

A Careful Look at the Drama of *Bush v. Gore*

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The U.S. Supreme Court's decision in *Bush v. Gore* has generated an extraordinary reaction within the U.S. legal academy—most of it falling within a range from condemnation to vilification. Perhaps the most notorious is the website message of “673 Law Professors” who effectively accuse the Court of stealing the election and of acting as “propagandists, not judges.” (1) The analysis of this group—like the analysis of much of modern Constitutional law scholarship—focuses entirely on the text of the two decisions of the Court—*Bush v. Gore*, its decision on December 9 to stay the statewide recount ordered by the Florida Supreme Court the previous day; and *Bush v. Gore* II its December 12 decision to terminate all further recounting, awarding the election to Governor Bush.

To my mind, to accurately evaluate the judgments of the U.S. Supreme Court, it is necessary as well to evaluate the judgments of the Florida Supreme Court as well as those of the Florida secretary of state and the State's Elections Division. One can accuse the U.S. Supreme Court of stealing the election only if one can defend without reservation the legitimacy of the decisions of the Florida Supreme Court overruling the secretary of state and the Elections Division.

The Drama Remembered

Toward this end, it is helpful to briefly review the background events leading to the respective decisions of the Florida and U.S. Supreme Courts: (2)

- 1) The election was held on Tuesday, November 7.
- 2) The next day, Wednesday, November 8, the Florida Division of Elections reported that Governor Bush had prevailed over Vice President Gore by 1,784 votes. According to Florida statute, given that small margin, an automatic machine recount was conducted (3) reaffirming Governor Bush's victory, but by a smaller margin;
- 3) The following day, November 9, the Florida Democratic Executive Committee requested manual recounts in Broward, Palm Beach, and Volusia counties. The statute vests discretion in each county canvassing board as to whether to conduct a manual recount. If a board chooses to proceed, the statute provides that it first conduct a sample recount to determine whether there is evidence of “error in the vote tabulation which could affect the outcome of the election.” If it finds such evidence, the statute provides that the board shall:

- a) Correct the error and recount the remaining precincts with the vote tabulation system;
- b) Request the Department of State to verify the tabulation hardware; or
- c) Manually recount all ballots. (4)

Pursuant to this procedure, the canvassing boards of these counties conducted a sample manual recount and concluded that there was a sufficient increase in votes for Vice President Gore to justify a full manual recount. At the same time, there was some uncertainty as to what the term “error in the vote tabulation” meant. The chair of the Palm Beach Canvassing Board requested an opinion from the director of the Elections Division as to how the statutory term was to be defined.

4) The Florida election statute also provides that each county board must certify returns no later than seven days after the election, here by November 14. Fearing that a comprehensive manual recount could not be completed by that date, the chair of the Palm Beach County Board requested a separate advisory opinion from the Elections Division as to what the consequences were if the manual recount in Palm Beach extended past the November 14 deadline. The Florida statute itself does not explicitly provide for exceptions to the deadline. It states, however, in Section 102.112, that “If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.” (5)

5) The Elections Division responded to these various requests for interpretive opinions on Monday, November 13. First, in answer to the requests as to the meaning of “error in the vote tabulation,” the division reported that the term meant machine or software tabulation error only. (6) The division expressly rejected the proposition that a failure of a voter in marking or punching the ballot qualified: (7) “Voter error is not an ‘error in the vote tabulation’.” (8)

Secondly, with respect to the question as to whether there could be an exception to the November 14 deadline if the manual recount could not be completed, the Elections Division reported that the only grounds for exception were unforeseen circumstances like a natural disaster that made compliance with the deadline impossible. (9) The Division added: “But a close election, regardless of the identity of the candidates, is not such a circumstance. The legislature obviously specifically contemplated close elections in that the law provides for automatic recounts, protests, and manual recounts. It also plainly states when this process must end.” (10)

6) Later that day, Monday, November 13, Katherine Harris, the Florida secretary of state (a Republican and co-chair of the Florida Bush campaign), issued a statement indicating that, on the basis of the department’s advisory opinion and upon the authority of Section 102.112, she would ignore all returns received after 5:00 p.m. on November 14.

