

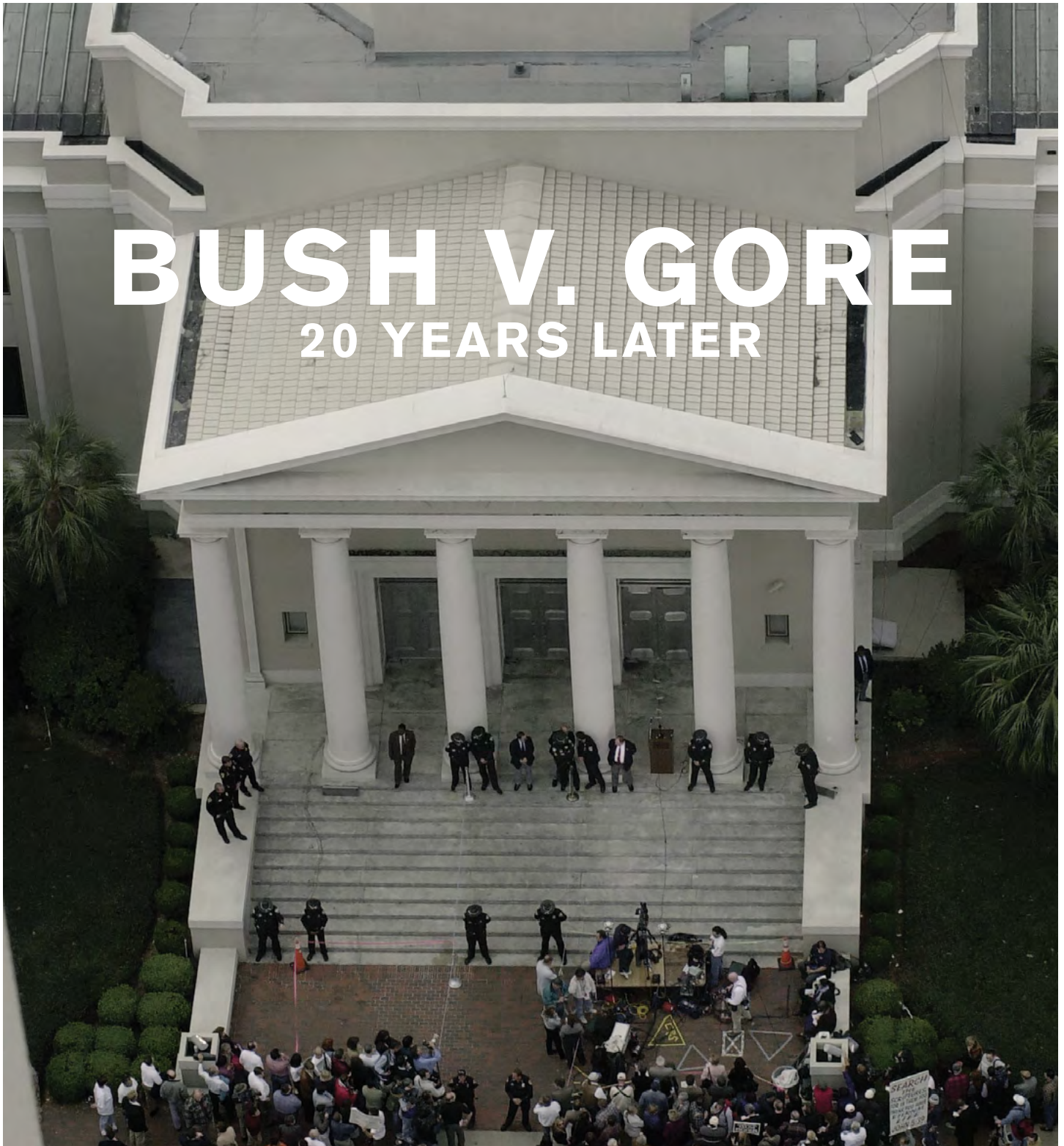
Historical Review

FALL / WINTER 2020

A Publication of THE FLORIDA SUPREME COURT HISTORICAL SOCIETY

BUSH V. GORE

20 YEARS LATER



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**Remembering
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"It was very special to be asked to cover something so important to our country and the whole world right here in my hometown. I think the rest of the world was envious with how we handled a very close election so peacefully. While not everyone liked the outcome, it showed that everyone respected and believed in the process."

RYALS LEE

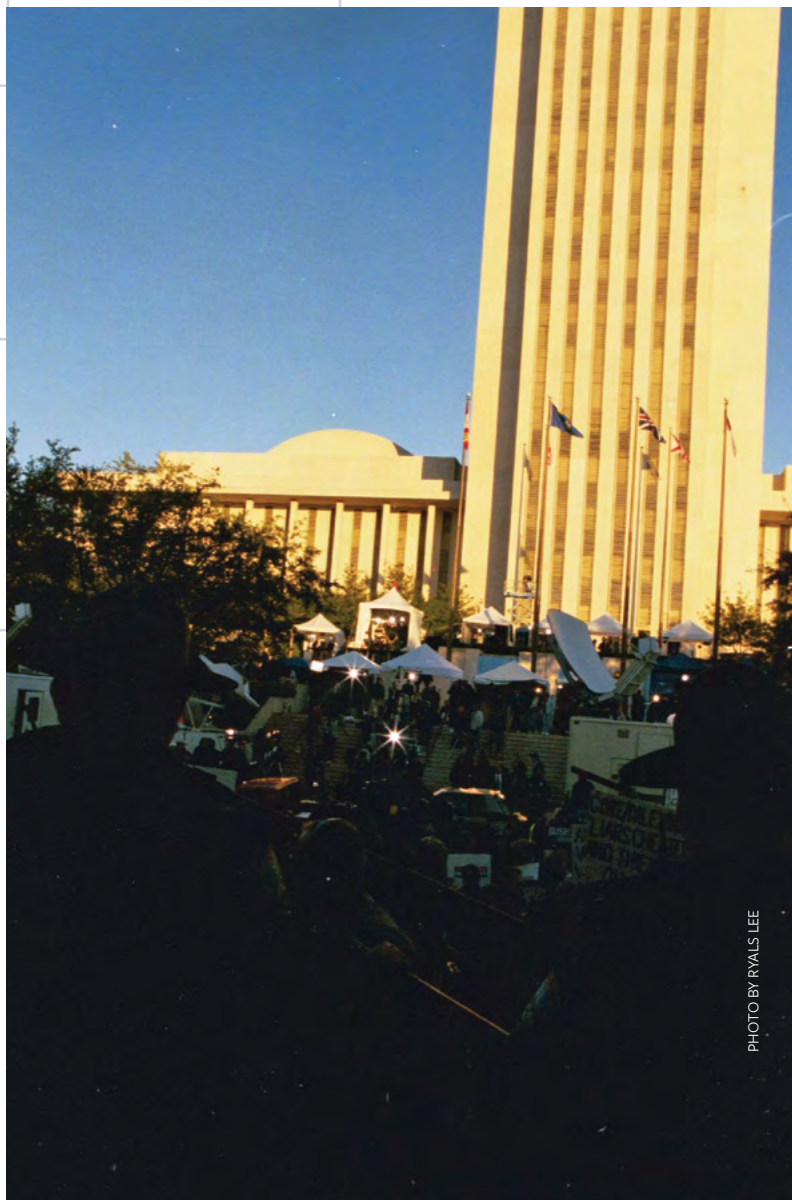


PHOTO BY RYALS LEE

EDITOR'S MESSAGE

Welcome to a very exciting issue of the *Historical Review*! Each of you probably has your own recollection of the 2000 election and its impact on your life. Although I was pretty young then, I did have the opportunity at the end of my clerkship with Justice Pariente to spend time going through her papers from *Bush v. Gore*. (Please see below for an explanation on the use of "*Bush v. Gore*" to characterize the 2000 election.) Through that experience, I came to understand and appreciate the amount of effort that the Supreme Court of Florida—the Justices, the law clerks, Central Staff, the Clerk's Office, the Public Information Office, and everyone else—expended in those days. It is an honor to commemorate those 36 days with this issue.



Photo by The Workmans
wearetheworkmans.com

If, after reading, you want more *Bush v. Gore*, I recommend (1) reading Justice Labarga's article from the 2018 Summer/Fall Issue of the *Historical Review* about his role as a circuit court judge in *Bush v. Gore*, which is available on the Historical Society's website; (2) watching *Recount*, which is available on Amazon Prime and HBO; and (3) visiting the Court's Memory Project page at www.floridasupremecourt.org/memory.

I owe thanks to several people: Mark Miller for the brilliant idea of dedicating this issue to the 20th anniversary of *Bush v. Gore*; Craig Waters and Tom Hall for their tremendous help in curating the articles and providing their expertise on those 36 days of chaos; each author for providing their unique perspective; and, of course, Steve Leacock for his design brilliance.

I hope you enjoy!



Melanie Kalmanson, Esq., *Editor*
AKERMAN LLP • JACKSONVILLE, FLORIDA

EDITOR'S NOTE

The Supreme Court of Florida heard 16 cases related to the 2000 presidential election over a 36-day period in November and December 2000. In many of the cases before the Supreme Court of Florida, the presidential candidates were not even parties, even though who would ultimately be elected President of the United States might have been determined by the outcome of the case. Notwithstanding, "*Bush v. Gore*" has come to be used to refer to the 2000 election generally. Likewise, we have titled this special edition of the *Historical Review* "*Bush v. Gore*" because the 2000 election litigation is best known by that reference and because the case *Bush v. Gore*, the last case after it reached the U.S. Supreme Court, essentially determined whether George W. Bush or Al Gore became President.

Pictures of the crowds outside the Court used throughout this issue were taken by Court staff members Tricia Knox and Gary Robinson.

Views espoused in this issue are the views of the authors, not the Society.



Florida Supreme Court Historical Society

FALL / WINTER 2020

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The Florida Supreme Court Historical Society works to save and maintain for future generations the records of the people and events that have shaped the evolution of Florida's court system from the early 1800s, through the 21st Century, and beyond. The Society is committed to making sure people understand the importance of a strong, independent judiciary in our governmental balance of power. The Society's two-fold mission is to (1) educate the public about the critically important work of the courts in protecting personal rights and freedoms, as well as in resolving the myriad of disputes that arise within the state, and (2) preserve the rich history of Florida's judicial system.

*This publication has been sponsored by the members
of the Florida Supreme Court Historical Society.*

From the President

Welcome to the Fall/Winter 2020 issue of the Florida Supreme Court Historical Society's *Historical Review* magazine. As our state and nation prepare for the upcoming Presidential election, this issue commemorates the 20-year anniversary of *Bush v. Gore* and Florida's role in the 2000 election. We hope you will enjoy the articles and features related to this important time in our nation's history and its potential impact on the election to come.

A heartfelt thanks to our Historical Society Trustee and magazine editor, Melanie Kalmanson, for her efforts in compiling this issue of our magazine from an impressive group of authors. The Society is proud and honored that so many of the living Justices that served on the bench in 2000—Justices Wells, Harding, Anstead, Pariente, and Quince—have contributed their thoughts and memories of the historic events 20 years ago. You will also read some surprising insights from Craig Waters, the Court's Public Information Officer, and Tom Hall, the Court's Clerk, into how the 2000 election changed Florida's judicial system forever.

