

she said “I have never gone for a specific dream job. I’ve gone more to have a certain impact. I didn’t join the Eastern District to say ‘I came to be the U.S. Attorney.’ I came because I believed there was a community that needed protecting,” but she added: “I don’t know what the future holds.”

We asked about rumors that she was a candidate to fill Justice Scalia’s seat when he died. She described her reaction as “practical and personal.... I have a tremendous respect for the Court, I have friends on the Court, and the Court tries very hard to get it right. I have always thought that – despite the fact that some people have gone to the Court without having been on the bench before – in my view, you should be on the bench before. Also, I did not want the role of being a sort of cloistered arbitrator. In addition, I knew that if I were to be nominated, having gone through a confirmation before, having to step back a lot from public things, this would render me ineffective for the rest of my term as Attorney General.”

I reminded Attorney General Lynch that I had once suggested that the ideal job for her would be U.S. Ambassador to the United Nations. Her eyes lit up, and this was her reply: “I think our place in the world is very important. Although we’re still a fairly young country, for a long time we have been an example in terms of democracy. And I mean democracy in a truly messy sense. We fight and we argue, but we have peaceful transitions of power.

And we have always been a force in the world and we could continue to do that. I think we’re taking a break from that right now, for some reason, but I think the world is still looking to us to be a stabilizing factor and a supporting factor to emerging democracies. And they’re looking at us to see how we survive the challenges facing our own democracy. They’re looking at us to see how we’re going to handle the challenges to our own democracy that we’re going through right now. There are a number of ways in which I would like to be helpful in how we do that ultimately.”

Editor’s Note: Elizabeth Slater is an associate in the New York office of Quinn Emanuel Urquhart & Sullivan LLP.

Legal History

Bush v. Gore (Redux)

By C. Evan Stewart



Twenty years ago the country almost went through a constitu-

tional crisis, as the presidential election of 2000 went unsettled for 37 days after the nation had collectively voted. Then, on December 12, 2000, the United States Supreme Court decided *Bush v. Gore*, 531 U.S. 8 (2000).

Nineteen years ago in these pages I published my take on the Court’s decision. With the 2020 presidential election now in full swing (and promising to be a doozie), and with the publication of Justice Stevens’ memoirs and Evan Thomas’ biography of Justice O’Connor (both of which give insights into the Justices’ views on the decision), it seems like a good time to take a second look at the Court’s work as part of my ongoing series on infamous rulings by the Court.

Setting the Stage

The day after the national election (November 8), 37 electoral votes were still undecided (Florida, Oregon, and New Mexico). The biggest prize was Florida, with 25 electors at stake. On that day, the Florida Division of Elections reported that Texas Governor Bush led Vice President Gore by 1,784 votes. The next day, a machine recount required under Florida’s Election Code reduced Bush’s lead to 327 votes (ultimately, Bush’s lead was determined to be 537 votes). Also on November 9, the Florida Secretary of State (Katherine Harris) declined to waive the statutory November 14 deadline for hand recounting, and Gore petitioned for hand recounts in four Florida

counties in which he hoped to find the necessary votes to defeat Bush (Volusia, Palm Beach, Broward, and Miami Beach).

Seven Decisions

The foregoing triggered seven judicial decisions that predated the Supreme Court's December 12 ruling. And that December 12 ruling cannot be understood without an analysis of those earlier seven decisions:

- (1) Florida Circuit Judge Lewis' decision upholding the Florida Secretary of State's refusal to extend the deadline for hand recounting beyond November 14 (November 17, 2000);
- (2) The Florida Supreme Court's reversal of Judge Lewis (November 21, 2000);
- (3) The U.S. Supreme Court's vacation of the Florida Supreme Court's decision (December 4, 2000);
- (4) Florida Circuit Judge Sauls' decision dismissing the contest proceeding brought on by Gore (December 4, 2000);
- (5) The Florida Supreme Court's reversal of Judge Sauls (December 8, 2000);
- (6) The U.S. Supreme Court's stay of the Florida Supreme Court's December 8 decision (December 9, 2000); and
- (7) The Florida Supreme Court's decision "clarifying" its November 21 decision (December 11, 2000).