7) Following Ms. Harris’s statement, the Volusia County Canvassing Board joined by the Palm Beach Board and Vice President Gore sought declaratory and injunctive relief, asking a county court to declare that the county canvassing boards were not bound by the November 14 deadline and barring the secretary of state from ignoring subsequently submitted election returns.

8) On November 14, the date of the statutory deadline, the Leon County Court ruled that the November 14 deadline was mandatory, but that Volusia County could subsequently submit amended returns, and that the secretary of state was afforded discretion under Section 102.112 as to whether to accept or ignore any amended returns. By the 5:00 p.m. deadline, all counties had submitted returns.

9) On the following day, November 15, the secretary of state sent a letter to the various county election supervisors requesting them to submit to her any grounds that they thought might justify a subsequent amendment of the vote counts that had been certified by the November 14 deadline. In her letter to the county boards, she set forth three criteria that she concluded, pursuant to her discretion, would justify post-deadline amendment: proof of fraud; substantial non-compliance with election procedures; or the intervention of acts of God or other circumstances beyond the control of the canvassing board that prevented reporting by the deadline. (11) Her letter provided supporting legal authority for each of these criteria. Her letter went substantially beyond the single grounds for exception—unforeseen circumstances such as a natural disaster—given in the Election Division’s November 13 advisory opinion.

10) Four counties submitted statements in response to the Harris letter. After reviewing the statements, Ms. Harris immediately announced that none of the reasons given by the counties in these statements qualified for exception according to the criteria announced in her letter and that, therefore, she would not accept amended returns. She indicated that the vote totals certified in compliance with the November 14 statutory deadline would stand, to be adjusted only by the results from overseas absentee ballots which, by stipulation with federal authorities, could be counted if received by November 17. (12)

11) Finally, on November 16, the Florida Democratic Committee along with the vice president sought an order compelling the secretary of state to accept amended returns. Pursuant to Florida procedure, the trial court certified the issues in the underlying litigation to the Florida Supreme Court and enjoined the secretary of state from certifying the results of the Florida election until the appeal was decided.

To the Courts

The certified case was resolved by the Florida Supreme Court in *Palm Beach Canvassing Board v. Harris*, issued on November 21. (13) The Court began its analysis by stating that the most important principle for determining how the election recounts should proceed was vindicating “the will of the people”—“the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases.” (14)

Later in the opinion, invoking a provision of the Florida Constitution that states that “All political power is inherent in the people,” the Court added: “Technical statutory requirements must not be exalted over the substance of this right.” (15) Applying these principles, the Florida Supreme Court ruled that:

- 1) The Department of Elections' advisory opinion defining "error in vote tabulation" to exclude voter error in punching the ballot was wrong as a matter of law. County boards possessed the authority to manually review wrongly punched ballots to determine "the will of the voter";
- 2) The criteria announced by the secretary of state for the exercise of her statutory discretion to accept amended returns were improper. The Court ordered the secretary to accept amended returns unless they were submitted "so late that their inclusion will compromise the integrity of the electoral process";
- 3) The county canvassing boards could continue manual recounts and could have until November 26 to submit amended returns.

Following this ruling, the manual recount resumed. Various disputes arose within individual counties as to what the standard should be for determining "the will of the voter," especially with respect to under-vote ballots—ballots which the machines read as having no vote for president, but which indicated votes for other positions (the single chad, dimpled chad issue). As the new November 26 deadline approached, the canvassing board in Miami-Dade County concluded that it could not complete the recount even within the extended period, and halted recounting with approximately 9,000 under-votes not reviewed. On November 26, the various counties amended their certified returns. The new totals showed Governor Bush again the victor, but now by only 537 votes. (16)

The drama, however, was not over. The Florida election statute allows a candidate to "contest" the certified total to determine whether it includes any number of "illegal votes" or has failed to include "a number of legal votes sufficient to change or place in doubt the result of the election." (17) On November 27, Vice President Gore filed a complaint in Leon County contesting Governor Bush's 537-vote margin. The Leon County Court held an evidentiary hearing on December 2 and 3 and entered an oral order denying Gore relief on December 4.

