

Right to vote upheld in Florida Supreme Court decision on recounts

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The Florida Supreme Court's decision Tuesday to compel state officials to accept and certify the hand recounts of the presidential vote in several south Florida counties was solidly rooted in both law and democratic tradition.

The court's ruling framed the issue in the case as the right of Florida citizens to vote, as against the claim of the Bush campaign and Republican Secretary of State Katherine Harris that a statutory deadline of Tuesday, November 14 justified suppressing votes which were missed in the machine tallies but recovered in the hand recount.

Citing the Florida state constitution, the seven justices wrote, "The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished."

Previous court precedents found that laws governing the electoral process were valid only if they imposed no "unreasonable or unnecessary" restraints on the right of suffrage. Harris's rejection of recounted votes, even before the recounts were completed, was just such an "unreasonable or unnecessary" restraint, the court held.

"Courts must not lose sight of the fundamental purpose of election laws. The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy. Technical statutory requirements must not be exalted over the substance of these rights."

The justices said that only two circumstances could justify the Secretary of State refusing to certify recounted totals: if the recount was so late that it would effectively deny candidates and individual citizens their legal right to contest the results, a procedure that in Florida begins after certification in Tallahassee; or if the lateness of the recount meant that Florida would miss the December 12 deadline for naming its 25 electors for president.

From the basic democratic principles, the Florida Supreme Court had little leeway. As the justices admitted, "to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory [local election] Board members, as she proposed in the present case, misses the constitutional mark."

The seven judges were clearly concerned, as representatives of the bourgeois state at its highest level, that to openly

dispense with the right to vote for tens of thousands of Florida voters would discredit both the court itself and the presidential election in the eyes of public opinion. Bush is seeking to become the first president in history to win office through the systematic disqualification of the votes of his political opponents.

At the same time, from a legal standpoint, the Bush campaign and Secretary of State Harris had only the flimsiest case, and their lawyers had great difficulty answering the largely hostile questions put by the Supreme Court justices during a two-hour oral argument November 20.

Contrary to the howls of the Bush campaign, the seven justices neither made new law nor usurped the authority of the legislature. Rather, they applied longstanding legal precedents from Florida and other states.

The legal challenge by the Gore campaign to Harris's decision pointed to contradictions in Florida's state election laws. One section of the law imposes the seven-day deadline for certification of results, which Harris sought to make absolute. Another section of the law provides for manual recounts, which candidates trailing in the vote may seek as late as six days after the election.

While Harris claimed an unconditional obligation to reject the hand counts, based on one section which says that late filings "shall" be ignored, another section limits this mandate, saying that late filings "may" be ignored, and proposing other sanctions, such as fines for negligent county election officials, rather than exclusion of the votes of citizens.

The state Supreme Court applied traditional rules of statutory construction to try to resolve these conflicts. Far from rewriting the laws, it declared, "Legislative intent—as always—is the polestar that guides a court's inquiry into the provisions of the Florida Election Code." The court sought to determine the intent of the legislature in adopting statutes with obviously differing provisions, and in the process overturned the tendentious and self-serving *interpretation* of the law advanced by Secretary of State Harris, Florida co-chairman of the Bush campaign.

The court noted, "It is well-settled that where two statutory provisions are in conflict, the specific statute controls the general statute." In this case, the seven-day deadline and the

restrictive “shall be ignored” language were set down in a law which focused on the duties and functioning of the Elections Canvassing Commission and only incidentally the penalty for late vote returns. The looser “may” be ignored language and the range of penalties for late returns are in a statute specifically concerned with that issue, and therefore were controlling.

The unanimous decision pointed to a significant feature of the election law, on which the Bush campaign and the media have been completely silent. The seven-day deadline and the restrictive “shall be ignored” language were enacted in a 1951 law, while the recount procedure and the looser “may” be ignored language were adopted in 1989.

According to the court, “it also is well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute.... The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.”

More broadly, the court accepted the argument made by Gore attorney David Boies that the legislature, in enacting the recount provision, did not intend to render it meaningless by imposing the seven-day deadline as rigid and unalterable, which would make recounts practically impossible, especially in counties with large populations.

The court also agreed that the election laws had to be construed as “a cohesive whole,” instead of, as Harris did, singling out the seven-day deadline, for transparently partisan purposes, and elevating this into the supreme and only law. The justices pointed out that the seven-day deadline had already been breached to include overseas absentee ballots, which had 10 days to reach county election boards, as required by federal law.

The state Supreme Court did not rule specifically on how punch-card ballots should be hand counted, i.e., whether ballots with only partially perforated (hanging) chads or clear indentations should be considered votes. This was a typical exercise in judicial restraint, since no lower court in Florida had ruled on that issue and it was therefore not actually part of the record.

The court noted approvingly, however, a decision by the Illinois Supreme Court which ordered all ballots to be counted in which the voter's intention could be clearly determined, regardless of whether they were fully punched through, partially, or merely indented. The victor in that 1990 case was a fundamentalist right-wing candidate in a Republican primary, who won the contest thanks to seven ballots with indented chads. (A Texas statute signed into law by George W. Bush makes similar provisions for hand recounts including partial and indented chads).

Despite the entirely traditional and precedent-bound character of this ruling, spokesmen for the Bush campaign denounced the Florida ruling as an outrageous act of judicial overreaching. Two hours after the decision was released, former Secretary of State James Baker, Bush's representative in the Florida recount,

charged that the court had “changed the rules and invented a new system for counting the election results.”

He strongly hinted that the Bush campaign would seek intervention by the Florida state legislature, which has Republican majorities in both houses. Such action would be legally and constitutionally unprecedented, and could create a situation in which two sets of electors were chosen for the state of Florida, with the issue to be resolved in the US Congress, now narrowly controlled by the Republicans as well.

On Wednesday evening, the Bush campaign announced that it was seeking emergency review of the Florida decision by the US Supreme Court, on the grounds that a recount in three south Florida counties constituted a denial of equal protection of the laws because similar recounts were not conducted in other counties.

The spurious and cynical character of this appeal is shown by the fact that the Bush campaign vehemently opposed recounts in the other counties and deliberately allowed the deadline for seeking such recounts to pass. Analysis of the voting patterns in many of the large Republican-controlled counties, such as Duval County (Jacksonville), suggests that a recount would have resulted in more votes for Vice President Gore, because undercounted ballots were disproportionately cast in precincts, largely in black neighborhoods in the city, where Gore took an overwhelming majority of the vote.

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