The COVID-19 pandemic has caused each of us to adjust the way our day-to-day life is led and the Court has constantly juggled the safety of our state's citizens with the right of access to the courts. We hope that you and your loved ones remain safe and healthy during this unprecedented period in our lives. As we all continue to adapt and adjust to life during the COVID-19 pandemic, the Society has made the decision to hold its annual event, **A Supreme Evening 2021**, in a virtual fashion.

Please be on the lookout for updates on the presenting speaker and the format for the event. We hope that we can count on you, our valued members, for generous support of the Society for this one-of-a-kind virtual event.

The news of Judge Jamie R. Grosshans' appointment to serve as the Court's 91st justice came this summer from Governor Ron DeSantis. The Society looks forward

to welcoming Justice Grosshans and celebrating her investiture along with the investiture of Justice John D. Couriel.

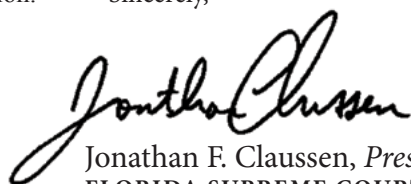
Our members may have noticed the Society's increased presence on social media during the pandemic shut down and thereafter. The Society's goal is to share as much information as possible with our members and the public. Please follow the Society's Facebook page at facebook.com/FLSupremeCourtHistoricalSociety and Twitter at [@FLCourtHistory](https://twitter.com/FLCourtHistory).

As always, the Society looks for ways to preserve the Court's history through artifact acquisitions, oral histories, and written publications. Please contact the Society directly if

you would like to submit an article for consideration or have historical artifacts from the Florida Supreme Court that you would like to donate.

As we look forward toward the impending Presidential election and the issues already being raised by the candidates, perhaps a look back to *Bush v. Gore* can provide some guidance as to what areas and arguments may help or hinder the result. Please enjoy the magazine.

Sincerely,



Jonathan F. Claussen, President
FLORIDA SUPREME COURT
HISTORICAL SOCIETY





FLORIDA LEGAL HISTORY

The 2000 Election: A Chaotic Part of Florida's Past

By Lucy Morgan



Crowds of media crews and protesters remained outside of the Supreme Court building day and night throughout the Bush v. Gore litigation.

Lucy Morgan spent 20 years as Bureau Chief for the Tampa Bay Times, Florida's largest newspaper. After partially retiring in 2006, she spent another seven years doing investigative projects for the paper and has since written columns for the paper and the Florida Phoenix, an online publication. In 1985 she was the first woman to win a Pulitzer Prize for investigative reporting.

For 36 days in the year 2000, Tallahassee, Florida was the center of the universe—and a textbook example of chaos.

In the early morning hours a day after voters went to the polls on November 7, Floridians discovered we were not going to immediately know who won the most important race on the ballot.

The presidential election between Republican George W. Bush and Democrat Al Gore was hanging in the balance as lawyers for both parties scrambled to get to Florida and file suits in a handful of Florida counties.

Reporters from all over the world descended on Florida and set up shop in Tallahassee. Within hours, they were broadcasting live from tents and trailers used as makeshift television studios. Someone counted at least 85 satellite trucks parked in the vicinity of the Supreme Court and the Capitol.

Sign-carrying protesters arrived to join the fray, adding to the chaotic scene around the Capitol and the Court. Some days it looked like the circus was in town—protesters were wearing ridiculous costumes, like the guy who wandered around wearing a bright pink papier-mâché Pinocchio head with a very long nose.

Someone counted at least 85 satellite trucks parked in the vicinity of the Supreme Court and the Capitol.

We all know that Bush became president when the fight ended at the U.S. Supreme Court, but many Floridians still argue about who actually won the most votes. We are unlikely to ever answer that question because there was never a full, official recount of the almost six million votes cast. Part of the problem stemmed from the punch card ballot machines used in many counties and the hanging “chads” created when a voter didn’t completely punch out a hole in the cardboard ballot. As a result punch card machines have since been banned in Florida and other changes have improved the process.

At the end of the first round of counting in 2000, Bush was ahead by 1,700 votes. A machine recount required by law wound up with Bush ahead by 537 votes. Gore requested a recount in four South Florida counties but never requested a statewide recount. The Florida Supreme Court ordered a recount of some 62,000 “under votes”—ballots where voting machines did not detect a vote for a presidential candidate—but that was not completed because the state ran out of time.

That recount was underway when the U.S. Supreme Court stepped in and halted the count, noting that the state was out of time. By law, the Electors for the winner ran out of time to meet a December 12 deadline for naming Electors. The Court’s decision was issued around 10 p.m. on December 12. The result made George W. Bush the next President of the United States.

Several news organizations later arranged for unofficial follow-up counts of the ballots, but some county officials were unable to produce as many as 2,200 ballots originally cast, leaving unresolved questions. Some officials thought



LEFT: The Votomatic machine with the infamous butterfly ballot was used throughout Palm Beach County during the 2000 election. **TOP RIGHT:** Reporters used every vantage point to keep an eye on what was happening at the Supreme Court. **BOTTOM RIGHT:** A tent city of reporters and their camera equipment popped up across the street from the Supreme Court building as they camped out on the steps of the State Capitol for more than a month.

a complete recount might have favored Gore, but he never requested a statewide recount.

Florida has since made a number of changes in election laws, standardizing voting machines and practices. In 2000, there was no standard practice in all 67 counties. Some counties used paper optical scanners that would not produce the same totals twice. Some counted a vote if the person using a punch card pressed a “simple” in the card, while others did not count that as a vote. Some counties reviewed individual ballots to see if they could determine who the voter intended to vote for. Others did not count those ballots.

Some counties did not count absentee ballots that were mailed on time but came in late. Others did. More than 100,000 voters had their ballots tossed out because they voted for more than one candidate for President.

There was no standardized ballot. A “butterfly ballot” style used in Palm Beach County became one of the stars of the election. It was so confusing it left thousands of votes in doubt.

It all made any recounting a nightmare. Many of the state’s election officers realized in advance how much trouble the state would have dealing with a very close election and said they often prayed in advance of each election that all the important races would be won by landslides.

Many of the problems uncovered in the 2000 election have been fixed. Now all Florida counties use an optical scan ballot that leaves a distinct paper trail that could be

Many of the state’s election officers realized in advance how much trouble the state would have dealing with a very close election and said they often prayed in advance of each election that all the important races would be won by landslides.

recounted and recounts are automatic in close elections.

One important issue remains on deck in any Presidential election: the need to have vote totals counted and affirmed by each state in time to comply with federal laws which require all controversies to be resolved six days before the Electoral College meets to formally select the new president. This year, that date is December 8.

There are increasing predictions that trouble determining the winner will again dominate the Presidential election between former Vice President Joe Biden and President Donald J. Trump. Contributing to the speculation is none other than President Trump who is loudly questioning mail-in ballots which are likely to be used by millions of Americans trying to avoid close contact with people who might be infected with COVID-19, the deadly virus that has killed thousands of people all over the world.

Trump is campaigning against voting by mail and openly suggesting that U.S. Postal authorities slow down delivery of the ballots.

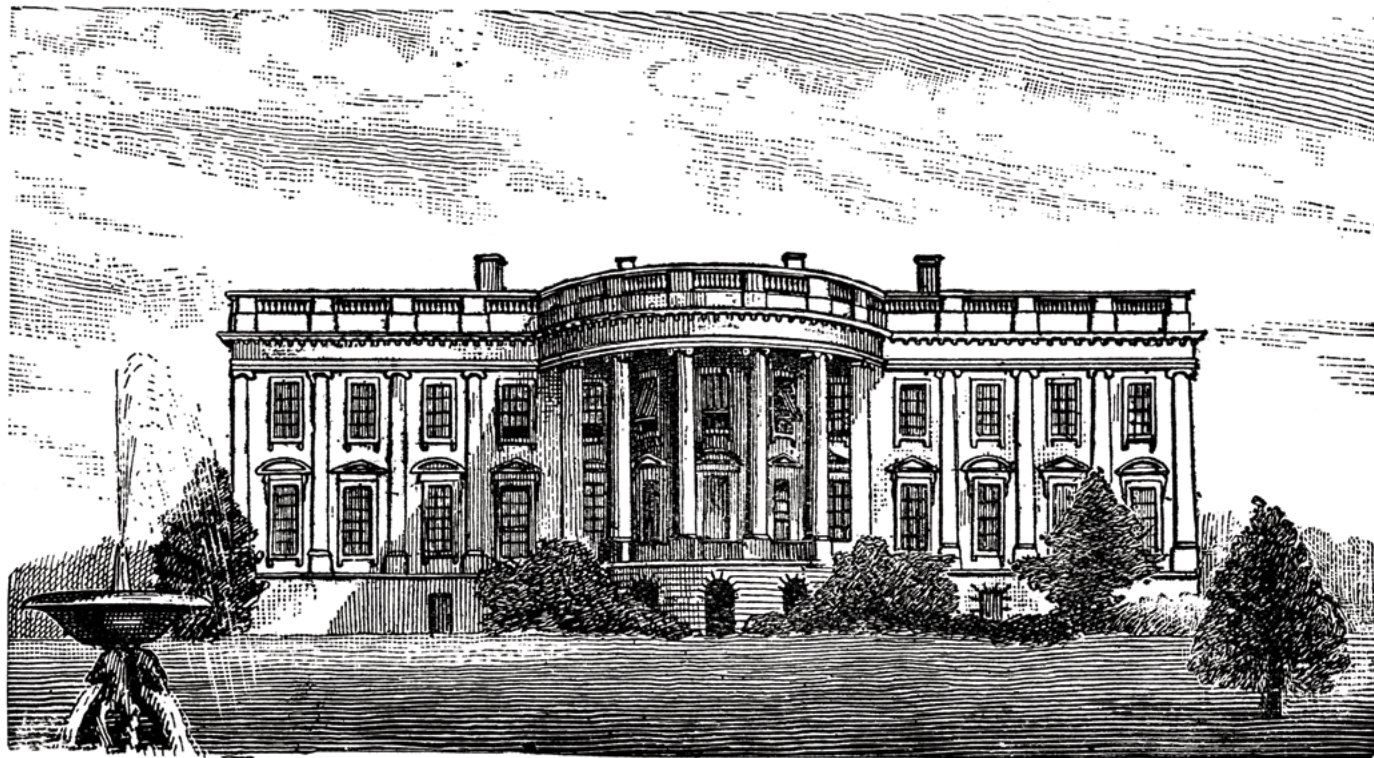
And many election experts are predicting that the expected increase in mailed in ballots might result in delayed counting in a number of states. Could Trump claim victory on the basis of early in-person voting and raise questions about a count that might take days before it can be resolved?

He is already claiming the election is “rigged,” raising doubts among some observers.

Could we be about to repeat history? You bet.

Bush v. Gore in Historical Perspective

By **Professor Michael T. Morley**



Professor Morley joined the Florida State University College of Law in 2018. He teaches and writes in the areas of election law and federal courts, among others. Professor Morley has testified before congressional committees, made presentations to election officials for the U.S. Election Assistance Commission, and participated in bipartisan blue-ribbon groups to develop election reforms. In addition, the U.S. Supreme Court has cited several of his articles. Before joining FSU Law, Professor Morley was a Climenko Fellow and Lecturer on Law at Harvard Law School. Prior to his experience in academia, he served in government as Special Assistant to the General Counsel of the Army at the Pentagon, as well as a law clerk for Judge Gerald B. Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit.