Under Florida law, vote totals had to be submitted to the Secretary of State by November 14 (seven days after the election). Within that seven day period, a "protest" could be interposed, with a hand recount ordered; if a recount was undertaken but not completed within that period, the Secretary of State "may... ignore" the incomplete results. Once the Secretary of State certified the election winner, a "contest" could be interposed by means of litigation.

By November 14, only one Florida county in which Gore had interposed a protest had completed a recount. Counting an additional 98 Gore votes, the Secretary of State certified Bush the winner of Florida's electoral votes by a 930 vote margin. With respect to the incomplete recounts, the Secretary of State refused to waive the deadline, absent evidence of fraud or some other calamity (for example, an act of God) interrupting the recount. Although Judge Lewis upheld the Secretary of State's discretion and decision, the Florida Supreme Court did not, extending the "protest" period to November 26.

This latter action was wrong on the law, and had profound consequences. As a practical matter, it meant that the inevitable "contest" period could not begin until after November 26, which rendered the amount of time for that process to an almost certain degree to be too short a period; the political, as well as legal, fallout from the resulting compressed "contest" period had much to do

with the crisis(es) that ensued (both actual and perceived). Legally, the decision was at odds with the Florida statute because it essentially re-wrote "error in the vote tabulation" (the only statutory grounds for a hand recount – an error of that sort had clearly *not* occurred) to mean "error by the voter," with the latter constituting the basis for extending the certification deadline. The Florida Supreme Court explicitly acknowledged its *ex post facto* handiwork – criticizing "sacred, unyielding adherence to statutory scripture," and "hyper-technical reliance upon statutory provisions," and citing to "the will of the people [as expressed in the Florida constitution]... [as the] fundamental principle... guid[ing] our decision today."

On December 4, the U.S. Supreme Court *unanimously* vacated and remanded that decision back to the Florida Supreme Court. Although perhaps it was too oblique (or restrained, or unable to agree on a unifying reason), the U.S. Supreme Court's decision signaled to the Florida Supreme Court that its reliance on the *Florida* constitution could not be a vehicle to negate or limit the power granted exclusively to the Florida legislature by Article II of the U.S. Constitution (each state shall pick presidential electors "in such manner as the Legislature thereof shall direct"). The U.S. Supreme Court, besides seeking clarification of the Florida Supreme Court's interpretation of Florida's election law, also sought that court's view of whether the Florida legislature

had wanted to come within the so-called “safe harbor” provisions set forth in the U.S. Code (a deadline – December 12 – by which a state’s presidential electors, if certified by that date, could not be challenged when Congress met in January to count the electoral votes). This latter inquiry was a stickier wicket than most observers understood at the time. Beyond the timing issue, a precondition of the safe harbor is the application of the state law existing as of the date of the election (that is, November 7, not November 21 or November 26). If the Florida Supreme Court persisted in its view(s) in re-writing the legislature’s election law, the safe harbor could be forfeited; if, on the other hand, the legislature wanted the safe harbor, then the Florida Supreme Court’s November 21 decision could well be at odds with state law *and* Article II of the U.S. Constitution.

On the same day as the U.S. Supreme Court’s decision, Judge Sauls handed down his decision rejecting Gore’s “contest” action, which had been brought against Palm Beach and Miami-Dade Counties. After a two day trial, the judge ruled that the two canvassing boards had not abused their discretion – Palm Beach in its recount methodology, and Miami-Dade in deciding not to complete a recount that it had started. There was no evidence of voter fraud or similar kinds of shenanigans put before Judge Sauls; rather, the trial focused on the questions of voter error(s), the nature thereof, and the methodologies by which recounts to

ascertain voter intent could be/would be/should be employed.

