

The US election

Bush attack on voting rights continues in arguments before Florida Supreme Court

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The seven-judge Florida Supreme Court on Thursday heard lawyers for Democratic presidential candidate Al Gore and Republican candidate George W. Bush argue whether Florida Circuit Court Judge N. Sanders Sauls properly rejected Gore's contest of the certified election results, which have given Bush a margin of 537 votes out of some six million cast statewide.

If the Florida high court allows the ruling to stand, Bush will become the winner of Florida's 25 electoral votes and therefore the presidency, unless absentee ballots are disqualified in two cases still pending in Florida trial courts. Even if the courts in these absentee ballot cases rule in favor of Gore, which is considered unlikely, the Bush camp will appeal the decisions to the Florida Supreme Court and, if need be, to the US high court. In any event, Gore and other Democratic leaders have strongly suggested that an unfavorable ruling from the Florida Supreme Court will be followed by a speedy concession.

At Thursday's hearing before the Florida high court, the candidates' positions continued on the trajectories established during the month-long post-election crisis. Gore's lawyers are trying to get a more complete count of votes cast, while the Bush campaign wants to suppress thousands of pro-Gore ballots so the Texas governor can gain the White House, despite having lost the popular vote both nationally and in Florida.

The main issue before the Florida Supreme Court was Gore's claim that approximately 14,000 legally cast ballots from Palm Beach and Miami-Dade counties either have not been counted, or have been counted but not included in the official statewide tally. These ballots include those already determined to bear clear presidential votes from Palm Beach—a net gain of 215 for Gore—as well as from Miami-Dade—a net gain of 168 for Gore. These Gore votes were excluded by the secretary of state, Republican functionary Katherine Harris, because the Palm Beach results were faxed 90 minutes late and the Miami-Dade recount was only partial, having been aborted under pressure from a right-wing mob acting under the direction of the Republican Party.

Gore is also claiming that Nassau County illegally disregarded its initial machine recount—required under Florida law because of the closeness of the election—and reverted to its election day count, thereby improperly adding 51 votes to Bush's margin.

If one takes into consideration the Gore votes already found by canvassers in Palm Beach and Miami-Dade, but excluded by Republican officials from the official state tally, and subtracts from Bush's official margin the 51 contested votes in Nassau County, the

Republican candidate's margin of victory shrinks to a little more than one hundred votes.

The uncounted presidential ballots include over three thousand in Palm Beach that Gore contends show votes for him, but were improperly rejected by the county election board, and another 9,000 so-called “undervotes” in Miami-Dade that have never been counted by man or machine.

The evidence presented at last weekend's trial before Judge Sauls demonstrated that there are more than sufficient legally cast ballots in this latter group for Gore's total to surpass Bush's. Witnesses explained that the crude “Vote-O-Matic” punch card ballot devices used in Palm Beach and Miami-Dade counties result in votes on more than one ballot out of every 10 not registering during machine counts, and the number increases where the devices are not properly maintained. Subsequent manual recounts recover at least one out of every four such undervotes, and in many cases many more than that. This is precisely what has happened in every manual count of punch card undervotes in Florida since the election.

In one of the most dramatic moments of the trial before Judge Sauls, Bush's own expert witness conceded that manual counts are necessary to tabulate votes in close elections where Vote-O-Matics are used.

Analysis of the November 7 election data has demonstrated that the undervotes are concentrated in lower income and minority areas, where voters have to use cheaper and more dilapidated voting equipment. Because these areas voted overwhelmingly for Gore over Bush, there is no question that an objective count of the challenged ballots will yield more than sufficient legally cast votes to win the election for Gore.

Nevertheless, in a thoroughly undemocratic ruling, Judge Sauls rejected the contest, stating that local canvassing boards had “discretion” to reject lawfully cast votes, and that Gore did not show that the uncounted votes would have changed the outcome of the election. This is the ruling the Florida Supreme Court reviewed on Thursday.

Last month, the Florida Supreme Court handed down a decision that Secretary of State Harris had abused her authority by denying county election boards time to conduct manual recounts. Citing the importance that the Florida Constitution gives to “the will of the people” as expressed in the vote, the court ordered a nine-day extension of the deadline for certifying the results of the presidential vote, and declared that Harris would have to include the results of manual recounts in the official tally.

That decision was vacated Monday by the US Supreme Court in an

astounding decision that suggested state legislatures can appoint presidential electors without regard to the popular vote of the people. The US high court in effect warned the Florida court against taking any action, in the interest of enforcing the right to vote and insuring a fair count, that could be construed as an infringement on the powers of the state legislature—in this case dominated by Republican allies of George Bush and his brother Jeb, who is the governor of the state.