As *Bush v. Gore* approaches its twentieth anniversary, it occupies a curious place in the American public consciousness. A majority of Americans today lived through the 36-day period in late 2000 that led up to the ruling and were old enough to have followed the events. While the details may now seem indistinct and technical, many recall the continuous shifts in the apparent winner of the presidential election as the recounts and post-election legal challenges proceeded. I was in my first year of law school at the time—disappointingly too inexperienced and untrained to participate in the litigation—and had the privilege of discussing each development in my weekly small-group constitutional law class. History was unfolding before our eyes. Along with the rest of the nation, we felt the

disquieting uncertainty over which candidate would be declared the winner, and whether his opponent—and the public—would accept that victory.

For an entire generation of younger Americans, however, *Bush v. Gore* is a purely historical event whose outcome is already known, as much an artifact of the past as the Apollo 11 moon landing or the Korean War. The Court issued its ruling before the college students, law students, and other young adults of today were born or while they were too young to understand. To them, *Bush v. Gore* is part of the pre-existing firmament of American history and law.

Bush v. Gore is a testament to the strength of our democracy. The world witnessed a peaceful transition of power, with control of the White House shifting from one political party to the other, despite deep-rooted disagreements over the final tally of Florida's votes. And the rule of law as set forth in the U.S. Constitution was upheld, with the Electoral College's results respected, even though it required the election of the candidate who had lost the national popular vote.

At the same time, the case points to the potential fragility of our democratic process. Federal and state courts may interpret the rules governing an election in unexpected ways, after votes have been cast and the courts are well aware of which candidates would benefit from various interpretations. They may also hold certain rules unconstitutional in post-election litigation, completely changing the apparent results. If a state legislature believes that election officials or courts have gone off the rails in determining the outcome of a presidential election, it may even attempt to appoint its own competing slate of presidential electors. Moreover, the Electoral Count Act of 1887, which governs the process that Congress uses to count and determine the validity of electoral votes, is archaic, confusingly drafted, and leaves certain important issues unresolved. And in a hotly contested election, Congress may assert power to disregard state officials' determinations, federal courts' rulings, and potentially even the constraints of the Act itself in deciding which electoral votes to count.

Bush v. Gore raises important questions about the proper role of federal courts in adjudicating constitutional challenges to the outcomes of federal elections. The case also established a Uniformity Principle that requires election officials to treat voters equally, even with regard to technical election administration issues that previously had not been deemed constitutionally significant. While many commentators questioned whether *Bush's* holding would have any lasting force beyond the 2000 election, lower courts have applied its Uniformity Principle throughout the past two decades to a wide range of election-related issues. Over the years to come, the Supreme Court is likely to revisit this key holding from *Bush*, to decide how it fits with precedents from the Civil Rights Era that sometimes allow states to apply different rules to different groups of voters participating in the same election.

The Federal Judiciary's Role in Presidential Elections

One fundamental question about *Bush v. Gore* is whether the Supreme Court should have heard the case at all. Justice Breyer forcefully dissented from the opinion, in part on the grounds that both the Constitution and Electoral Count Act empower Congress, rather than the Supreme Court, to resolve disputes concerning the outcomes of Presidential elections. Several commentators have echoed this critique, arguing that *Bush v. Gore* presented a nonjusticiable political question that was inappropriate for the Supreme Court's intervention.

In *Baker v. Carr*, the Supreme Court identified several types of cases over which federal courts may not exercise subject-matter jurisdiction, because they present political questions. *Baker* bars courts from asserting jurisdiction over a dispute when there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" or a lack of "judicially discoverable and manageable standards" for resolving it. The political question doctrine also applies where, among other things, adjudicating a matter would exhibit disrespect for a coordinate branch of government, undermine a "political decision already made," or lead to "embarrassment from multifarious pronouncements by various departments on one question." None of these considerations applied to *Bush v. Gore*.

The Constitution assigns ultimate responsibility for resolving federal elections to the chambers of Congress. Each house is the sole judge of the elections, qualifications, and returns of its own members. And the chambers of Congress are likewise responsible for counting and determining the validity of electoral votes. Neither federal courts nor other entities may interfere with Congress' constitutional authority over these matters.

Bush v. Gore did not concern Congress' counting of electoral votes, however. Rather, the case involved the anterior issues of whether state election officials should conduct a statewide recount in the presidential election or include certain results of more localized recounts to determine which competing slate of presidential electors the Secretary of State would certify as elected. After the candidates litigated the matter in Florida state court, the U.S. Supreme Court was free to adjudicate the federal issues in the same way it would any other case. Its ruling no more usurped Congress' authority to count or determine the validity of electoral votes than the Florida Supreme Court judgment it reversed. Moreover, the Constitution governs state officials' actions at all stages of the electoral process, from voter registration and determining voter eligibility long before an election begins, to the actual conduct of the election itself, to counting ballots and canvassing results during the post-election period. Federal courts are available to adjudicate constitutional or federal statutory issues that arise at any stage of this process.



In 1870, the Reconstruction Congress sought to preclude federal courts from adjudicating constitutional challenges to the results of federal elections. It enacted the Enforcement Act, granting federal district courts jurisdiction over election contests arising from violations of the newly ratified Fifteenth Amendment. The Act contained an important proviso, however; it did not apply to disputes over elections for “elector of President or Vice President, representative or delegate in Congress.” Congress thereby excluded federal courts from adjudicating Fifteenth Amendment challenges concerning those offices to preserve its constitutional prerogative to resolve federal elections.

The very next year, Congress enacted the Civil Rights Act of 1871. That statute granted federal courts jurisdiction over suits against state or local officials for violating “any rights, privileges, or immunities secured by the Constitution,” without excluding cases concerning federal elections. And a few years later, Congress granted federal courts general federal-question jurisdiction, including over cases arising under the Constitution (subject to an amount-in-controversy requirement that Congress ultimately eliminated). Neither of these subsequent jurisdictional grants purported to limit the federal judiciary’s ability to hear constitutional challenges relating to the outcomes of federal elections. Thus, except for an extremely brief interlude during Reconstruction, not even Congress itself views its prerogative to determine the outcomes of federal

elections as precluding federal courts from adjudicating constitutional challenges concerning those elections’ results.

The Constitution’s grants of power to Congress do, however, impose some limits on the federal judiciary’s authority concerning cases like *Bush v. Gore*. First, a federal court’s rulings concerning the outcomes of federal elections—including whether the Constitution requires or prohibits the counting of particular votes—are not binding on Congress. Rather, Congress is free to revisit such issues for itself when exercising its power to determine the elections of its members or count electoral votes. Second, federal courts are generally barred from engaging in judicial review of Congress’ resolutions of federal elections. While the judiciary can have a substantial impact on which federal candidates or slates of presidential electors states certify to Congress, the ultimate decision on whether to accept those results lies with Congress itself.

***Bush v. Gore* as Precedent**

Another recurring attack on *Bush v. Gore* is that the majority determined the outcome based on a principle that it crafted solely for that occasion and did not wish to apply to any future cases. Toward the end of its opinion, the Court inserted a caveat declaring, “Our consideration is limited to the present circumstances, for the problem of



equal protection in election processes generally presents many complexities.” Defining the relevant facts narrowly, the Court noted that the case involved a highly unusual situation: “a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.” Critics charge that this apparent attempt to prevent future courts from applying *Bush*’s principles in other contexts renders the opinion a suspect “ticket for one train only.”

Whatever the merits of such critiques at the time the Court issued the opinion, they have proven to be erroneous. *Bush v. Gore*’s holding has evolved into an important principle of constitutional law. The case extended the Constitution’s Equal Protection Clause to require equal treatment of similarly situated voters, even with regard to technical “nuts and bolts” issues of election administration, such as the rules for ballot counting. Equal Protection restrictions, the Court explained, apply not only to the “initial allocation of the franchise,” but “to the manner of its exercise,” as well. A state may not subject voters to “arbitrary and disparate treatment” that “value[s] one person’s vote over that of another.” This holding may be called *Bush v. Gore*’s Uniformity Principle.

Admittedly, the Supreme Court itself has not cited *Bush v. Gore* in any subsequent majority opinions. Its only reference to the case appears in a concurrence by Justice Thomas, who cited it for the proposition that states have

plenary authority over the appointment of presidential electors. Notwithstanding *Bush v. Gore*’s limiting language, however, lower federal courts and state courts throughout the nation have applied its Uniformity Principle in a wide range of circumstances. Most basically, courts have invoked the principle when holding that a jurisdiction or election official may not intentionally apply different rules to similarly situated groups of voters or ballots, when such distinctions would afford people substantially different opportunities to either cast a vote or have it accepted as valid.

Courts have likewise invalidated laws that expressly delegate broad discretion over particular issues to county and local officials when they result in substantial disparities in the ability of various political subdivisions’ voters to cast ballots or have them counted. For example, several courts have struck down state laws allowing localities to choose among different types of certified voting machines with substantially different error rates, because voters participating in the same statewide elections would have different chances of having their votes counted. In other cases, courts have rejected disparities among counties’ rules governing important election-related issues such as the permissibility of third-party ballot harvesting, the need for voters who register online to submit hard-copy signatures, and the inclusion of checkboxes on absentee ballot request forms to confirm voters’ citizenship. Gross disparities

in resources among different polling places that result in substantially different waiting times have also been held, in extreme cases, to violate *Bush*'s Uniformity Principle.

Finally, courts have been skeptical about laws establishing vague, subjective standards that officials in different jurisdictions may interpret and apply in different ways. In particular, based on the facts of *Bush v. Gore*, they have required states to apply specific, detailed rules when counting ballots.

The Scope of *Bush v. Gore*'s Uniformity Principle

Important limits exist on the Uniformity Principle. For example, the principle requires states to ensure equal treatment only of voters participating in the same election. Different municipalities may adopt varying voting rules for purely local proceedings like bond issuances or municipal elections that each jurisdiction's residents vote upon separately. Likewise, even when states adopt vague or subjective standards, equal protection concerns generally do not arise when a single decisionmaker is responsible for applying them. Moreover, unintentional disparities in the treatment of different voters typically do not rise to the level of Equal Protection violations. And courts have usually upheld the constitutionality of "matching" requirements that require election officials to determine whether a voter's signature or personal information matches official records, an identification card is valid, or distinct government records containing similar information both refer to the same voter.

Perhaps the most significant limitation on the applicability of *Bush v. Gore*'s Uniformity Principle is that most courts have declined to apply it to early and absentee voting. This limitation stems from a pair of Supreme Court cases from the late 1960s in which the Court sought to make it easier for the government to expand opportunities to vote. In *Katzenbach v. Morgan*, the Court upheld a provision of the Voting Rights Act (VRA) that prohibited states from applying their literacy requirements to people who had been educated in Spanish-language schools in Puerto Rico. At the time, New York required voters to be literate. Since the VRA was a "reform measure aimed at eliminating an existing barrier to the exercise of the franchise," rather than a restriction on the right to vote, the classifications it drew

were subject only to rational basis scrutiny. The fact that the statute extended voting rights only to certain people who were unable to read and write in English did not violate the Equal Protection Clause.

