

Supreme Court halts Florida vote count: A black day for American democracy

The Editorial Board
10 December 2000

The order issued Saturday afternoon by the US Supreme Court, halting the hand tabulation of uncounted Florida ballots in the presidential election, is a frontal assault on the most fundamental of democratic rights, the right to vote. It is the culmination of a protracted attempt by the campaign of George W. Bush and the Republican Party to prevent the counting of votes which would show that Democratic candidate Al Gore, and not Bush, carried the state and won the presidency.

In the course of a month of court proceedings and legal and political maneuvers, the essential issue has emerged. The Florida Supreme Court, in its ruling Friday, declared that Florida law required “that every citizen’s vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States.” The five-member right-wing majority on the US Supreme Court takes the position, in the words of Justice Antonin Scalia on December 1, that “there is no right of suffrage” in a presidential election.

The four Supreme Court justices who opposed halting the recount—John Paul Stevens, Stephen Breyer, Ruth Bader Ginsburg and David Souter—joined in a dissenting opinion written by Stevens. The minority denounced the stay as a violation of both constitutional procedures and democratic principles.

The Florida Supreme Court was clearly within its legal and constitutional rights in interpreting state election law and issuing its order for the recounts. What is, on the other hand, an extraordinary act of judicial “overreaching” is for the US high court to countermand the state court’s ruling without even having heard arguments on the legal issues. As Justice Stevens’ dissenting opinion stated: “On questions of state law, we have consistently respected the opinions of the highest courts of the States.”

The Bush campaign failed to provide a legal basis for the issuance of a stay, the minority declared, which requires a demonstration that Bush would suffer irreparable harm if the recount continued. “Counting every legally cast vote cannot constitute irreparable harm,” their decision asserted. “On the other hand, there is a danger that a stay may cause irreparable harm to the respondents [i.e., the Gore campaign]—and, more importantly, to the public at large ... Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election.”

The minority made it clear that they regarded the Florida Supreme Court decision as fully justified, both by Florida law and broader democratic considerations. “As a more fundamental matter,” Stevens wrote, “the Florida court’s ruling reflects the basic principle, inherent in our Constitution and our democracy, that every legal vote should be counted.”

It is a remarkable commentary on the decay of American democracy that a majority of the country’s highest court should reject such an elementary reaffirmation of popular sovereignty. Judges for whom no one ever voted are seeking to eviscerate the right to vote.

Four of the five Supreme Court justices who voted to stop counting votes in Florida—Chief Justice William Rehnquist, Clarence Thomas, Sandra Day O’Connor and Anthony Kennedy—did not even supply a

reason for their action. Only Scalia, who postures as the intellectual leader of the right-wing faction, issued a brief concurring opinion, consisting of one cynical lie after another.

Scalia wrote, “The key issue is not, as the dissent puts it, whether ‘counting every legally cast vote can constitute irreparable harm.’ One of the principal issues in the appeal we have accepted is precisely whether the votes that have been ordered to be counted are, under a reasonable interpretation of Florida law, ‘legally cast ballots.’”

This is an extraordinary invention. The Bush campaign has made no claim that the undervotes in Florida were not “legally cast ballots.” Scalia made this up out of whole cloth, and without bothering to explain how “interpretation of Florida law” could become an issue in the federal courts. These votes were indisputably legal, cast by registered voters and recorded as legal votes for a myriad of other offices and referendum issues on November 7, from US Senator on down.

The issue is not the legality of these ballots, but the fact that counting machines failed to detect a choice in the presidential contest. Whether the machines were in error or the voters did not choose to vote for president can only be determined by a manual inspection of the ballots. But this is precisely what the right-wing majority seeks to prevent.

Counting such votes, according to Scalia, “does in my view threaten irreparable harm to petitioner [George W. Bush], 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.”

With these words Scalia all but admits that the stay was issued to protect the political credibility of George W. Bush’s claim to be president, by preventing the counting of votes that would show the opposite. If sufficient votes had been counted in Florida to prove that Gore won the election, he argues, it would be impossible to win “public acceptance” for a Bush presidency.

This concern was spelled out by Bush’s lawyers in their brief to the court, which attacked the Florida Supreme Court ruling because it raised “a reasonable possibility that the Nov. 26 certification of Governor Bush as the winner of Florida’s electoral votes will be called into doubt—or purport to be withdrawn...” In other words, they asked the court to block the recount because Bush would lose.

Gore’s attorneys focused on this admission in their own brief to the Supreme Court. It begins: “Applicants’ request for a stay makes a remarkable claim: for the ostensible purpose of advancing the interests of voters, applicants urgently request this Court to *stop the counting of votes*. Their surprising assertion is that a candidate for public office can be irreparably harmed by the process of discerning and tabulating the will of the voters. This suggestion is contrary to established law, the US Constitution, and basic principles of democracy.”

The final issue raised by Scalia was the decision by the Florida court not to prescribe specific criteria for what constitutes a vote. He questioned

“the propriety, indeed the constitutionality, of letting the standard for determination of voter’s intent—dimpled chads, hanging chads, etc.—vary from county to county.”

Here Scalia echoes the hysterical propaganda of the Bush campaign, taken up by the media as well, about 64 counties allegedly employing 64 different standards to count votes. The entire issue, however, is a red herring. Leaving such judgments to local election officials is characteristic of recount laws in most US states, including Florida.

Moreover, there is wide variation in the method of “measuring voter intent” from locality to locality throughout the United States. Some counties use voting machines, some punch cards, some ballots marked with pencil and scanned optically, some paper ballots counted by hand. The rule suggested by Scalia would declare unconstitutional, not merely the Florida recount, but the entire presidential election and every other election in America.

