House, with the Senate split 50–50, tie votes to be broken by Vice President Albert Gore. Should Gore pull ahead in the Florida popular vote, how would George W. Bush look, trailing Al Gore by nearly half a million popular votes nationally, seeking to be imposed on the country by a resolution of the Florida legislature?

“We would never have done that, I’ll tell you that,” James Baker later recalled. “That’s not the way George W. Bush wanted to be president. It was great having the Florida leg-

islature in our corner. But we needed to win in the Supreme Court.”

Late in the evening of December 12, the Supreme Court of the United States effectively ended the battle for the White House by holding that the recount ordered by the Florida Supreme Court violated the principle of equal protection by subjecting ballots in different counties to widely divergent counting rules and that the effort by the Florida Supreme Court to resolve all disputes by December 12 reflected the will of the legislature, had the force of law, and was under the circumstances impossible to achieve. The unsigned decision was by a 5–4 vote reflecting the liberal-conservative court split. Two of the liberal justices, Souter and Breyer, agreed that equal protection was a serious problem, but each would have sent the case back to Florida and permitted the state to try to salvage the situation by the time the electoral college met on December 18. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, would have included as additional grounds for reversal actions by the Florida court that, they argued, made new law, usurping the functions of the state legislature in violation of Article 2 of the Constitution.

Endorsing the right to vote as “fundamental,” the majority concluded, “The recount mechanisms implemented in response to the decisions of the Florida supreme court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right.”¹⁹

Borrowing heavily from the supplemental Bush brief on the stay petition, the court relied on documented examples of divergent standards applied and even of changes within particular counties. For example, “Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.”²⁰

The court also found no valid excuse for ignoring overvotes, given the fact that there were up to 110,000 of them

to be left unexamined under the state court ruling while attention was lavished on the roughly 60,000 undervotes.

The Florida court's effort to count the Miami-Dade partial vote from the overwhelmingly Gore precincts drew one of the U.S. Supreme Court's most pointed rebukes. "This accommodation no doubt results from the truncated contest period established by the Florida Supreme Court in *Bush 1*, at respondent's own urging. The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees."²¹

Returning to the material in the supplemental brief, the court found even the latest state court order pregnant with constitutional concerns. "That order did not specify who would recount the ballots. . . . Further, while others were permitted to observe, they were prohibited from objecting during the recount."²²

At issue, said the majority, was not the right of local entities to develop different systems for conducting elections. "Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."²³

Noting that any remand for further counting would require both the adoption of new procedures plus later judicial review to resolve disputes, the Court concluded that, "Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed."²⁴

The dissent, commanding support from all four in the minority, was written by Justice Stevens. He described the equal protection argument as "not substantial." Admittedly, the use of different standards from county to county "may raise serious concerns." But, "Those concerns are alleviated—if not eliminated—by the fact that a single impartial

magistrate will ultimately adjudicate all objections arising from the recount process.”²⁵

Stevens said that underlying the “entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed,” and that “can only lend credence to the most cynical appraisal of the work of judges throughout the land.” And while we may never know the real winner of this year’s election, said Stevens, the certain loser “is the nation’s confidence in the judge as an impartial guardian of the rule of law.”

Justices Souter and Breyer, in separate dissents, endorsed the equal protection conclusion of the majority, but urged a remedy that would have given the state the opportunity to correct the flaws and decide for itself whether the December 12 date was critical.

Noting that electoral votes were scheduled to be cast in six days, Souter would have remanded the case to the courts of Florida “with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments.”²⁶

Breyer would have remanded the case with instructions to count all undercounted votes, including those in Broward, Miami-Dade, Palm Beach, and Volusia—Gore’s handpicked counties—“and to do so in accordance with a single uniform standard.”²⁷ Somewhat inconsistently, Breyer criticized the Court for “improvidently” stopping a recount the state might have completed in time to meet its deadline. Exactly why an unconstitutional recount should have proceeded, he did not explain.

It is difficult to imagine why Justices Kennedy and O’Connor declined to join Chief Justice Rehnquist’s opinion, particularly given their statements from the bench during oral argument. Perhaps they wanted to hold a clear majority of seven justices behind the Court’s assessment of the constitutional wrong even if two of their brethren could not endorse the remedy. In doing so, they left many to wonder whether stopping the

process could be really necessary. Why not, as Breyer and Souter had suggested, leave it to Florida to see if it could complete a process in the time allotted by both the federal government and its own legislature?

By contrast, Rehnquist hammered at the pattern of judicial excesses committed by the Florida court. “This inquiry does not imply a disrespect for state *courts*,” wrote the Chief Justice, “but rather a respect for the constitutionally prescribed role of state *legislatures*.”²⁸ His attack on constitutional infirmities—violations of Article 2—was substantial.

After extending the certification deadline and “short-changing the contest period,” the state court implied that “certification was a matter of significance” with the winner enjoying “presumptive validity” and the loser facing “an uphill battle. In its latest opinion, however, the court empties certification of virtually all legal consequence,”²⁹ thereby departing from the legislative scheme.

