Bush v Gore

By Leonard M. Niehoff

This column will attempt to address the United States Supreme Court's decision in *Bush v Gore* without dissolving into a political harangue.[1] This may, of course, prove impossible. Indeed, the attempt brings to mind Samuel Johnson's description of a dog walking on its hind legs: "we do not expect to see it done well; we are just surprised to see it tried at all."

Let's start with a quick refresher of the events that brought the case to the Supreme Court. Those events had, and still have, a hazy surrealism to them. In one sense, it seemed as if the election would never end, and as if history were dragging its heels. In another sense, it seemed as if important new developments rushed in upon us every few minutes, and as if history had taken off in a full sprint. Several months of hindsight may help bring this blurry picture into focus.

On November 7, 2000, our country conducted its popular election for President of the United States. It is tempting to describe the outcome as follows: 49 states participated, and Florida abstained. The next day, the Florida Division of Election reported a margin of 1,784 votes favoring George W. Bush. Because the margin of victory was less than one-half of one percent of the votes cast, Florida law required an automatic *machine* recount. The machine recount showed Governor Bush still winning, though by a narrower margin.

Vice-President Gore asked for *manual* recounts in four counties pursuant to Florida election law. (Those four counties were Volusia, Broward, Palm Beach, and Miami-Dade.) A dispute arose about the deadline by which the local canvassing boards had to submit their returns to the Florida Secretary of State. The secretary maintained that there was a statutory deadline of November 14, which she declined to waive. Vice-President Gore sought emergency relief from the Florida Supreme Court, which set a November 26 deadline for returns.

At this point we have to take a brief detour to follow the trail of this decision of the Florida Supreme Court. Governor Bush sought review of this decision by the United States Supreme Court, which on December 4, 2000 found "considerable uncertainty as to the grounds on which it was based" and vacated it. On December 11, the Florida Supreme Court issued a decision on remand that offered some additional explanation and reinstated the November 26 date.

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In this first appeal, Governor Bush included among his arguments a claim that a partial recount in only four counties violated the equal protection clause of the fourteenth amendment by weighing some votes more heavily than others, but the Supreme Court did not grant certiorari based on this argument. Many observers interpreted this as a sign that the Court did not think much of an equal protection argument in this context. This would, of course, turn out to be a misinterpretation.[2] But back to the principal sequence of events.

On November 26, 2000, the Florida Elections Canvassing Commission certified the results of the election and declared George W. Bush the winner of the state's 25 electoral votes. The next day, Vice-President Gore filed a complaint in Florida state court contesting the certification. The Florida trial court heard and rejected the claim, and the Florida Court of Appeals certified the matter to the Florida Supreme Court.

On December 8, 2000, the Florida Supreme Court issued a decision affirming in part and reversing in part the trial court's decision. The decision included three significant holdings:

(1) The Florida Supreme Court ordered Miami-Dade County to manually recount 9,000 ballots that the machines had registered as undervotes.[3]

(2) As a result of manual recounts, Palm Beach had identified a net gain of 215 votes for Vice-President Gore. The Florida Supreme Court ordered these included in the certified results. Miami-Dade, which had started but then halted a manual recount, had identified a net gain of 168 votes for Vice-President Gore. The Florida Supreme Court ordered these included in the certified results as well, subject to completion of the manual recount in Miami-Dade.

(3) The Florida Supreme Court ordered that manual recounts should begin immediately in all Florida counties where undervotes had not been so counted.

Governor Bush sought an emergency application for a stay from the United States Supreme Court. On December 9, 2000, the Court issued a stay, treated the application as a petition for certiorari, and granted certiorari. One of the attorneys involved later suggested that the case was over before the

This column addresses proceedings before the United States Supreme Court that are of interest to *Michigan Bar Journal* readers.

oral argument even took place, contending that "Bush won the case on CNN, when there were all those pictures of the weird ballot recounting. Believe it or not, Justices watch CNN."[4]

Perhaps there is something to this. Chief Justice William Rehnquist himself once wrote: "I was recently asked . . . whether the justices were able to isolate themselves from the tide of public opinion. My answer was that we are not able to do so, and it would probably be unwise to try. We read newspapers and magazines, we watch news on television, we talk to our friends about current events."[5]