Four days later, the Florida Supreme Court (by a 4-3 vote) reversed Judge Sauls. In a remarkable decision, the Florida Supreme Court (i) stripped the county canvassing boards of their discretion in the “contest” period (having already done so previously to the Secretary of State in the “protest” period); (ii) ordered recounted votes that Gore had gained in Palm Beach and Miami-Dade to be added to the totals; and (iii) ordered a hand recount of all remaining “undervotes” throughout the entire state (but not any “overvotes”). “Undervotes” are where the voter seems to have decided *not* to make a specific choice and thus was not detected by voting machines, such as punch card ballots with no holes (or holes only slightly indented). “Overvotes” are where a voter selected more than the maximum number of available options.)

The Florida Supreme Court’s December 8 decision offered no standard for how the hand recounts were to be determined, notwithstanding that the trial before Judge Sauls indisputably demonstrated that the various counties employed wildly different standards (with attendant disparate results). This was but one critical flaw in the court’s decision. Another was to focus only on undervotes, to the exclusion of overvotes. A third was its mandate that the process be completed and certified as of December 12 (to preserve the safe harbor);

there was simply no way the approximately 60,000 undervotes could have been recounted (with the certain legal challenges to follow) by that date. The chief justice of the Florida Supreme Court pointed out these (and other) flaws in his vociferous dissent. He went on to predict (presciently) that the inevitable review the court’s decision would receive would not be a pleasant one.

The next day (December 9) the U.S. Supreme Court (by a 5 to 4 vote) stayed the recount ordered by the Florida Supreme Court. The ground for issuing the stay was “irreparable harm” to the petitioning party (Bush). Some/many have argued that only “political” harm would have accrued to Bush if the stay had not been granted; certainly harm of that type might well have been suffered by him, as well as possible harm of that nature to the U.S. Supreme Court itself (if it had waited until after a standardless recount of only the undervotes, and then reversed the Florida Supreme Court). But other “real” harm also loomed for Bush if the “contest” period were to be deemed completed and the aforementioned recount (with all of its flaws) had pushed Gore’s totals across the finish line. I believe another reason underlay the U.S. Supreme Court’s quick action: the Florida Supreme Court had acted on December 8 without any reference, or response, to the U.S. Supreme Court’s earlier ruling. Such institutional insubordination directly manifested in such a charged atmosphere (as we will see) appears to have prompted the

Court's desire to weigh in at that point.

On December 11 (the same day oral argument in the U.S. Supreme Court took place), the Florida Supreme Court finally responded to the U.S. Supreme Court's decision of December 4. The Florida court's "clarifying" opinion set forth that: (i) it had engaged only in everyday statutory construction in its November 21 decision; (ii) it had not changed the Florida statute after the election; (iii) it had not based its decision on the Florida constitution; and (iv) in its view, the Florida legislature wanted to take advantage of the safe harbor. Those first three assertions (as we have seen) were dubious, at best; and the final assertion meant that the Florida Supreme Court believed everything was required to be wrapped up the next day – an obvious impossibility (thanks in large part to its earlier extension of the "protest" period).

The U.S. Supreme Court Decides

On December 12 (16 hours after oral argument), the Supreme Court handed down its decision in *Bush v. Gore*. Seven of the nine Justices (Rehnquist, O'Connor, Scalia, Kennedy, Thomas, Breyer, and Souter) believed that the Florida Supreme Court's December 8 decision was unconstitutional because of the recount procedure ordered. And because they believed time had run out (it being December 12), five Justices (Rehnquist, O'Connor, Scalia,

Kennedy, and Thomas) basically shut down any further recounts. By those two determinations, Bush's lead in certified votes was allowed to stand; he was subsequently awarded Florida's 25 electoral votes, and thereafter was sworn in as president on January 21, 2001.