In *McDonald v. Board of Election Commissioners*, the Court applied this principle to uphold an Illinois state law that did not allow pretrial detainees held in their home counties to cast absentee ballots. The Court ruled that the case did not involve "the fundamental right to vote," but rather only "a claimed right to receive absentee ballots." It explained, "[T]he absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise." Thus, restrictions on eligibility for absentee voting were subject only to rational basis scrutiny.

The *Katzenbach-McDonald* line of cases appears to be in direct tension with the *Bush v. Gore* Uniformity Principle. *Katzenbach* and *McDonald* allow states and localities to selectively extend opportunities for absentee or early voting only to certain groups of voters, on the grounds that the Constitution generally does not restrict states' ability to facilitate voting or remove barriers to it. On the other hand, *Bush* requires that all voters within a jurisdiction be afforded substantially comparable opportunities to vote. Given the critical roles that absentee and early voting have come to play in our electoral system—especially as a result of COVID-19—the clash between these lines of authority may force the Court to revisit *Bush v. Gore* and address the scope of its central holding.

Conclusion

As the years pass, *Bush v. Gore* will continue its transition from shared national experience to purely historical event. Rather than being an anomaly limited to the unique context of the 2000 presidential election, the case established a far-ranging Uniformity Principle that lower courts have applied to most aspects of election administration. Over the years to come, the Court is likely to revisit the case to decide whether to extend that Uniformity Principle even further, to absentee and early voting.

For ease of publication and reading, footnotes have been removed from this article. The full version, with footnotes, may be viewed on the Historical Society's website at www.flcourthistory.org/Historical-Review/Extended-Articles.

 LEGAL HISTORY

LITIGATING HISTORY

By **Barry Richard**



Barry Richard is a principal shareholder with the law firm of Greenberg, Traurig, P.A. He has argued almost one hundred cases in the Florida Supreme Court and four successful cases in the U.S. Supreme Court. In 2000, he served as lead Florida counsel for George W. Bush in the 2000 litigation that determined the presidency. As a result of his performance in that role, he was named Lawyer of the Year by the National Law Journal.

The 2000 Bush v. Gore litigation consisted of 47 cases in Florida and federal courts over 36 days. The following article was written for the ABA Journal shortly after the conclusion of the litigation by Bush's lead Florida lawyer, Barry Richard. It gives an insider's view of the day-by-day strategy and tactics of the battling legal teams and the pivotal role of the Florida Supreme Court. The full version can be found online at www.flcourthistory.org/Historical-Review/Extended-Articles.

The Bush-Gore litigation swept into Florida like a hurricane, forming without warning and gaining rapidly in both size and intensity. I was retained by the Bush campaign on November 8, 2000, the day after the election, to act as lead counsel for the Florida litigation. By the following night, nine lawsuits had been filed; Warren Christopher was on his way to Tallahassee to act as Gore's spokesman; and it was reported that Gore had engaged the services of David Boies, the attorney who had recently gained national attention by beating Microsoft at trial.

The Bush team was beginning to realize that Gore intended to make a serious stand in Florida, and we anticipated a pitched battle. No one that evening, however, expected that the battle would become as involved or take as long as it did. Over the next 34 days, 45 lawsuits would be filed in 12 cities; the names of 53 judges and 192 lawyers would be inscribed in the history books; and Tallahassee, a quiet college town, would become the center of the world.

The Factor of Time

It is arguable that the most important factor in the litigation was not lawyers or judges, but time. After the Tilden-Hayes presidential election in 1876, four states each sent competing delegations to the electoral college. The dispute languished in a deadlocked Congress until four months after the election. In the aftermath, Congress enacted what is now codified as Article III, Section 5 of the U.S. Code. The provision states, in essence, that if a state finally determines any controversy concerning the Selection of presidential electors at least six days prior to the meeting of the electoral college, such determination is conclusive and the delegation so selected is beyond congressional challenge. In the year 2000, six days prior to the electoral college meeting was December 12. The running of the clock toward that date would have a continuing impact upon the strategic thinking of the litigants.

The Forgotten Case

The first skirmish in the 2000 litigation actually occurred two weeks before election day in a case that drew little attention but could have decided the presidency. The Republican Party of Florida had sent a mailing to all registered Republicans in the state informing them of the ability to vote absentee. The mailings enclosed an absentee ballot application and a letter from the governor of Florida, George W. Bush's brother, Jeb. The letter bore what appeared to be a depiction of the state seal.

The Democratic Party of Florida filed a suit, in which I defended Jeb Bush, claiming that the letters violated a state statute that prohibited the use of the state seal for political purposes. Among the relief sought was invalidation of all absentee ballot applications sent with the mailing. Had the case been successful, there would not have been sufficient time for persons who had sent back the applications to be notified of the invalidation, receive and return new applications, and receive and return the ballots before the absentee voting deadline. Bush led Gore in Florida by 739 absentee ballots statewide, well in excess of his total 327 vote lead after the final machine count. Had the Democrats won the suit, Gore might well have received Florida's electoral votes and become president.

As it turned out, the circuit court agreed with Jeb Bush's position that the statute upon which the Democratic Party was relying did not give rise to a private right of action. The case was dismissed, and there was no appeal.

The Opening Move

Florida law establishes two methods for a candidate to challenge election results. Before the winner is certified, a candidate can file a protest and request that one or more county canvassing boards conduct a manual recount. As an alternative, a candidate can wait until after the winner has been certified, bypass the canvassing boards, and file an election contest in the circuit court.

The Gore team chose to file a pre-certification protest. It was not a simple decision. The primary advantage of a protest was controllability: A protestor could choose the counties to recount and would likely have more influence over the standards used by canvassing boards than over the decision of any court. The primary disadvantage of a protest was time: If the recount tipped the election in favor of Gore, Bush would have the right to file a contest that might remain unresolved on December 12. In that case, the Selection of Florida's electors would be thrown to the state legislature and Congress, both of which were under Republican control. The final decision was reportedly made by Gore himself, based upon a concern that if he filed suit after Bush was certified the winner, he would appear to be trying to frustrate the will of the people.

Gore requested recounts in only four of Florida's 67 counties. It is likely that the Gore team was receiving the same advice from its statisticians that we were receiving from ours: In a statewide recount, the winner was anybody's guess.

The counties chosen by Gore shared two factors. The machine

tally had given Gore a margin of victory in each, and each had a relatively high number of machine-rejected ballots from which Gore might draw additional votes. The decision to file a protest would result in three hearings and delay certification from November 14 to November 26, a loss of 12 days.

The Bush Team Counters

The Bush team made two early strategic decisions. The first was to oppose all manual recounts. Several considerations led to the decision. First, recounts served only Gore's interests. Bush had won Florida, albeit by a slim margin, and there was no reason to give Gore a chance to upset the status quo. Second, the Bush team did not trust Florida's canvassing boards, many of which were dominated by Democrats. Finally, several of us truly believed that the manual recount procedures set out in Florida's statutes were inherently unfair and constitutionally flawed. Bush could have responded by requesting recounts in counties where he had enjoyed a substantial margin of victory, but such a request would have been inconsistent with our argument that the recounts were unfair and unconstitutional. The same considerations led to a decision to file suit in an effort to stop the recounts.

The second significant strategic decision was to file in federal rather than state court. Our first reason was a simple, logistical one: Each of the four counties in which Gore requested recounts was in a different circuit, and Florida venue requirements would have necessitated the filing of four separate suits, a cumbersome procedure with the prospect of inconsistent decisions. On the other hand, three of the four counties were in the same federal district, and we could name the boards of such counties in a single federal action. The second reason for the federal court filing was that the Bush political camp was not comfortable with the state courts and was unwilling to place all of its legal eggs in the state Judicial basket.

The U.S. District Court dismissed the suit, and the Eleventh Circuit agreed to hear an expedited appeal en banc. The appeal was later abated to await completion of the state litigation. Even in its dormant posture, however, it influenced our decision not to raise federal due process and equal protection issues in the state court proceedings. The Eleventh Circuit appeal was available as a matter of right, and the initial agreement to hear it en banc was a hopeful sign. If the Florida Supreme Court, however, had ruled upon the federal issues, the Eleventh Circuit would not have been able to consider them further. Only the U.S. Supreme Court can review a decision of a state high court under the *Roquer-Feldman* doctrine. At that point, we had no assurance that the U.S. Supreme Court would grant certiorari.

Getting Organized

The organizational demands of the 2000 presidential litigation were unlike those in any other case in history. It was not the number of cases or cities alone that made the litigation unique but also the speed at which it moved on so many fronts, the absence of precedent, and the surreal atmosphere that

surrounded it. It was like playing a dozen chess games at once with the rules not revealed until after the moves were made, all in the middle of an Olympic-style media frenzy.

Every case was set immediately for emergency hearing, often within hours of filing. And every decision was appealed immediately to a Florida intermediate appellate court, which passed the case directly up to the Florida Supreme Court. Florida law permits an intermediate appellate court to catapult a case directly to the high court by certifying that the case involves a matter of great public importance requiring immediate resolution by the supreme court. Since 1954, 75 cases have been so certified, averaging fewer than two per year. During the 36 days of the presidential litigation, 41 were certified, though many had been consolidated before they reached the supreme court.

The Bush team made the decision to defend with a full-court press. We would intervene in every case in which Bush was not named as a defendant, and we would defend vigorously. The decision to defend all suits dictated our organizational approach. There was little time for decision by committee. Our organization was decentralized. Overall recount strategy was formulated by Ben Ginsberg, George Terwilliger, and former Secretary of State James Baker, all of whom worked out of the Republican state headquarters. Ted Olson spearheaded the federal litigation from his Washington office, and I managed the state cases from Greenberg Traurig's Tallahassee office.

Early on the morning of November 10, we set up our firm organizational structure. We designated my Tallahassee office as command center and assigned responsibility to attorneys and paralegals in all six of our offices throughout the state. Beginning that day, at least one of our attorneys monitored each counting canvassing board around the clock. The Bush campaign enlisted a dozen bright young lawyers from around the country to assist with brief writing. The briefing team was headquartered in a conference room at the Florida Republican Party headquarters and worked 24 hours a day. After several days, a number of the senior lawyers on the briefing team moved to our offices in order to work in a quieter atmosphere.

Because lawsuits were being filed against election officials without naming Bush as a defendant, we stationed paralegals in the clerk's office of every county in which litigation was likely to develop and made arrangements with the clerks to notify them if anything was filed involving the election. Motions were filed in out-of-town cases to transfer venue to Tallahassee, where we intended to seek consolidation. Eventually, most cases did end up in Tallahassee, but the consolidation plan was not successful. The circuit judges had met and decided not to consolidate in order to avoid overburdening a single judge.

The first major hearing took place in Palm Beach on November 15. Six judges had recused themselves before Judge Jorge Labarga finally agreed to preside over a number of consolidated cases challenging the "butterfly" ballot. The plaintiffs' lawyers asked for an expedited trial on the merits. I anticipated that the issue would be tried on the merits somewhere, but I preferred not to have this done in Palm Beach County, the center of the most vociferous protests. In addition, a trial in Palm Beach would divert my attention from cases proceeding in Tallahassee.

Judge Labarga agreed that, before setting the case for trial, he would hear argument on the question whether there was a legal remedy even if the ballot were determined to be defective. He scheduled the hearing for November 17.