As these events occurred, the Florida Supreme Court's November 21 decision in *Palm Beach Canvassing Board v. Harris* was appealed to the U.S. Supreme Court. The U.S. Supreme Court issued its ruling on the appeal on the same day that the Leon County Court denied Vice President Gore's contest, December 4. In *Bush v. Palm Beach Canvassing Board* (18) the U.S. Supreme vacated the Florida Supreme Court's opinion, and remanded the case to the Florida Court for further consideration. Presumably, from concerns about comity, respect for the state court, or sensitivity to state supreme court authority, the U.S. Supreme Court indicated only that it had concluded "that there is considerable uncertainty as to the precise grounds for the [underlying] decision."

At the same time, however, the Court listed several substantive issues that it believed that the Florida Supreme Court had not adequately considered: 1) Article II's delegation to the Florida legislature of the right to direct how electors are chosen; 2) the safe harbor provisions of 3 U.S.C. §5; 3) and what Constitutional statutory grounds there were for the Florida Court's extension of the "7-day deadline...by 12 days."

The Florida Supreme Court chose to hear the appeal of the Leon County Court's denial of the Gore contest of the vote total certified on November 26 prior to readdressing the case remanded by the U.S. Supreme Court. (19) The Florida Supreme Court ruled on the Gore contest on December 8 in *Gore v. Harris* largely, though not entirely, overruling the Leon County Court. (20) First, the Florida Supreme Court overruled the County Court's rejection of 215 Gore votes from Palm Beach County and of 168 Gore votes from Miami-Dade County, but affirmed the addition of 51 Bush votes from Nassau County. Through these rulings, Governor Bush's November 26 margin of 537 votes was reduced to a margin of 205. More importantly, however, because it kept the election undetermined, the Florida Supreme Court ordered the trial court to itself examine the 9,000 votes from Miami-Dade County which the Miami-Dade election officials had declined to count because of the impending November 26 deadline. At the same time, the Florida Supreme Court ordered a statewide recount of all under-votes, not just the 9,000 from Miami-Dade County. (21) While the Florida Supreme Court's opinion in *Palm Beach Canvassing Board v. Harris* had been unanimous, *Gore v. Harris* was a four-to-three decision. Chief Justice Wells issued an extraordinary dissent that is worthwhile reviewing because, in my view, it was likely to have been highly influential with the majority of the U.S. Supreme Court in its ultimate decision in *Bush v. Gore II*. Though Chief Justice Wells stated that he did "not question the good faith or honorable intentions of my colleagues in the majority," he also concluded that "to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion. The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown....Importantly to me, I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution." (22)

Chief Justice Wells was particularly concerned about the ruling ordering a new statewide manual recount of under-votes: "I do not find any legal basis for the majority of this Court to simply cast aside the determination by the trial judge made on the proof presented at a two-day evidentiary hearing that the evidence did not support a statewide recount. To the contrary, I find the majority's decision in that regard quite extraordinary." (23)

The Chief Justice repeatedly insisted that the Florida Court had not set forth any standards or procedures for recounting the under-votes: "section 101.5614(5) utterly fails to provide a meaningful standard. There is no doubt that every vote should be counted where there is a 'clear indication of the intent of the voter.'" The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled

chad” where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress. (24) ...the majority returns this case to the circuit court for a recount with no standards...It only stands to reason that many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards for determining voter intent by the various canvassing boards, individual judges, or multiple unknown counters who will eventually count these ballots.” (25)