The constitutional ground on which seven Justices agreed was that the standardless recount (on the basis of the widely disparate interpretation in play on the ground in Florida) constituted a violation of equal protection. As I wrote in 2001 (and still believe today), this was not a persuasive constitutional argument. Throughout our history (before and after 2000) localities – which control the electoral process – have used (and will continue to use) different methods for voting and for the counting of votes. Undoubtedly recognizing that equal protection could open a litigation Pandora's Box of future challenges to close elections, the Court's per curiam opinion stated that its equal protection analysis was "limited to the present circumstances, for the problem of equal protection in the election process generally presents many complexities."

According to Evan Thomas' biography of Justice O'Connor ("First" (Penguin 2019)), she was the author of this limiting phrase. (p. 332) Justice O'Connor also appears to have played an important role in cobbling together the diverse coalition of seven Justices who signed on to the equal protection analysis (principally

authored by Justice Kennedy). (*Id.*) Also according to Thomas, Justice Scalia held his nose and voted for equal protection, but later said that argument was, "as we say in Brooklyn, a piece of shit." (*Id.*)

Thomas' biography also revealed (as I suspected 19 years ago) that many of the Justices were not pleased by the Florida Supreme Court's institutional insubordination. For example, Thomas wrote that Justice O'Connor (who, by all accounts, was one of the most collegial and least confrontational of all the Justices) "did not disguise her annoyance at the Florida Supreme Court.... [T]he judges on the Florida high court had essentially ignored the gentle nudge from the [J]ustices in Washington to come up with a fair method of counting votes and a rationale for doing so. Now time was running out." (*Id.* at 330)

As I also wrote in 2001 (and continue to believe today), the Article II concerns identified in Chief Justice Rehnquist's concurrence would have been a far better ground upon which to base the Court's decision. Clearly, the Florida Supreme Court (despite what it said on December 11) had in fact voided the legislature's law – after the election – and put in place its own view of what the law should have been (acting in the name of "the will of the people"). But in the 16 hour, rushed process imposed on the Court, the Chief Justice could only get two other Justices (Scalia and Thomas) to sign on to that view.

The remedy ordered by the

five Justices has usually taken the biggest hit from critics. Ironically, in my view, this has always been the least objectionable part of what the Court did.

First, the Florida Supreme Court had indicated that December 12 was the drop dead day for the safe harbor; and December 12, of course, was the date of the U.S. Supreme Court's decision.

Second, even if December 18 was viewed (by some) as an alternative date (the date on which the Electoral College met and voted for president), there was no way a recount (based upon a single standard – acceptable to both candidates, or ordered by a court – after the issue had been litigated), with subsequent litigation challenges, etc., could have been completed by December 18.

Third, if the issue went unresolved by December 18 and/or competing slates of electors had been submitted to Congress, the country would have been faced with the very likely result of the Speaker of the House (Dennis Hastert) or the President Pro Tem of the Senate (Strom Thurmond) becoming Acting President of the United States (or, if those two declined the honor, Secretary of the Treasury Lawrence Summers), while Congress decided the winner – a complicated (to say the least) process, for which the 1876-77 precedent provided little historically helpful guidance.

The two Justices who found an equal protection violation dissented on the remedy (Breyer and Souter), in large measure because they saw nothing magical about

December 12 and believed that it was possible to meet the December 18 date. As set forth above, however, and even putting aside Florida's view of the safe harbor, it just seems a virtual impossibility that an accepted, orderly recount process (with subsequent challenges thereto) could in fact have been finalized in six days.

The two Justices who did not agree with either part of the Court's decisions (Ginsburg and Stevens) wrote dissenting opinions that were especially bitter and cast aspersions particularly upon the good faith of the remedy resolution determined by the five Justices. One quote from Justice Stevens' dissent should suffice on this score: "[The decision] by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land.... Although we may never know with complete certainty the identity of the winner in this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."