In any multijurisdictional litigation, even one on a normal timeline, one of the most difficult problems is consistency. In this instance, with dozens of cases all proceeding at lightning speed, there was no time to ensure that multiple lawyers would argue the same issues in different courtrooms from the same page. So I undertook to argue personally as many of the cases as possible. At the early stages, many of the hearings were in widely separated counties, often on the same day. Although every trial lawyer prefers to argue to a judge face to face, we elected to participate by telephone rather than risk inconsistency.

I argued the remedy issue to Judge Labarga from my desk in Tallahassee and, immediately upon completing my argument, asked to be excused and rushed to an adjoining office to argue a change of venue motion in Broward County. Later that day, I argued a similar venue motion in Dade County, also by telephone. Several days later, Judge Labarga would dismiss all of the butterfly cases, a decision eventually unanimously affirmed by the Florida Supreme Court. We had weathered the first storm.

The First Trip to the Florida Supreme Court

Florida's statutory scheme for challenging election results was not well suited to the peculiarities of choosing presidential electors. Enacted in bits and pieces over a period of 154 years, it was anything but a model of clarity. It is unlikely that the drafters ever contemplated its application to the Selection of presidential electors, and there is no previously recorded interpretation of the provisions as applied to a statewide contest. As presented to the Florida Supreme Court in November 2000, it was a case of first impression.

Two separate, and apparently conflicting, statutes dealt with the date of submission of returns by the county canvassing boards to the Department of State. Both required that the returns be received by 5:00 p.m. on the seventh day after the election, in this case, November 14. One section, however, provided that, as of the deadline, all returns not received by the secretary of state "shall" be ignored, while the other section provided that such returns "may" be ignored. The secretary of state denied additional time for manual recounts. This was the position of the case when it reached the Florida Supreme Court.

Oral argument was set for November 20. The courtroom holds 264 spectators. The court had announced that it would open the doors to the public at 8:00 a.m. on a first-come, first-served basis. The line in front of the court began to form at 5:00 a.m. It was more like a rock concert than an appellate proceeding.

Boies argued the case for Gore. He had a simple message, which he pursued with dogged persistence: The statutory provision for canvassing boards to submit their returns to the secretary of state within seven days was not cast in stone; it was really a flexible date. The important thing was to ensure that the votes were properly counted, and the court had the power to



The Bush team's attorney, Barry Richard, confers with attorney Ben Ginsberg before their oral arguments on December 7, 2000.

PHOTO BY RYAN LEE

extend the deadline to do so.

Ben Ginsberg had decided that Mike Carvin and I should split the Bush argument, and Mike was taking the rostrum first. The Chief Justice recognized Mike, and he stepped into a hornet's nest. He barely got out two sentences when the questions began, and they never let up. Mike is an excellent lawyer, but he never had a chance. The justices fired 44 questions at him in 30 minutes. He was like a swimmer being dragged down by seven others. We were drowning in minutiae, and our message was going under.

It was clear that the Court was not inclined to interpret the law in a manner that would favor Bush. If we had a chance of winning, it would be because we could convince the court that it did not have the authority to interpret the law. I was also concerned about countering Gore's argument that every vote should be counted with a technical statutory construction argument. I felt it was essential to ground our position in fundamental principle.

The principle asserted was separation of powers. We argued that the job of writing the rules for the election lies with the legislature because the Florida Constitution grants that authority exclusively to the legislature and, in the case of presidential electors, the U.S. Constitution does as well. The legislature, in turn, has given the job of administering the election laws exclusively to the secretary of state. Both by statute and by long-standing legal principles, the exercise of any discretion permitted by the election statutes, and the interpretation of any ambiguity in those statutes, falls to the secretary of state, and the courts' obligation is to defer to the decisions of the secretary unless they are clearly erroneous.

The Supreme Court was not convinced. It handed down its unanimous opinion the following day, ordering the manual recounts to continue and extending the deadline for submission of returns by canvassing boards for five days, until November

26. Ted Olson immediately filed a petition for certiorari in the U.S. Supreme Court.

Three Crucial Days

The three days following the supreme court ruling would set the stage for the final U.S. Supreme Court decision. By November 22, the Gore game plan was in trouble. A legal challenge to overseas military ballots had been resolved in Bush's favor, which had increased his lead to 930 votes. The Dade County Canvassing Board had completed only 1 percent of its count and was vacillating on whether or not to continue. Gore had been counting on its pool of 10,000 undervote ballots from which to slash Bush's lead. Meanwhile, Volusia County had completed its recount with scant impact on the result. In Palm Beach and Broward Counties, the recounted votes were tipping in Gore's favor but appeared insufficient to overtake Bush's lead.

The Gore legal team had to increase its chances of picking up votes on the recounts. Both the Palm Beach and Broward boards had adopted fairly conservative standards for reviewing the ballots. Then the Dade County board voted not to continue counting. The court denied the petition immediately, and Gore again petitioned the Florida Supreme Court for review. The court unanimously denied the petition the following day.

The Gore team turned its attention to the only other county still counting, Broward. On November 24, Gore's counsel persuaded the board to adopt a liberal standard for counting ballots. The board decided to count as a vote any ballot on which any portion of a chad appeared to be dislodged, any dimple appeared in a chad, or any mark appeared on or beside a chad or a candidate's name. This proved to be a Pyrrhic victory.

During the November 20 argument before the Florida Supreme Court, Justice Barbara Pariente had asked Gore's counsel whether a variance in recount standards from one county to another would raise constitutional questions. Gore's counsel answered candidly that, if the variance were substantial, it could create constitutional problems. For that reason, they urged, it was important that the court set forth specific standards for the

recounts.

Ultimately, the percentage of votes retrieved in Broward County, with its liberal standard, was 60 times the percentage retrieved in Palm Beach County, demonstrating a substantial variance. We can only assume that the Gore team, faced with a racing clock and diminishing options, elected to take a calculated risk. They would take the steps necessary to keep the effort alive and deal with the constitutional issue when its day arrived.

The Sauls Trial

The Gore team's decision to proceed under Florida's protest statute rather than file a post-certification election contest had cost 12 days. Only 16 days remained, and the Gore team lost no time in filing its contest in the circuit court in Tallahassee. The case was assigned to Judge Sanders Sauls, a practical, no-nonsense judge with a Southern drawl and a sense of humor that he often uses to take the edge off court-room tension. This would be Gore's only chance to make an evidentiary showing that the results of the election had been materially skewed by flawed vote counting. The center of action had shifted back to Tallahassee, where four critical hearings, each with potentially decisive consequences, would take place over a six-day period.

At a pre-trial conference on Tuesday, November 28, Gore's team attempted to convince the court to order that the recounting of ballots begin immediately and continue even as the trial was in progress. Judge Sauls declined.

The Gore team then argued that a contest proceeding called upon the court to conduct a de novo determination of how the votes had been cast, rendering the canvassing board's findings immaterial. The challengers relied upon a Florida Supreme Court case from the 1930s in which the trial court had decided an election contest case without looking at the ballots. The Florida Supreme Court had reversed, holding that the ballots themselves (fewer than 100 of which were in dispute in the case) were the best evidence of their validity, and remanded for the trial court to review them. The Gore camp asserted that the case stood for the proposition that the trial court in an election contest must review the ballots, and there was no reason for the court to take other evidence before doing so. Again, Judge Sauls refused.

Judge Sauls announced that we would convene again on Saturday as planned, to begin trial. We were adjourned.

Gore filed an immediate petition to the Florida Supreme Court asking that Judge Sauls be ordered to start the recount immediately; for the second time, the court unanimously rejected Gore's petition.

Three critical cases were heading for trial at about the same time.

We divided the case by issues, with team members each handling particular witnesses. We agreed that I would present opening statement and closing argument and handle any legal arguments that arose in the course of the trial. We also put together our initial witness list, which consisted of 30 witnesses.

The day before trial, we pared our list down to 10.

The morning of the Sauls trial, demonstrators set up camp



PHOTO BY RYALS LEE

Counsel from both sides meet for a brief but friendly exchange before oral arguments before the Supreme Court of Florida on December 7, 2000. Left to right: Barry Richard, Stephen Zack, Mitchell Berger, and Jeff Robinson

facing each other on opposite sides of the road—the Bush supporters in front of the county courthouse and the Gore supporters in front of the capitol. Reporters and cameras were massed in the hallway leading to the courtroom, and the courtroom was standing room only.

The Gore team called two expert witnesses, one who discussed his opinion regarding potential problems with the punchcard voting machines, and a statistician who calculated the total number of votes that had been counted improperly statewide. Philip Beck had deposed both witnesses and conducted a textbook cross-examination. The Gore team then stunned us, and presumably everyone else, by resting its case.

As surprising as the decision was at the time, in retrospect, it is not difficult to understand the reasoning behind it. As of that morning, there were only 10 days remaining until the final bell. The more witnesses they called, and the more issues they raised, the longer our defense would be. Whatever the decision by Judge Sauls, there would be an appeal, which would take additional time. The Gore team had apparently decided to rest its chances on the *de novo* argument, asserting that any evidence other than the ballots themselves was immaterial. Having failed to jump-start the counting before the trial began, they truncated their case, intending to end the trial as rapidly as possible and make their stand before the Florida Supreme Court.

We opened our case-in-chief with Judge Burton, at my suggestion. He had done a good job at the Labarga hearing, describing the difficulty of truly discerning a voter's intent from the punchcard ballots and recounting the conscientious effort the canvassing board had made. I thought his window on reality would be a good counterpoint to what I regarded as speculative opinions by the Gore experts. We called the inventor of the punchcard voting device and our own statistician, as well as six other short witnesses.

We made a last-minute decision to cut several witnesses.

Boies and I gave closing arguments Sunday night, and Judge Sauls read his ruling from the bench to a full courtroom on Monday afternoon. From our perspective, it was a grand slam. He resolved every factual and legal issue in our favor. The general consensus, probably shared by the Gore team, was that it would be a difficult ruling to overturn. Four days remained.

The Final Chapter

The final chapter in the drama began on December 6. Gore proponents filed lawsuits in Seminole and Martin Counties, seeking to have 25,000 absentee ballots invalidated due to alleged improprieties in the offices of the supervisors of elections. Bush had won the absentee ballot vote by more than 1,000 votes in each county. Because neither case involved a federal issue, there would be no basis for federal court involvement. A decision favorable to Gore in either case would make him president.

The assignment of the Seminole case to Judge Nikki Clark was extremely worrisome to most of the Bush camp. She had all the hallmarks of a judge who would be inclined to favor Gore. She is a Democrat who had been passed over by Governor Jeb Bush for appointment to the appellate bench several weeks earlier. The Bush campaign wanted to take no chances and urged me

to file a motion to recuse her. I advised against it. She is a sharp, independent judge. I was confident that she would be objective. Two recusal motions were eventually filed, the only documents filed on behalf of Bush in the state litigation that did not bear my signature. Their fears, as I expected, were unfounded.

Judge Terry Lewis began the Martin County case at 8:00 a.m. and recessed an hour later to allow Judge Clark to begin the Seminole County case. When the Seminole case concluded at 7:00 p.m., Judge Lewis reconvened and continued until the plaintiffs rested, after midnight.