Chief Justice Wells also expressed serious concerns that the Florida Supreme Court’s interpretation of the election statute violated Article II’s delegation of authority to determine the manner of choosing electors to the Legislature and about the implications of the continuing recount with respect to Florida’s qualification for the 3 U.S.C. §5, safe harbor. (26)

Gore v. Harris was decided by the Florida Supreme Court on December 8, and immediately appealed to the U.S. Supreme Court. What the U.S. Supreme Court did after December 8 has led to the charges of stealing the election and “Constitutional coup.” First, on December 9, the day after the Florida Supreme Court ordered the additional Miami-Dade and statewide recount of under-votes, the U.S. Supreme Court stayed that order. (27) Again, the recounting stopped. On December 11, the Florida Supreme Court released its revised opinion in *Palm Beach County Canvassing Board v. Harris* the case remanded by the U.S. Supreme Court, affirming each of its earlier conclusions, but removing its expansive discussion of the Florida Constitution. (28) Finally, the U.S. Supreme Court released *Bush v. Gore* on December 12, reversing the Florida Supreme Court’s order of the additional recount of under-votes and determining that no time remained for principled recounting, effectively awarding the election to Governor Bush.

Evaluating the Court’s Behavior

Given this sequence of events, how should we characterize the U.S. Supreme Court’s actions? Do they reflect, as charged, naked partisanship, stealing the election, a Constitutional coup?

Charges of that nature seem strained. In retrospect, there were strong reasons to suspect that a majority of the Florida Supreme Court (each of whose members were Democrats) were, themselves, pressing Florida law to keep open the possibility that some manner of further recounting would generate enough new “votes” to secure the election for Vice President Gore.

The Florida Supreme Court had been, to put the point mildly, aggressive in its interpretation of the Florida election statute. First and most importantly, in *Palm*

Beach Canvassing Board v. Harris had overruled, not the secretary of state's, but the Division of Elections' various advisory opinions limiting the interpretation of the term "error in the vote tabulation" to machine error, not voter error. This decision was crucial to the entire drama because it transformed the recount from a machine reading which could be completed immediately (and which, presumably, could not be easily manipulated, but which would guarantee victory for Governor Bush) into a county-by-county subjective determination of voter intent with an uncertain outcome. In addition, in the same opinion, the Florida Supreme Court overruled the discretion that the statute afforded to the secretary of state with respect to amended returns, and unilaterally extended the statutory deadline by twelve days. In its next opinion, *Gore v. Harris* the Court added a net 332 Gore votes, ordered the Leon County Court to count the 9,000 Miami-Dade votes that the Miami-Dade Canvassing Board had declined to count, and out-of-the-air ordered a statewide recount of under-votes.

Some have defended these various rulings of the Florida Supreme Court as efforts to rein in the partisanship of the Republican secretary of state, Katherine Harris. Harris was in an unfortunate position as a Republican and, especially, having served as co-chair (with the presidential candidate's brother, the Florida governor) of the Florida Bush campaign. It surely would have been wiser for her to recuse herself from any decisionmaking with respect to the election, though she, in turn, may have felt it necessary to stay in control in order to rein in the partisan decisions of the Democratic canvassing boards in Palm Beach, Broward and Volusia counties.

Moreover, she was not the author of the advisory opinions that the Florida Supreme Court overruled. The civil service Division staff—not Ms. Harris—had generated the various opinions defining the term "error in the vote tabulation," interpreting the deadline, and determining the criteria for the acceptance of amended county returns. (29) The Florida Court insinuated partisan impropriety in Ms. Harris's announcement on November 13, the day before the deadline, that she would refuse to accept returns or amendments submitted after the deadline. Perhaps her announcement was totally partisan. But it is not inappropriate for a public officer to announce in advance the manner in which she expects to exercise her discretion, especially where the individual county canvassing boards may have been exerting great effort in conducting manual recounts that could not be completed by the November 14 deadline. In addition, the position she announced only mirrored the determination by the Department of Elections in the opinion which had been published earlier that day. And the final criteria that she applied were substantially more expansive than the single natural disaster exception interpreted by the Elections Division staff.