In his memoirs "The Making of a Justice" (Little Brown 2019), Justice Stevens spent most of his time on *Bush v. Gore* with a critique of the Court's equal protection analysis; he also attacked "the Majority's second guessing the Florida Supreme Court's interpretation of its own state's law," quoted the above-cited language from his dissent, and on page 374 closed with he "remain[s] of the view that the Court has not fully

recovered from the damage it inflicted on itself in *Bush v. Gore*."

Conclusion

I believed in 2001 (and continue to believe) that the Court's decision saved the country from an immense political and constitutional crisis. That it did so under a less-than-perfect constitutional rationale is also clear to me. But given the gross liberties that the Florida Supreme Court took in rewriting (after the election) its own state's election law, if that court's decisions had been left standing Vice President Gore would likely have become President Gore; and that kind of Banana Republic precedent would have been far worse than the one set by *Bush v. Gore*.

Over 70 years ago, Justice Robert Jackson wrote: "I do not think we can run away from the case just because Eisler has." *Eisler v. U.S.*, 338 U.S. 189, 196 (1949). I am thankful that the Supreme Court did not "run away" from the case which was presented to it.

Postscripts

- Not surprisingly, a lot of ink has been spilled on (and over) *Bush v. Gore*. Professor Alan Dershowitz published "How the High Court Hijacked Election 2000" (Oxford University Press 2001); in it, he wrote that the ruling "may be ranked as the single most corrupt decision in Supreme Court history." Vincent Bugliosi, a

former Los Angeles deputy district attorney, published “The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President” (Thunder’s Mouth Press 2001); in it, he wrote that the Justices in the majority were “criminals in the very *truest* sense of the word” (and as to public comments by Chief Justice Rehnquist and Justice Thomas that politics played no part in the outcome, Bugliosi wrote: “Well, at least we know they can lie as well as they can steal.”).

- On the other hand, Judge Richard Posner wrote “Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts” (Princeton University Press 2001); in it, he criticized the equal protection analysis, argued that Article II was the better basis for reversing the Florida Supreme Court, and contended that the Court acted (on balance) appropriately (rendering “a rather good” decision) and averted a national crisis (if the matter had ended up before Congress). Obviously, I come down on Judge Posner’s side of things.
- Regardless of how one views the various opinions handed down on December 12, 2000, most (if not all) should agree that they do not reflect the Justices’ best work. But given the median age of the Court at the time and the fact that the Justices had to pull (essentially) all-nighters to get their

opinions written and finalized (within the 16 hour window), is that surprising?

- I will give the last word to the late Justice Scalia. Noting that post-election analyses have confirmed that Bush actually did win Florida (in large part because of confusion caused by Florida’s butterfly ballot – which was *not* a litigated issue in the various decisions discussed above), Justice Scalia’s final comment to critics was: “I say nonsense. Get over it. It’s so old by now.”

In the Courts

RISE-ing in the Southern District

By Joseph Marutollo



On October 24, 2018, the Southern District of New York

Board of Judges approved a two-year pilot program called the Re-entry through Intensive Supervision and Employment (“RISE”) Court. The RISE Court’s objective is to reduce recidivism, encourage employment, and assist in the successful re-entry of certain at-risk individuals on supervised release.

To learn more about the RISE Court, the *Federal Bar Council Quarterly* recently spoke with District Judge Denise L. Cote, who helped inaugurate the RISE Court, and Frederick Schaffer, who served as the first RISE Court liaison.

Development of the RISE Court

The RISE Court grew out of concerns from the Southern District’s Judicial Conference’s Criminal Law Committee regarding employment resources available to those on supervised release. Southern District judges – including Judges Cote, Paul A. Engelmayer, and Ronnie Abrams – looked at a similar re-entry court in the Eastern District of Pennsylvania (“EDPA”) as a model. The EDPA re-entry court has successfully been in operation for over 12 years. Judge Cote and members of the Southern District traveled to Philadelphia to see the EDPA re-entry court in person. Judge Cote noted that she was truly inspired by what she witnessed in the EDPA. Following the visit, the Southern District judges – along with, as Judge Cote described, “many helping hands” – worked