The next day (my wedding anniversary) was a busy day. I argued the appeal from the Sauls trial before the Florida Supreme Court at 9:00 a.m. and made the closing argument in the Seminole case at 1:30 the same afternoon. Bristow simultaneously gave the Martin County closing.

The following day brought mixed greetings. The Seminole and Martin decisions came down in our favor, but in a surprising four to three decision, with two of the strongest dissenting opinions in its history, the Florida Supreme Court reversed Judge Sauls and ordered a statewide recount to begin immediately. The Court did not, however, set specific uniform standards. The following morning, a Saturday, the U.S. Supreme Court issued an equally surprising stay and scheduled oral argument for Monday, December 11.

On December 12, it all ended as quickly as it had begun. The U.S. Supreme Court vacated the Florida Supreme Court order, with seven justices finding a violation of equal protection due to a lack of uniform standards in the conduct of manual recounts. The Court cited the disparity of standards used in Palm Beach and Broward Counties. Five justices agreed there was no remedy available to the state because December 12 had arrived. The same day, the Florida Supreme Court unanimously affirmed the Seminole and Martin decisions.

At 10:00 p.m. that evening, my wife and I sat before the television like many Americans, watching the flood-lit steps of the U.S. Supreme Court building. Television correspondents received the Supreme Court's lengthy opinions and tried desperately but unsuccessfully to decipher them. I called Bush headquarters. They were waiting anxiously for the decision to print slowly off the fax. I sat down at my computer, and, with my wife standing behind me, I located the opinion on the CNN Web site and skimmed through it to get to the holding. "It's over," I said. After 36 days, 147 hours of continuous media coverage, and countless hearings, the 2000 presidential litigation was, literally, history.

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In addition to this article, Barry Richard also wrote an article defending attacks against the Supreme Court of Florida for acting politically during the 2000 election. A copy of that article is available online at www.flcourthistory.org/Historical-Review/Extended-Articles.

LEGAL HISTORY

GORE TEAM: RECOLLECTIONS FROM THE 2000 ELECTION

By **Mitchell W. Berger, Charles Lichtman, & Leonard K. Samuels**



Recollections of Mitchell W. Berger

Mitchell Berger is the co-chair of Berger Singerman, the firm he founded in 1985. He has nearly 40 years of successful representation in commercial disputes, including Fortune 500 companies. In 2000, he was named Co-Lawyer of the Year by the National Law Journal. Among many other notable positions, he served as a Trustee on the Florida Supreme Court Historical Society's Board of Trustees from 2008 through 2020.

While two decades have passed since the presidential election of 2000, and the ensuing disputes that gripped Florida and its courts, the events of that time—and the potential lessons that can still be learned—remain as important today as they have ever been. For me, and for my law firm, Berger Singerman, what began on November 7th as an effort to represent and advise our clients, Vice President Al Gore and Senator Joe Lieberman, quickly became something entirely different and more meaningful: a mission to support our constitutional democracy, and to protect everyone's right to vote. As we move through what is already a tumultuous election season in 2020 and witness efforts to question and delegitimize votes before they are even cast, we would be wise to remember this central idea from the Florida election of 2000: that the right to vote is a paramount right, and its safeguarding is essential for the survival of our democracy.

The journey that would become *Bush v. Gore* actually began early on election day. That morning, it became clear that there were some major voting problems in the state, including in Palm Beach County, where the Supervisor of Elections was already being asked to warn voters about defective ballots. That evening, I had to decide whether to fly to Nashville, and also whether to file an injunction. I talked to Charles Burson, Vice President Gore's chief of staff, Joe Sandler, chief counsel for the Democratic National Committee, and Lynn Utrecht, special counsel to the campaign, and we decided that since we could not enjoin to keep the polls open, I would head up to Nashville. On the flight, news reached me that Gore had won. Needless to say, the news soon changed, and what was happening in Florida became the focus. Within hours I was on a plane back to Florida.

Over the next 35 days, our firm took on the task of representing Vice President Gore on multiple fronts. At the time, no other law firm of any size or substance in Florida was willing to take part, and so with the agreement of my incredible partners at the time, Leonard Samuels, Paul Steven Singerman, and James Berger, we began an effort that had no clear end in sight, no operational precedent or blueprint, and no guarantee of payment. In order to carry out such an extensive undertaking, we closed our firm to all other work, and our offices in different parts of the state—in Miami-Dade County, Broward County, and Palm Beach County—essentially became headquarters for our work in each region.

On a day-to-day basis, I was stationed in our Tallahassee office, which was quite small at about 2,000 square feet. This space became our home base of the Gore recount effort. I remember being elbow-to-elbow, amidst a frenzy of activity at all times. For more than a month, we rarely slept, seldom ate, and always worked.

We faced great personal challenges as well, including death threats made with regularity—so much regularity, in fact, that at one point my assistant stopped passing on the messages to me, hoping to spare me the anguish. People were protesting, becoming agitated, and throwing things outside of our offices. Eventually, armed officers were assigned to protect many of us on the Gore legal team.

Eight days after the election, Vice President Gore made what I believe was one of the most significant attempts to end the recount dispute before it became a damaging legal battle, and to build faith among Floridians—and all Americans—in the voting process and our system of democracy. Even today, few people want to focus on this proposal, but Gore announced on television on November 15th that he would agree to a statewide recount of all votes in Florida in accordance with the very same rules detailed in a law signed in Texas by then-Governor George W. Bush. That law specifically addressed the processes and standards that would be used to count votes and determine intent to vote in any instance where voting machines failed. And clearly, the voting machines and ballots had failed in Florida.

Instead of agreeing to this proposal, and ensuring that everyone's vote in Florida counted equally, the Bush campaign sued in federal court that very day. It was at that moment that I knew that our job was not just to represent a particular candidate, but to protect all of the voters across our state who were at risk of being disenfranchised.

Simultaneously, the Florida Governor, Jeb Bush, and the Secretary of State of Florida and Co-Chair of Bush's statewide campaign, Katherine Harris, who had the responsibility for legally certifying the election, proceeded to use the election machinery for the advantage of George W. Bush. In addition, Roger Stone was organizing the 'Brooks Brothers Riot' to prevent the votes from being counted after the machines had failed. It is only through an independent judiciary that their actions were prevented.

Many casual observers may not realize that, between the two candidates for president, it was George W. Bush who sued first, not Al Gore. So, our role was to present the Vice President's position in these cases, and ultimately to see that votes would be correctly counted, and that disputed ballots would be properly examined.

We also faced the great challenge of an aggressive publicity machine that worked to refute the need for any kind of recount. Soon after the election, many people in the country falsely believed that a full recount of votes in Florida had already occurred, when in fact the recount had not even begun.

Twenty years later, it is apparent that our democracy is fragile. The future depends on individual leaders who will support and build up the rule of law and our institutions—not tear them down.



Pictured is the group known as "the Broward team." From left to right: Leonard Samuels (Lead Litigation Counsel), Charles Lichtman (Lead Recount Counsel), David Boies (National Lead Litigation Counsel), David Fink (volunteer attorney from Detroit), Michael Moskowitz (volunteer attorney from Fort Lauderdale), and Chris Sautter (Democratic National Committee recount expert). Photo provided by Charles Lichtman.

Recollections from Charles Lichtman

Charles Lichtman is a Partner at Berger Singerman in Fort Lauderdale. His national complex commercial litigation and trial practice has largely focused on representing victims of fraud, and in receivership and trustee matters, corporate shareholder disputes and finance and securities litigation. He currently serves in a full-time role as Chief Legal Counsel to the Florida Democratic Party overseeing all election law and voter protection issues, including litigation, for the November 2020 elections.

Everyone remembers the hanging, perforated and dimpled chads. I was the "Chad Guy," because I learned everything about the chads, the equipment, and what happened on election day. I was the lawyer falsely accused of eating chads, which went viral in the media.

David Boies was sent to Fort Lauderdale to learn about election day and to handle an argument before the Broward County Canvassing Board. I told him the whole story in an hour. David took no notes, only occasionally asking a question. In the first sentence of David's presentation, I realized he was the best lawyer I'd ever seen.

One day I received a call from Warren Christopher. I answered all his questions, and as it ended, he said (and I wrote it down), he said, "Thank you, Chuck. You're doing great. I don't want to put any pressure on you, but you know the fate of the nation is on your shoulders." I burst out laughing and replied, "No pressure, sir."

Halfway through the recount, I received death threats requiring Broward Sheriffs guarding me for a week. Even walking to the bathroom inside the Broward courthouse where the recount was taking place, and escorting me home at night and back the next morning until everyone felt the threat was gone.

On the final fateful Saturday when a full state recount was to begin, Leonard Samuels and I were sent across the state to handle Collier County. At 6:00 a.m. I was driving us across Alligator Alley going well over 100 mph. A State Trooper pulled me over and asked why we were in such a hurry. Lenny shouted, "We're the recount guys." Upon sizing us up in our suits with briefcases in the back, he let us go, and didn't even tell me to slow down. We put a lot of "points on the board" in this red county because we persuaded their Canvassing Board to adopt the standard that any discernable mark on the ballot showed voter intent. Subsequent to our trip, Justice Scalia shut us down and the recount ended.

Recollections from Leonard K. Samuels

Leonard Samuels is a Partner at Berger Singerman in Fort Lauderdale. He focuses his practice on both employment-related litigation and complex litigation. His litigation experience includes handling non-compete litigation throughout the United States as well as substantial multi-state matters involving theft of trade secrets, tortious interference with business relationships and contracts.

I was the DNC lawyer assigned to Broward County, Florida on Election Day. During the day, I was receiving complaints from voters and politicians that they could not get through to the Supervisor of Election's office. I was also receiving calls about confused voters in Palm Beach County who thought they may have accidentally voted for Buchanan when intending to vote for Vice President Gore. On election night, I, like the rest of the country, watched Florida flip back and forth from red to blue. My cell phone and home phone were ringing off the hook. People were telling me about empty envelopes and boxes that were alleged not to have been delivered to the Supervisor of Elections, and other concerns.

I was then given the task of getting the recount started in Broward County, Florida. When I appeared before the Broward County canvassing board in an effort to convince them to start the recount, I saw just about everybody I had ever known throughout my years of political involvement, as well as TV cameras for as far as the eyes could see. I successfully convinced the Broward County canvassing board to commence a recount. By this time, we had hundreds of lawyers passing through our office to help, some assisting with legal papers and others gathering affidavits from voters.

I will never forget defending against the All Writs Motion filed in Broward County Circuit Court to stop the recount. The Motion was set for a hearing shortly after filing, and lots of lawyers worked hard on putting together a response. I was successful at the hearing and the recount continued. I never would have imagined appearing on the cover of the *National Law Journal* after winning this hearing.

I participated, in one way or another, in legal proceedings before the Broward County canvassing board, the Broward County Circuit Court, the Leon County Circuit Court, the Fourth District Court of Appeal, the Florida Supreme Court, the United States District Court for the Southern District of Florida and the Eleventh Circuit Court of Appeals. Legal action was nonstop.

I will never forget working on behalf of the Gore-Lieberman recount effort. It is not often that a lawyer is asked to work on legal matters that determine who would be the President of the United States. Our cause was just. The lawyers I encountered on both sides were noble. Working with Laurence Tribe and David Boies, two legal icons, was special. Working with countless other extraordinarily talented lawyers is something I will always cherish. I would do it all over again if asked.