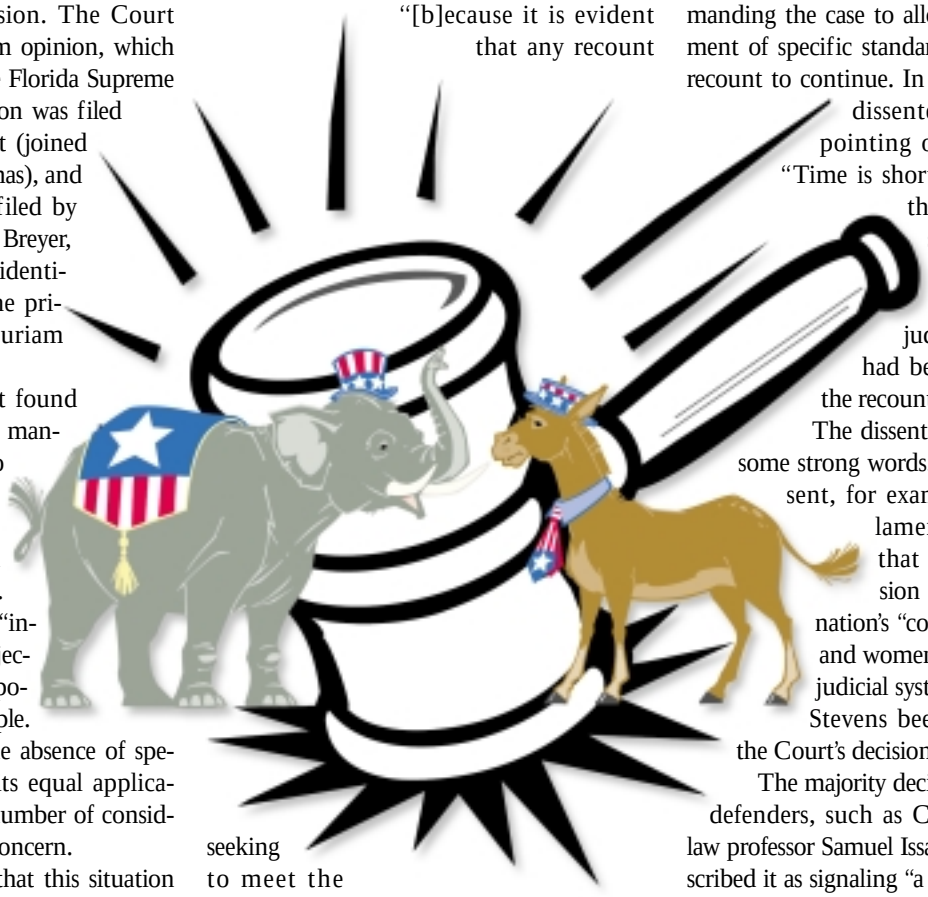
On December 11, 2000 the Supreme Court heard oral argument, and the next day the Court issued its decision. The Court spoke through a per curiam opinion, which reversed the decision of the Florida Supreme Court. A concurring opinion was filed by Chief Justice Rehnquist (joined by Justices Scalia and Thomas), and dissenting opinions were filed by Justices Stevens, Ginsburg, Breyer, and Souter. Reports have identified Justice Kennedy as the primary author of the per curiam opinion.[6]

In summary, the Court found fault with the directive that manual recounts proceed to discern the "intent of the voters" whose choice for President had not been identified by the machines. The Court noted that the "intent of the voter" is "unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application." The Court listed a number of considerations in support of this concern.

First, the Court noted that this situation lent itself to "specific rules designed to ensure uniform treatment," because "[t]he factfinder confronts a thing, not a person." The Court pointed out that "the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object . . ." Thus, to expect specific rules was not to expect the impossible.

Second, the Court noted that "[t]he want of those rules has led to unequal evaluation of ballots in various respects." In this connection, the Court raised a number of issues. For example, they pointed out that standards could vary from county to county and even from team to team, they cited some record examples of differing treatment between counties, and they noted that the recount order addressed undervotes but not overvotes.

Finally, the Court observed that Florida law required electoral contests to be completed by December 12 and held: "That date is upon us, and there is no recount procedure in place under the state Supreme Court's order that comports with minimal constitutional standards." The Court continued that "[b]ecause 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."