The claim of "Constitutional coup" has been buttressed by the assertion that the grounds upon which the U.S. Supreme Court overruled the Florida Supreme Court were a pretext. In *Bush v. Gore II* the U.S. Supreme Court reversed the order mandating a statewide recount invoking Article II of the Constitution, the Equal Protection clause and the ambition of the Florida Legislature to comply with the safe harbor provisions of 3 U.S.C. §5.

These grounds hardly seem pretextual. The Article II ground is serious because there were good reasons to believe that the Florida Supreme Court was interpreting the election statute enacted by the Florida legislature in totally unknown and unexpected ways. The Florida Court began its opinion in *Palm Beach Canvassing Board v. Harris* with the extraordinary statement, “the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases.” Similarly, at a later point in the opinion, the Court stated, “Technical statutory requirements must not be exalted over the substance of this right” (guaranteeing political power to “the people”). It is not implausible to interpret these statements as indicating that the Florida Supreme Court was ready to enforce its definition of “the will of the people” without regard to the statutory election rules enacted by the Florida legislature in violation of the Article II delegation of authority to determine the method of choosing presidential electors: “in such manner as the Legislature [of each State] shall direct.”

The U.S. Supreme Court has been particularly excoriated for its December 9 ruling in *Bush v. Gore* staying the continuation of the Miami-Dade and statewide recounts. The claim here is that it represents bad faith for the U.S. Supreme Court to conclude on December 12 in *Bush v. Gore II* that there is insufficient time for a further recount when the Court itself had halted recounting three days earlier in *Bush v. Gore I*

The December 9 ruling by the U.S. Supreme Court was without opinion. Justice Scalia issued a concurring opinion which, given the emergency nature of the proceeding, was probably unwise. In his concurrence, he presented two reasons justifying the stay. The first was that the counting of votes of questionable legality threatened irreparable harm to legitimacy of Governor Bush’s apparent election, which does seem to get the cart somewhat before the horse.

The second reason given by Justice Scalia, however, is more telling and, in fact, illustrates a problem with the recount procedure that was more serious than Justice Scalia may have recognized. Justice Scalia indicated that another issue in the case was the varying county standards for determining the will of the voter from examining under-votes—the dimpled chad, hanging chad, Equal Protection issue. Justice Scalia concluded that “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.”

(30)

This is an important point. As one with substantial experience with empirical studies in many different contexts, it has been my experience (and I would expect, the experience of every other empirical worker) that, any empirical counting conducted prior to determining the final standard for the count must usually be abandoned and the counting begun again from the start once the appropriate standard is determined. This means that, even if the Florida Supreme Court were later to announce a standard for determining “the will of the voter” in the context of a punchcard under-vote, each canvassing board would have to begin the recount again once the standard were announced. (31)

As a consequence, no time was lost by virtue of the U.S. Supreme Court's December 9 stay. That the counting process itself led to degradation of the ballots only reinforces the conclusion. (32)

Finally, the strongest grounds refuting the claim that the U.S. Supreme Court stole the election for Governor Bush or engaged in a Constitutional coup is that its December 12 opinion in *Bush v. Gore I* so closely tracks the dissent of Chief Justice Wells (a Democrat) in *Gore v. Harris* Every proposition upon which the majority of the U.S. Supreme Court defended halting the recount appears first in Chief Justice Wells' dissenting opinion. Chief Justice Wells states that there is no legal basis for the Florida Supreme Court to order the statewide recount of under-votes. (33) Chief Justice Wells raises the Article II (34) and Equal Protection claims. (35) Many have criticized the U.S. Supreme Court for emphasizing the 3 U.S.C. §5 safe harbor provision, arguing that the Court should have remanded the case to the Florida courts to allow them—or the Florida legislature—to determine how important to them the federal safe harbor provisions were. But Chief Judge Wells in his dissent emphasizes those provisions, and argues that they provide strong reasons to halt the recounting immediately. (36)

Finally, it is Chief Justice Wells who first raises the issue of Constitutional crisis and who, in his dissent, warns his colleagues that crisis is upon them unless they stop the recounting, necessarily leaving Governor Bush the victor. (37)

A Constitutional Coup?