“No reasonable person would call it ‘an error in the vote tabulation,’” Rehnquist continued, “or a ‘rejection of legal votes,’ when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify.”³⁰ And when the secretary of state “rejected this peculiar reading of the statutes” and offered a reasonable one, the state court struck her action down.

Thus, in the view of the Chief Justice and those who concurred with him, the Florida Supreme Court had tainted the process to the point where it could not be fixed. By contrast, the majority opinion concluded that those constitutional infirmities on which the decision hinged were curable, but they could not be cured in the allotted time.

At Bush headquarters in Tallahassee, there was simply no work to be done while they awaited the Supreme Court decision. Lawyers tossed footballs in the yard and on the street. In some cases, clients or partners received unexpected phone calls from men (mostly) who had been off in their own world

for the past month. Day turned into evening and evening into night with no word. When the decision did come down, Don Evans happened to be on the phone with George W. Bush. "I gotta call you back, buddy," he said, hanging up. As network correspondents struggled to interpret the ruling in Washington, the lawyers in Tallahassee were doing the same, as were the people around the governor of Texas.

Then the phone rang. It was Governor Bush looking for James Baker.

"Good evening, Mr. President-elect," said Baker, and a huge cheer erupted. Baker said he planned a low-key reaction. He didn't want to smear egg on the face of Gore's lawyers.

Then Evans's cell phone rang. Dick Cheney was on the other end wanting to speak to Baker.

"It's Big Time," announced Evans. Cheney had earned that nickname on the campaign trail after Bush had referred to a *New York Times* reporter as an "asshole" and Cheney had dutifully replied, "Big time."

"Jim," said Cheney. "Congratulations. Only under your leadership could we have gone from a lead of 1,800 votes to a lead of 150 votes."

John Bolton, who had run the ground war in Palm Beach County, observed the scene. He never much liked Gore, and thought Bush might save the country from the Clinton epoch of moral and political permissiveness. Nonetheless, he wished it all could have happened without a U.S. Supreme Court decision imposing ad hoc constitutional standards on the states. Bolton also had a dispassionate sense of the grand stroke of luck that had made it all end so well.

"If the canvassing board had been two partisan Democrats or three partisan Democrats in Palm Beach County, we'd have been screwed," he later said.

Among the Bush lawyers who waged the battle in Florida, few would join Bolton in complaining about the route traveled by the U.S. Supreme Court in reaching its conclusion. Mentally, most seemed still to be combatants in the battle of recounts,

trading jabs with protagonists, arguing fiercely for positions long since determined, seeing little distinction between the instant verdict and that of history.

Among those capable of more detached reflection, two themes seemed dominant: First, a feeling of professional pride and accomplishment in what they had achieved. Gore, starting the battle with a ferocious head of steam had been neutralized and then defeated on every front . . . before the canvassing boards, in the courts, and ultimately, in the political arena. And it had not happened by chance, but rather by decisions as to where and how to fight and not to fight, and by the strategic deployment of human resources.

The second theme was an overwhelming sense that the rogue player in the battle was not Al Gore or Joseph Lieberman, not William Daley and Warren Christopher, and not even David Boies, but the Florida Supreme Court. These justices, particularly the four that constituted the majority in the appeal from the contest trial decision of Judge Sanders Sauls, were the perpetrators of the constitutional crisis of Election 2000. This was the body that was totally out of control. These were the justices that:

- Transformed voter error into an “error on vote tabulation” sufficient to warrant a recount.
- Turned the statutory discretion of the Secretary of State to reject recounts not meeting the seven-day deadline into a prohibition against rejecting any late recount so long as it does not impede the contest period.
 - Legislated new deadline dates from the bench.
 - Failed to adhere to its own deadlines.
 - Failed to hold counties to a consistent recount standard.
 - Allowed Gore to keep a 168-vote pickup in Miami-Dade County despite the fact that the recount had been limited to staunch Democratic precincts.
 - Gave negligible weight to canvassing board decisions made during the protest period.

- Set a statistically banal standard to justify contest period recounts, saying one should be ordered whenever the number of undervotes exceeds the margin between the top two candidates.
- Ignored the first Supreme Court decision until after the second appeal was argued, thereby insulting the U.S. Supreme Court and angering at least one of its justices.

A tendency to intrude on the discretion of states exercising their sovereign functions is far from the most prominent instinct of the current U.S. Supreme Court. But when confronted with lawless frolic by a supreme state tribunal in an enterprise of monumental national significance, the court found intervention imperative. And it was the work of James Baker and his colleagues in Tallahassee that defined the essence of the controversy and determined the forum for its resolution.

In the months ahead, political opponents would snipe at the results, hoping to cripple the infant Bush presidency. Their efforts would come to naught, in part because Mr. Bush outlined and then pursued his agenda with the apparent confidence of a man who had achieved a victory of landslide proportions. The critics also lacked a guiding voice, Al Gore having gracefully recused himself to grow a beard and a belly while the Bush presidency took hold. Future historians may well spend years pouring over the nuances of the Florida contest, but they will likely conclude that those who fought that contest quickly moved on.