The dissenting justices raised a number of points in response.[7] First, the dissenters observed that the Court had taken an extraordinary step by undertaking to review—and by rejecting—a state Supreme Court interpretation of state law. Second, although they acknowledged that the circumstances raised some fairness concerns, they pointed out that "we live in an imperfect world" and that there was no reason to find the "intent of the voter" standard any more troublesome than many other standards routinely employed in important cases, such as the "beyond a reasonable doubt" standard. Third, they noted that, even if differing applications of the standard did emerge, equal protection was assured because a single impartial magistrate would ultimately adjudicate any objections. Finally, they concluded that, even if the majority were correct in every respect, the Court should have adopted a different remedy, remanding the case to allow for the establishment of specific standards and to allow the recount to continue. In this connection, the dissenters could not resist pointing out a certain irony: "Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process."

The dissenting opinions include some strong words. Justice Stevens' dissent, for example, concluded by lamenting the "wound" that the majority's decision had inflicted on the nation's "confidence in the men and women who administer the judicial system." Nor has Justice Stevens been the last to decry the Court's decision.

The majority decision has found some defenders, such as Columbia University law professor Samuel Issacharoff, who has described it as signaling "a reinvigoration of the fundamental rights doctrine in the area of voting, [which] could be very positive." But, on the whole, the decision has had a chilly reception. This is true not only among critics of the Court, such as former clerk Edward Lazarus, who called the decision "an act of rank hypocrisy," but also among some who are generally supportive of the Court, such as

University of Chicago law professor Cass Sunstein, who called the decision "a real embarrassment" and one of the Court's "worst moment[s]" in years.[8]

Commentators have also divided over whether the decision will have any significance as precedent. Thus, Harvard law professor Randall Kennedy has said that the decision "certainly opens up a new avenue of litigation about voting, or at least it potentially does." McGeorge Law School professor J. Clark Kelso has wryly countered that the decision "probably won't have much effect on the law other than in a case involving a manual recount of punch card ballots in a presidential election."[9] The Republic probably ought not to test the precedent too often. As the old joke goes, jumping off a building and surviving is a miracle if you do it once; if you do it more than once, it's just another bad habit.

A recent editorial by Douglas McCollam in *The American Lawyer* maintains that, whatever else one might think about *Bush v Gore*, the case spotlighted the special role that attorneys play in our democracy.[10] McCollam notes that, "[e]ven when the fight was at its most contentious, the lawyers maintained a level of decorum sadly absent in most of the discourse surrounding the election." He observes that this is in part because lawyers must conform to a code of professional conduct and adds: "Nonlawyers and worldly-wise poseurs laugh off this notion as quaint. Most of the lawyers I know don't. They'll make the best arguments they can . . . but they won't cross the ethical line. Would that the nation's pundits and political leaders could make the same claim."

McCollam concludes by quoting from de Tocqueville, who in the nineteenth century wrote: "The authority Americans have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy." McCollam adds: "Then, as now."

Indeed, the remarkable thing about *Bush v Gore* is not that the Court enmeshed itself in a political fray (it does that occasionally), or that the Court divided five-to-four along ideological lines (it does that commonly), or that the Court left the rest of us scratching our heads (it does that frequently). The remarkable thing about *Bush v Gore* is the occasion it afforded the public to see lawyers as civil professionals who can speak brilliantly but plainly, who can argue vigorously but respectfully, and who can tell the difference between a fine point and a lie. That is a precedent worth following. ✦

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FOOTNOTES

1. Portions of this column are taken from remarks made by the author before a meeting in February of this year of the Eastern District chapter of the Federal Bar Association.
2. In retrospect, it now seems clear that the Court decided not to grant certiorari on this issue because it was still pending before a federal appeals court in a companion case and therefore was not yet ripe for Supreme Court review.
3. An "undervote" occurs when the machine does not register a vote for President. An "overvote" occurs when the machine registers more than one vote for President.
4. Quoted in Tony Mauro, "In Search of a Swing," *The American Lawyer* (January, 2001) at 75.
5. William H. Rehnquist, The Supreme Court: How it Was, How it Is (1987) at 98. In this connection see also "The Truth Behind the Pillars," *Newsweek* (December 25, 2000), which includes a gossipy report of Justice O'Connor's attendance at an election-night party and her disgusted reaction upon hearing CBS anchor Dan Rather call Florida for Al Gore.
6. See Jeffrey Rosen, "In Lieu of Manners," *The New York Times Magazine* (February 4, 2001) at 50.
7. These points are collapsed into one discussion for purposes of efficiency. Not all of the dissenting justices expressed agreement with all of these arguments.
8. All of the quotations in this paragraph are taken from David G. Savage, "The Vote Case Fallout," *ABA Journal* (February 2001) at 32.
9. Id.
10. Douglas McCollam, "Taming the Political Animal," *The American Lawyer* (January 2001).