The Florida Supreme Court declined to spell out detailed criteria because no such criteria are laid down by the Florida legislature or state election laws. Instead, it upheld the legal standard stipulated by state law—namely that local officials attempt to determine “the intent of the voter” from the appearance of the ballot.

Here the remarkable double-talk of the Bush campaign and the Supreme Court majority reveals itself again. The Bush campaign appealed the original Florida court ruling, which pushed back the deadline for certifying the vote from November 14 to November 26, claiming that this was an illegal and unconstitutional judicial act that amounted to rewriting Florida election law. Scalia, Rehnquist and other right-wing justices harped on this issue in the first hearing before the US Supreme Court December 1.

Now Scalia and the Bush campaign are denouncing the Florida Supreme Court because they *didn't* rewrite Florida election law by setting a new, uniform standard for the counting of chads, dimples, etc.

The cynical dishonesty of these arguments shows the reactionary character of the position taken by Scalia and the court majority. They do not reason consistently from legal principles, even conservative ones. Instead, they start from the desired end—the installation of George W. Bush in the White House—and work backwards, seizing upon whatever legal or constitutional pretexts they can devise to justify the result, regardless of the absence of any coherent logic.

There is an obvious element of desperation and brazenness in these legal machinations. Never before has an American presidential candidate sought to enter the White House after losing both the popular vote overall and the electoral vote. Bush has used the machinery of the Florida state government—controlled by his brother, Governor Jeb Bush—in an attempt to overturn the will of the people of Florida and of the American people as a whole. Now, with the backing of a compliant media and a Supreme Court packed with right-wingers, this anti-democratic conspiracy is coming to a head.

The timid response of the Gore campaign and the Democratic Party to this reactionary decision is a further demonstration of the bankruptcy of liberalism and its inability to defend democratic rights against the right-wing assault. The contrast with the viciousness of the Republicans is remarkable. After the Florida Supreme Court decision Friday, Bush spokesman James Baker had no compunctions about issuing a scathing response, denouncing the court majority as usurpers, suggesting that a 4-3 ruling was inherently illegitimate, and threatening to nullify their actions through appeals to the US Supreme Court, the Florida legislature and the Republican-controlled US Congress.

But after Saturday’s 5-4 decision halting the recount, legal and political spokesmen for Gore gave no public indication of anger, defiance or even serious criticism. Where is the outrage? Why the unwillingness to say what everyone knows is true: the Supreme Court majority is a co-conspirator in a right-wing attempt to hijack the presidency. Instead,

Gore’s chief attorney David Boies reiterated the legitimacy of the court.

During the election campaign, Gore repeatedly cited the danger that Bush would appoint more justices like Scalia and Thomas as an argument to vote for the Democrats. Now that Scalia & Co. are exposing themselves as judicial thugs at war with democracy, Gore adheres to the absurd position that the high court is a neutral arbiter above the political struggle. In this way, the Democrats contribute to the pretense that what is unfolding is some sort of reasoned exercise in judicial review, rather than a sordid and criminal violation of democratic rights.

Even if the stay is not followed up with a decision Monday overturning entirely the Florida Supreme Court decision, the halt in the vote counting has already had a major impact, since the preliminary date for concluding the selection of Florida’s electors is December 12. Citing an obscure 1887 law which has never before been invoked, the Republican-controlled Florida legislature has threatened to impose a slate of Bush electors, regardless of the votes cast by the people of the state, if the selection of electors is not finalized by December 12. The two-day delay imposed by the Supreme Court stay makes it even more difficult to meet that deadline.

In the event that the Supreme Court goes forward to a ruling that upholds the Bush campaign and suppresses the votes of tens of thousands of Floridians, it would be an assault on democratic rights unparalleled, in terms of its ruthlessness and cynicism, since the infamous Dred Scott decision of 1857. In that decision, the Supreme Court upheld the slave system and declared that black people were property and could not be citizens. Today the same court is on the verge of a decision equally fundamental, declaring that a right-wing minority, not the votes of the American people, should select the next president.

The struggles of the past month have revealed how little support there is for democracy in the upper reaches of American society—in corporate circles, among the politicians and judges, and in the media. The right-wing elements are increasingly conscious of the fact that they cannot impose their economic and social agenda—huge tax cuts for the rich, the destruction of all government social programs, the elimination of all restraints on corporate America—within a democratic framework.

There is a growing consensus in the ruling circles on the necessity to move towards an authoritarian regime and to scrap the democratic structures and institutions that have been the basis of the United States throughout its history. This consensus is expressed in the ferocity and aggressiveness of the Republicans, in the shameless propaganda of the media, in the timidity and cowardice of the Democrats, and in the stupid and complacent attitude on the part of liberal and academic circles.

In the final analysis, the crisis of the 2000 election demonstrates that the political forms in the United States are coming into line with the social structure of the country, which more and more constitutes an oligarchy of the wealthy, with a minority fabulously enriched by the stock market boom, and the great majority facing an increasingly difficult struggle to survive.

The success of the right wing will prove illusory, however. The wealthy elite may abandon even lip service to democratic principles, but the broad masses of the American people have not yet become involved or had their say. Up to now, the crisis of the 2000 election has taken the form of a vicious struggle within the ruling elite. But what is being fought out is of the utmost significance to the entire population. As the assault on basic democratic rights becomes more obvious and the political issues are clarified in the minds of millions, these events will have an enormously radicalizing effect. The stage is being set for massive social and political convulsions in America.





To contact the WSWWS and the
Socialist Equality Party visit:

wsws.org/contact