The impact of the US Supreme Court ruling was obvious from the first moment of the Florida high court proceedings. Chief Justice Charles T. Wells began by expressing grave concern that the US high court ruling deprived the state courts of all jurisdiction to settle disputes over the selection of presidential electors. Wells wondered aloud why the lawyers on both sides had not addressed the precedent on which the US high court had relied, the 1892 decision in *McPherson v. Blacker*, not only in the earlier argument before the Florida Supreme Court, but also in the briefs filed over the last two days in advance of Thursday's hearing.

Gore lawyer David Boies, a skilled business litigator, assured the Florida Court that it had jurisdiction to review the legal propriety of Sauls' ruling. Boies explained that the state legislature had determined that presidential electors were to be selected through popular vote, and that the Florida Election Code applied. The state Supreme Court has authority to settle disputes over the meaning of these laws, just as it does over other state laws, he asserted.

Boies interjected that these basic legal principles were so obvious that “no one would have questioned them before this election.” He perhaps said more than he intended to.

Boies then addressed Sauls' alleged legal error in refusing to count the contested ballots, most of which, Boies emphasized, Gore first asked to be counted on November 9 and have never once been counted. Boies places special emphasis on the fact that the contested ballots themselves were in evidence, and that Sauls refused even to look at them to see whether any contained legal votes.

Although Boies was clear in arguing that the applicable provisions of the Florida Election Code require judicial examination of contested votes in close elections, he skirted the central issue in the case—which transcends the immediate outcome of the 2000 election and goes to the right to vote itself.

In the arguments of Gore's lawyers, both Boies in Florida and Lawrence Tribe before the US Supreme Court, there has been an unmistakable reluctance to identify the principal issues before the courts—namely the Republicans' attempt to install a president through the suppression of votes and, along with that, their overt attack on the most basic tenets of popular sovereignty.

Boies, knowing that Thursday's hearing was nationally televised, chose to obscure these basic political and constitutional issues, instead of stating them clearly before the court and also before the American people.

This avoidance is not simply a matter of legal tactics, but reflects the unwillingness of the Democrats to directly and openly fight the Republican power grab. It is the product of the same general prostration before the Republican right that was so apparent during the impeachment controversy.

Bush lawyer Barry Richard followed Boies. Chief Justice Wells repeated his concern that Monday's US Supreme Court action might deprive the Florida courts of jurisdiction. In what was one of the more surprising aspects of the argument, Richard equivocated on his support for the more far-reaching implications of the US high court position. That profoundly anti-democratic posture, first advanced by

ultra-right Justice Antonin Scalia at the December 1 hearing before the US Court, centers on the claim that the Florida legislature, rather than the voters of Florida, ultimately holds the power over the selection of presidential electors.

Richard made his central contention that the contested votes should not be counted because Judge Sauls' determination that they would not affect the outcome of the election cannot be disturbed on appeal. Richard's claim that there was absolutely no contrary evidence, like Judge Sauls' ruling, defies not only facts and statistics, but common sense. That Bush is fighting so hard to prevent a full and accurate count in Florida demonstrates that he knows full well that these votes, if counted, would change the results in his opponent's favor.

Richard also argued that Judge Sauls was correct in his legal conclusion that the individual county election boards have discretion whether to count certain votes or not. This position gives partisan local officials the green light to discard ballots cast against the candidates they favor. In fact, Florida law provides for no such leeway: every legally cast ballot on which “voter intent” can be determined must be counted toward the total.

Moreover, the “local discretion” argument contradicts another Bush legal contention—that the so-called “selective recounts” Gore is seeking in heavily Democratic areas will unfairly “dilute” the votes cast in Republican parts of the state where recounts are not taking place. Based on this supposed concern for the rights of Florida voters, Richard argued that if a court counts the 14,000 ballots Gore is contesting—a task which could easily be accomplished over the weekend—all six million ballots in the state must be recounted. The latter proposal is highly impractical because Florida's results must be finalized by December 12.

Richard, no doubt emboldened by the US Supreme Court decision to vacate last month's Florida high court ruling, adopted a posture of barely disguised contempt for the Florida justices. The substance of his argument was contemptuous and dismissive of the democratic right of Floridians to vote and to have their votes counted. He brought to mind the adage that what matters most in an election is not who votes, but who counts the votes. Clearly, Richard had in mind that any action the Florida Supreme Court might take adverse to Bush would be quickly trumped by the pro-Republican state legislature, which is prepared to select its own slate of Bush electors on Friday, as well as by the US Supreme Court.



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