As a consequence, the strongest defense to the claim that the five-person, conservative, Republican majority of the U.S. Supreme Court acted as partisans, seized power, or executed a Constitutional coup is that the Chief Justice of the Florida Supreme Court, a Democrat, seems to be the architect of the coup. There is not an argument in favor of cutting off the Florida recount in the U.S. Supreme Court's opinion in *Bush v. Gore II* that was not presaged by Chief Justice Wells' dissent in *Gore v. Harris* (38)

This is a very peculiar form of political coup.

It is an interesting question whether the text, no less the reasoning, of the U.S. Supreme Court's opinions in this drama survive as foundations for future election law jurisprudence. In many major cases, however—take *Dred Scott* or *Brown v. Board of Education*—the purely legal grounds for the decisions are of less interest than the character of the judgments rendered by the Court in its institutional role under the Constitution.

It is abundantly clear, however, that the U.S. Supreme Court's decisions in the *Bush v. Gore* drama cannot be fully understood without examining the role of the Florida Supreme Court and, surely, cannot be understood without appreciating the dominant influence of Florida's chief justice.

NOTES

- (1) <http://wwwthe-rule-of-law.com/statement.html>
- (2) This history is largely taken from the Florida Supreme Court's opinion in *Palm Beach Canvassing Board v Harris* 772 So. 2d 1220, 1225-27.
- (3) Florida Statutes Section 102121(4).
- (4) Section 102166(5)(a)-(c).
- (5) Florida Statutes Section 102112. Note that the preceding Section 102.111 states inconsistently, "If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties *shall be ignored* and the results shown by the returns on file shall be certified." (emphasis added) In its November 21 opinion in *Palm Beach Canvassing Board v Harris* the Florida Supreme Court made much of the inconsistency between the term "may be ignored" in §102.112 and "shall be ignored" in §102.111, emphasizing the incoherence of the statute as a grounds justifying the Court's intervention. 772 So.2d 1220, 1233-34. The Court's discussion seems disingenuous since the term "may be ignored" of §102.112 surely trumps the "shall be ignored" of §102.111. The Court's labored discussion of this easily-resolved inconsistency appears (to this reader) as a pretext to justify the Court's aggressive interpretation of the statute.
- (6) According to the Division, "An 'error in the vote tabulation' means a counting error in which the vote tabulation system fails to count properly marked marksense or punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Therefore, unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes." DE 00-13, Manual Recount Procedures and Partial Certification of County Returns, November 13, 2000, L. Clayton Roberts, Director, Division of Elections.
- (7) "The inability of a voting systems [sic] to read an improperly marked marksense or improperly punched punchcard ballot is not a [sic] 'error in the vote tabulation' and would not trigger the requirement for the county canvassing board to take one of the actions specified in subsections 102155(5)(a) through (c)." DE 00-11, Definitions of Errors in Vote Tabulation, November 13, 2000, L. Clayton Roberts, Director, Division of Elections.
- (8) DE 00-12, Manual Recount Procedures, November 13, 2000, L. Clayton Roberts, Director, Division of Elections.
- (9) "[I]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at the time may be certified by the department. This section contemplates unforeseen circumstances not specifically contemplated by the legislature. Such unforeseen circumstances might include a natural disaster such [sic] Hurricane Andrew, where compliance with the law would be impossible." DE 00-10, Deadline for Certification on

County Results, November 13, 2000, L. Clayton Roberts, Director, Division of Elections.

(10) Id

(11) The text of the Harris November 15 letter appears in *Palm Beach Canvassing Board v Harris* 772 So.2d 1220, 1226-27 n.5.