LESSONS FROM THE JUSTICES

Reflections on
Bush v. Gore
from the Justices
who were there.



PHOTO BY RYALS LEE

Then-Chief Justice Wells (front) is pictured on the bench during oral argument on November 20, 2000, in one of the cases regarding the 2000 election. Justice Shaw is seen in the background.

FLORIDA LEGAL HISTORY

2020 Vision: Important Lessons from the 2000 Presidential Election

By **The Honorable Charles T. Wells**

Charles T. Wells served as Chief Justice of the Supreme Court of Florida from July 2000 through June 2002. During that time, he presided over the cases that became known as Bush v. Gore. He was appointed to the Court in 1994 and served until his retirement in March 2009.

As we have learned over the years, 20/20 vision is what we hope to have so as to see our way clearly. In this year 2020, what I hope is that we have vision that will clearly let us see some of the lessons we should have learned from the Florida Presidential election in 2000. I believe these lessons learned can help us avoid significant problems in future Presidential elections.

The first issue about which I became aware in 2000 was what came to be known as the butterfly ballot. This arose from the form of the ballot in Palm Beach County. Controversy about it arose the evening of the election when some voters raised questions as to whether they had actually voted for the Presidential candidate that they intended

because of the placement of the names on the ballot, and the manner in which the ballots were voted.

The second issue that came to my early attention was the counting of punch card ballots. This was a ballot that was used in a substantial number of Florida counties. Soon after the close of voting on the day of the election there were problems with the machine counting of those ballots. The ballots required voters to punch out a piece on the ballot to cast a vote. Some of the cast ballots did not have the pieces completely punched out. This caused some of those ballots to not be counted in the counting machines. The pieces that did not come all the way out of the ballots became known as “chads.” Hanging chads became a focus of attempts to discern voter intent of ballots that were not counted by the machines.

A third issue was that there were conflicting statutes for the time limits of reporting votes from the counties to the state Division of Elections. One statute stated that if a deadline for the reporting of votes was not met, it was mandatory that the county’s votes be ignored by the State.



Most major media outlets were well-represented with reporters, cameras, and satellite trucks as they all competed to report the latest news from Tallahassee.

A second statute stated if the deadline was not met that the county's votes could be ignored—indicating there was some discretion provided to the State as to the ignoring of a county's votes that was not sent to the State by the deadline.

What became apparent to me was that each of these issues could have been avoided if there had been attention to them prior to the election. For example, the issue with the punch card ballot and the chads had come to light in another state a couple of years before the election. The use of those types of ballots were known to cause issues in counting. The use of those types of ballots should have been banned before the election, as was done by Florida statute after the election.

We learned in 2000 that Presidential elections are controlled by a combination of state law and federal law. State law adopted by the state legislature controls the voting and counting of votes cast by voters in a particular state. The United States Supreme Court held that state legislatures have plenary power as to the selection of a

state's Presidential electors. In Florida, the same laws that apply to voting and counting of votes for state officers apply to the election of the state's Presidential electors. These are statutes that are in effect on the day of the election, and they have to be applied as written.

Federal law controls the counting of the electoral votes. A federal statute provides that if contests as to electors are concluded six days before the meeting of the electoral college, the resolution of such contests within the state shall be conclusive. In 2000, that date was December 12. This was 36 days after the election that was held on November 7.

At the first oral argument held in the Florida Supreme Court in the 2000 election case, lawyers for both Vice President Gore and for Governor Bush agreed that meeting the December 12 deadline was the way to protect Florida's voters' electoral votes. What was learned was that if contests were not concluded by December 12, another section of the Federal election statute that dated to 1887 would have to be applied to resolving the contests. This section was confusing to read and uncertain as to meaning. The law appeared to provide that the resolution would be up to both Houses of Congress. If both Houses did not agree, then to the Governor of the State. It was apparent that this section had many unanswered questions.

This section for resolving contests to electors remains the same. A key lesson then from 2000 is that the deadline for a state to resolve contests as to electors continues to be 6 days before the meeting of the electoral college. In 2020, this date is December 8. Therefore, it is vital to Florida, as well as every other state, to be aware of and prepare to meet this deadline by finally concluding all counting and contesting of votes for Presidential electors by that date. This is a very short deadline. However, in 2000, we succeeded in processing and hearing two cases on decisive questions both through the Florida Supreme Court and the United States Supreme Court by the deadline—demonstrating that it can be done.

Significant to me in 2000 was that though we had many cases and serious controversies, there was throughout a consensus that once the last Court had made a conclusive decision that the power of the Presidency was going to peacefully pass. Though we had during the 36 days large crowds outside of our Court building, and constant media attention, we had no violence. That is the way our democracy has to function, and we must constantly work to improve our election procedures so that we maintain confidence in our elections. That is the ultimate lesson.

Finally, in order to have successful elections there must be preparation. There is nothing more important to our democracy than the electing of our President. The ultimate lesson clearly applies in that Presidential elections require diligent and constant preparation for the election to be successfully performed.



The steps of the Supreme Court building became the rallying place for supporters of both presidential candidates.

Twenty Years After *Bush v. Gore*: Recollections From Justices Pariente & Quince

By **The Honorable Barbara J. Pariente & The Honorable Peggy A. Quince**

Barbara J. Pariente was the 77th Justice, and the second female justice, to serve on the Florida Supreme Court. She was appointed to the Court in 1997 and served until her mandatory retirement in 2019. She served as Chief Justice from 2004-2006.

Peggy A. Quince was the 79th Justice, and the first African-American female justice, to serve on the Florida Supreme Court. She was appointed to the Court in 1998 and served until her mandatory retirement in 2019. She served as Chief Justice from 2008-2010.

Tuesday, November 7, 2000, began as most oral argument days. We completed our final preparations to hear the four cases that would be argued that morning beginning at 9:00 a.m. before the Florida Supreme Court. Our caseload for the week included a full docket of regularly scheduled cases covering four days, from Monday to Thursday, with Friday being Veterans Day. It was Election Day, but we had already voted—Justice Pariente by mail, because her residency was Palm Beach County, and Justice Quince by early voting. We knew the day would be hectic with arguments, a discussion among the Justices about each case to decide on a resolution at a conference following the court session, and preparations for the next four cases on the docket that would be argued on Wednesday. Strong believers in the importance of voting, we made sure we did not have to worry about what time the polls would close or whether we

could get in and out of the polling place in a timely fashion.

In addition, both of us were on the ballot for merit retention, a “yes” or “no” vote on whether we would remain as members of the Court. Thus, we had a personal interest in the election. After a full day at the office, we attended a watch party at a friend’s house to keep abreast of the early returns. Somewhere around 7:00 p.m., when the polls closed in the Eastern Time zone, we were confident of our retention. Before 8:00 p.m., the TV networks had called the presidential election in Florida for Al Gore, but that changed throughout the evening and into the early morning hours as George W. Bush gained the lead. We learned the next morning that Florida’s vote count was “too

close to call”—a phrase that quickly entered the national consciousness. Only several hundred votes separated the presidential candidates with almost six-million cast. Even still, we had no idea what lay in store for the two of us, as the presidential election litigation would wind up placing our Court in the middle of the election fray.

As we look back on that six-week period in November and early December 2000, twenty years later, we are struck by the sheer amount of legal cases the Supreme Court of Florida was called upon to adjudicate in an extremely compressed time period. While we were clearly in the center of a political firestorm, our focus inside the courthouse was addressing the legal issues that came before us, as we would have in any other case.

Numerous legal disputes arising from the presidential

election were adjudicated in the state courts, with several percolating up to the Florida Supreme Court during a truncated 36-day timeframe. What is most remembered, of course, are the two cases in which we held oral arguments and issued opinions the following day. The first unanimous opinion, *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220 (Fla. 2000), extended the time to submit the vote totals to the Secretary of State for the four counties in which recounts were requested, allowing for those counties' votes to be included in the statewide total. The Court engaged in statutory construction, while recognizing that "the right to vote is the preeminent right in the Declaration of Rights of the Florida Constitution."

The second opinion, decided by a 4-3 majority, was an appeal from an election contest lawsuit initiated by Gore. The majority determined that every citizen's vote should be counted to the extent possible. The evidence at trial had established that in Miami-Dade County, 9,000 votes had never been manually examined and recounted. We held that because the "Legislature and the courts have recognized that the voter's intent is paramount, in close elections the necessity for counting all legal votes becomes critical." We therefore ordered that all "undervotes"—votes that had been cast but not counted by the voting machines—should be manually examined.

We also issued opinions and orders in related *Bush v. Gore* cases, including two significant matters in which we ruled in George W. Bush's favor. The first concerned the butterfly ballot challenge in Palm Beach County, in which Gore requested a new election in that county because of confusion in the way the ballot was configured. The second involved the absentee ballot challenges from Martin and Seminole Counties, in which Gore claimed irregularities in the procurement of thousands of absentee ballots.

For perspective on the pressures the Court encountered, consider the staggering number of cases that lined our docket. During the same time as the *Bush v. Gore* litigation, in addition to the regularly scheduled oral arguments in the first week of November, we also prepared



PHOTO BY RYALS LEE



PHOTO BY RYALS LEE

Justice Peggy A. Quince (above) and Justice Barbara J. Pariente (below) are intently focused while asking questions during oral argument at the Supreme Court of Florida.



With a full gallery, the Justices of the Supreme Court of Florida listen to argument from attorney Barry Richard (at the podium), counsel for George W. Bush.

for and participated in a full oral argument week of regularly scheduled cases the first week in December, and we were required to prepare for and deal with time-sensitive litigation surrounding two death warrants that were signed by then-Governor Jeb Bush on November 14, with executions scheduled for December 7 and 8.

Some aspects of the experience were surreal, such as seeing blocks and blocks of satellite trucks and hundreds of reporters from around the world lining the streets in front of our Court day and night for weeks on end. Although we would see reporters and camera crews when leaving the courthouse at night, fortunately, we were spared from encounters with what appeared from photos to be a circus-like press atmosphere in front of the building each day. Overnight, it seemed, we became household names on national and local TV and talk-show radio.

Another surreal aspect of this time was the number of emails, letters, and phone calls received from people who wanted to give us their opinions or, in essence, tell us how we should rule. Many of these emails were identical except the names of the senders, so it was abundantly clear that some organizations had encouraged their members to send these communications. When we realized that groups were organizing email and letter-writing campaigns, our Judicial Assistants had our Technology Department remove the emails from our computers. The emails and correspondence were sent to the Marshal's Office, which had to screen, evaluate, and investigate some of the threats we received along with the "advice." We were offered police

protection, but to our knowledge, no Justice opted to accept it. Although, police patrolled our homes regularly.

Other aspects of the experience were actually humorous. One of our favorite anecdotes involved the infamous "hanging chads." On the weekend before the first *Bush v. Gore* oral argument, we thought we needed a break from the intense 24/7 preparation. So we went to see a just-released version of *Charlie's Angels* at the movies and, to our consternation, one of the male love interests was named Chad. We couldn't escape! We even had a reporter try to get a picture of us in our second-story offices from his vantage point in a tree.

Because we regularly televised our oral arguments, the atmosphere in the courtroom was not much different, although it was hard to miss the capacity crowd, which included former Secretaries of State James Baker and Warren Christopher sitting in the front row. When we look back on these arguments and the accounts of the arguments as presented in newspapers and magazines, we cannot help but remember that despite the thoughtful and thought-provoking questions, one commentator could only describe us as "two middle-aged ladies."