(12) The State of Florida had entered an agreement after a federal suit that it would accept absentee ballots from overseas voters if received no later than ten days after the election. The Florida Supreme Court also made much of the three-day difference and of the unwillingness of the Secretary of State to accept amendments following the seven-day deadline provided in the statute notwithstanding the ten-day deadline established by the federal settlement. The Elections Division, however, had adamantly advised of the strictness of the November 14 deadline. ("It [the statute] also plainly states when this process must end.") The State's settlement of the federal suit, of course, could not effect a general amendment of the election statute.

(13) 772 So2d 1220 (Fla. 2000).

(14) 773 So2d 1220, 1227. This quotation appears in a Section entitled, "Guiding Principles".

(15) Id at 1236-37.

(16) *Gore v Harris* 772 So.2d 1243, 1247 (Fla. 2000).

(17) Florida Statute Section 102168(3)(c).

(18) No 00-836 (U.S. Dec. 4, 2000), 531 U.S. (2000).

(19) Hearing the Leon County Court appeal first allowed the Florida Supreme Court to order the resumption of the recounting of the Miami-Dade returns and the extension of recounting to the entire state. As a matter of judicial economy, it surely would have seemed more prudent to address first the questions raised by the U.S. Supreme Court, another grounds of suspicion of the Florida Supreme Court's motives.

(20) 772 So2d 1243 (Fla. 2000).

(21) The Court also affirmed the rejection of 3300 Palm Beach votes allegedly for Gore, but which the Palm Beach Canvassing Board had refused to certify. Id.

(22) Id at 1263.

(23) Id at 1265.

(24) Id at 1267.

(25) Id at 1269.

(26) Id at 1268-69.

(27) *Bush v Gore* 121 S.Ct. 512 (2000) (*Bush v Gore*)

(28) 772 So2d 1273 (Fla. 2000). Chief Justice Wells dissented on the grounds that the decision should wait until review of *Bush v Gore* by the U.S. Supreme Court. Id at 1292.

(29) Although each of these Advisory Opinions is signed by L. Clayton Roberts, the Director of the Division of Elections, each indicates that the text of the opinion was prepared by Kristi Reid Bronson, Assistant General Counsel.

(30) 121 SCt. 512 (2000).

(31) The counting issue might have been different if each canvassing board had recorded upon its review of each ballot what the chad condition of the ballot

was. Then, once a standard were announced, the appropriate total could be reconstructed. Without this procedure, however, recounting would have to begin anew after announcement of the standard. No county board, of course, was counting the ballots in such a manner.

(32) The stronger and more plausible defense of the December 9 stay is that a majority of the Court recognized the persuasiveness of Justice Wells' dissent, though they suspended final judgment until briefing and argument.

(33) *Gore v Harris*, 772 So. 2d 1243, 1263, 1265.

(34) *Id* at 1268.

(35) *Id* at 1267, 1269.

(36) *Id* at 1268-69.

(37) *Id* at 1263.

(38) Chief Justice Wells' views on these issues were again signalled in the Court's treatment of the remand of *Bush v Gore* from the United States Supreme Court. The United States Supreme Court remanded the case on December 12, as is typical, "for further proceedings not inconsistent with this opinion." 531 U.S. (2000). On December 22, 2000, the Florida Supreme Court issued a per curiam opinion which stated, self-servingly, that its December 8 decision in *Gore v. Harris* (the case overruled in *Bush v Gore*) had established a clear standard for the recount—whether there was a "clear indication of the intent of the voter"—that was the equivalent of the standard established by the Florida Legislature. The opinion mentioned that the United States Supreme Court had ruled that there was not sufficient time to define a more precise standard for ballot review, and then commented that, "upon reflection, we concluded that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature." *Gore v. Harris* 772 So.2d 524, 526 (Fla. 2000).

Pointedly, Chief Justice Wells separately concurred "only in the result." 772 So.2d 524, 527 (Fla. 2000).