Nonetheless, we were praised for our preparedness in the oral arguments—the result of the many hours we spent preparing for them. But we also began to realize how ill-informed some of our citizens were about the judicial process, such as the person who complained that obviously the Justices did not know what they were talking about or they wouldn't have had to ask so many questions!

So what lessons can be learned? First is the importance of the judiciary remaining as a neutral decision-maker, even in the face of highly charged political issues. With the stakes of these cases determining the outcome of the presidential election, it is understandable that partisans on both sides would see our opinions and those of the United States Supreme Court as politically motivated. This may sound self-serving, but we are confident our opinions were based solely on the facts and a neutral application of the prior case law in this state. Although we certainly recognize that the United States Supreme Court, by a 5-4 vote, ultimately reversed our decision on the recount, we continue to believe that the central premise of all our decisions in the 2000 presidential election litigation—that every vote should count and be counted—will stand the test of time.

Second, and relatedly, is the lesson that when elections are so close, no court will emerge from election-related litigation without vilification and partisan rancor. As Alexis de Tocqueville put it more than 170 years ago: “There is hardly any political question in the United States that sooner or later does not turn into a judicial question.” Yet maintaining the rule of law is paramount. Despite the contentious nature of the court battles, the election

was decided based on a fight over ballots, not a fight with bullets. Our election and the transition of power was resolved peacefully.

Finally, we came away from *Bush v. Gore* with a fresh understanding of that most democratic principle: every vote counts and must be counted. Our first opinion in the 2000 presidential election litigation emphasized this point: “The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.” That is a lesson more critical today than ever as we head into the 2020 election.

In that vein, the two of us wrote a series of editorials in June, looking back at *Bush v. Gore* and ahead at the upcoming election, that appeared in various news outlets around the state. We share one below from the *Palm Beach Post*. Similar columns appeared in the *Tallahassee Democrat*, the *Florida Times-Union*, the *Orlando Sentinel*, the *Sarasota Herald-Tribune*, the *Tampa Bay Times*, the *Florida Sentinel Bulletin*, the *Northwest Florida Daily News*, the *Miami Herald*, and the *New Journal and Guide* in Norfolk, Virginia. As we did in those publications, we urge everyone reading this article to remember the lessons of *Bush v. Gore* and make sure your voice is heard this November through casting your vote!

Lessons From *Bush v. Gore*: Why Every Vote Counts and Every Vote Must Be Counted

By **Barbara J. Pariente**
& **Peggy A. Quince**

Twenty years ago Palm Beach County was one of the “hot spots” of the country when butterfly ballots and hanging chads became known throughout the world. At the same time, the Florida Supreme Court became the epicenter of the 2000 presidential election between George W. Bush and Al Gore. In November 2000, we were two of the seven Florida Supreme Court justices who decided a series of cases arising from that historic presidential election. In this role, we witnessed firsthand how essential it is to protect the right of all citizens to have their votes counted.

But despite our best efforts at the time, the fact remains that not every vote cast in Florida was counted. When the United States Supreme Court issued its order stopping the recount that the Florida Supreme Court had ordered, only 537 votes out of the 5.9 million votes cast separated the candidates.

As we approach the twentieth anniversary of *Bush v. Gore*, we are reminded of its important lessons that, in our democracy, every vote should count and every vote must be counted. Our court’s first opinion in the *Bush v. Gore* litigation emphasized this point: “The right to vote is the right to participate,” we said, but more than that “it is also the right to speak” and “most importantly the right to be heard.”



Two decades ago we bore witness to the type of electoral legal issues that can occur when the outcome of an election depends on very small margins. In a series of cases we heard and decided over a six-week period, we agreed to requests seeking to extend the time for recounting ballots in three south Florida counties and agreed to order recounts of “undervotes,” or votes that were cast but never counted. We also rejected a request to not count absentee ballots in two Florida counties because of irregularities in how the ballots were procured. Each of these decisions, where we were part of the Florida Supreme Court majority, reflected our view that all legally cast ballots deserved to be counted.

As we reflect on *Bush v. Gore* twenty years later, our elections face a new, unprecedented challenge: how to ensure a free, fair, and safe process for voting in light of ongoing health concerns caused by the coronavirus. Around the country, we have already witnessed significant problems, even during primary voting. Wisconsin, with its long lines and issues with voters obtaining mail ballots, showed how critical it is to protect all eligible voters’ right and ability to cast a vote. More recently, the primary election in Georgia became, by all accounts, Exhibit A for the perils that can occur from voting during the time of coronavirus. These recent elections reinforce the critical importance of keeping focused on ensuring fair and safe procedures for voting in each of our states.

One important step to guaranteeing that every citizen can exercise the right to vote is easy access to vote-by-mail. A majority of Americans favor such access. Here in Florida, all eligible voters have that right, and our own Department of State’s website is an excellent resource for making sure voters know how to request a mail ballot.

Preparing for the election includes, but extends beyond, the officials responsible for administering it. For example, adding additional early voting days or additional early voting sites can reduce the specter of long lines on Election Day, especially if social distancing protocols due to the coronavirus remain in place. But citizens must take advantage of these expanded early voting opportunities and, no matter how they choose to cast a ballot, make sure to vote.

Ensuring that ballots can be accessed and cast without onerous requirements and that citizens are provided notice and an opportunity to fix any potential problems with the signatures on their mail ballots is also key. So too is expanding early voting opportunities, and knowledge of those opportunities, for those citizens who need or want to vote in person. In short, we must remove any non-legitimate impediments to voting, because the right to vote is an earmark of our democracy.

The 2000 presidential election was unprecedented because of the extraordinary closeness of the vote in Florida. But the lessons of that election—that every vote counts and that every vote must be counted—resonate twenty years later. As the United States Supreme Court observed in *Wesberry v. Sanders*, and the Florida Supreme Court has reaffirmed over the years, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.”

In the wake of the tragedy of George Floyd’s death, peaceful protestors around the country, and around the world, remind us that significant change depends on the involvement of citizens demanding it from their government. While the messages conveyed by these peaceful protests are important, we also echo the words of George Floyd’s younger brother, who emphasized that each of us must “stop thinking our voice doesn’t matter.” He urged everyone not only to protest but also to vote at all levels, from local to national.

If we are to avoid a repeat of *Bush v. Gore* in 2020, everyone must do their part. We likewise urge each eligible citizen to register to vote, verify your registration information, find out how to request a vote-by-mail ballot, understand how to properly complete the ballot and how to follow up online to ensure your ballot was accepted and counted, and, if you decide to vote in person, know where to vote.

The outcome of this presidential election, as well as every election both nationally and locally, will depend on each of us. If you do not think your vote matters, remember *Bush v. Gore*!



PHOTO BY RYALS LEE

Justice Major Harding listens closely to oral arguments on December 7, 2000, at the Supreme Court of Florida in Tallahassee, Florida.

FLORIDA LEGAL HISTORY

2000 Election Memories

By **The Honorable Major B. Harding**

Major B. Harding was the 74th Justice to serve on the Supreme Court of Florida. He was appointed to the Court in 1991 and retired from the Court in 2002. Justice Harding served as Chief Justice from July 1998 through June 2000. Today, he is a Shareholder at Ausley McMullen in Tallahassee, Florida.

When it became obvious in the press that Florida courts would become involved in the election of the President of the United States in 2000, one morning as I went to my home mailbox on the street a neighbor passed by and said, “I guess you will get to be the one to determine our next president.” While that was a shock, yes, it was the beginning of a historic election that attracted worldwide attention and in which our Court would play a major role. The media and press began to consume the print and electronic media with news of butterfly ballots, hanging chads, recounts, and the legal challenges that were being filed in numerous courts throughout the state.

As I look back over the years since the election of 2000 and remember what it was like at the Supreme Court of Florida during the Court’s involvement, several specific things come to mind. While the press and the world looked at the Court and its decisions from the outside, I continue to marvel at the work done on the inside by Tom Hall (Clerk of the Court), Craig Waters (Public Information

Officer), Wilson Barnes (Marshal), and all the Court staff to make what happened on the inside go smoothly. As the litigation started in South Florida, Tom Hall and Craig Waters reached out to the trial court clerks and requested that they send any pleadings filed relating to the election to the Clerk’s Office at the Supreme Court. The clerks compiled the pleadings, and they were distributed to the Justices, who were able to get a “heads up” on the issues that might come to the Supreme Court and to begin to do some research.

As the crowds began to gather in front of the Supreme Court building and realizing that entry into the court building by visitors and press seeking copies of the filings in the Clerk’s office would be a security problem, Craig and Tom worked together to provide the public with electronic access to all of the documents filed in the Clerk’s office. (Note: All of the documents and hundreds of pictures from the 2000 election can still be accessed online at the Court’s website at <https://www.floridasupremecourt.org/News-Media/Presidential-Election-2000>.) The number of documents that were processed and copies made were enormous. Tom reported that his office made over 650,000 copies during the time the cases were in the Court, and his office received close to 100,000 emails.

In order to ensure safety and order within the Court building, and realizing that it would be more than his

current staff could handle, Marshal Barnes secured the help of local and state law enforcement agencies to assist with security of the Court during this time. The street in front of the Court was lined with vans topped with large discs channeling news reports all over the world, and hundreds of people gathered daily in front of the Court—some wearing costumes and carrying signs. The contrast of the peace and quiet within the Court compared to what was going on outside the Court was phenomenal.

While the public and press were not permitted inside the Court, it became obvious that some method had to be created to allow the public and press, in limited numbers, safely and in order, into the courtroom for the oral arguments. It also became obvious that, without some limitation, the press camped out in front of the Court would fill the courtroom for the oral arguments. Craig and Marshal Barnes developed a system where only a certain number of members of the press would be able to come into the courtroom. Those who wished to attend put their names in a box and there was a blind drawing to see who would attend. The public lined up outside the Court, and only the predetermined number were permitted to attend. While only a limited number of people could personally be permitted in the courtroom, the oral arguments were viewed around the world on TV. I heard from friends who said they watched the oral arguments in Africa, South America, and the Philippines.

Even though the opinions of the Court were released electronically to the public, Craig Waters would go onto the steps of the Court and announce on a public address speaker the opinion of the Court to those in front of the building.

There were an unbelievable number of phone calls from all over the world to the Clerk's Office and to the Justices' offices. New phone lines had to be installed so the attorneys involved in the cases and the Justices could connect with the Clerk's Office. My Judicial Assistant, Helen West, would listen to the many voice mail phone messages left on my office phone and pass along the calls that were personal. She often laughed and told me that she was not old enough to listen to some of the messages. Although our home address and telephone number were in the phonebook, we were not subject to any threats or calls at home except for two. As I walked in the house after release of our first opinion, the phone rang. I answered, and a man who did not identify himself asked if I was Justice Harding. I indicated that I was, and he said, "Why did you have to vote for that SOB?" and hung up. Another came around 11:30 PM one night after the first opinion was released from a sweet-sounding lady from Tennessee who said she was praying for us, but she certainly did not agree with the decision the Court had made. I could not have personally gotten through this unusual time, as well as I did, without the support of Helen West and my Staff Attorneys, Susan O'Halloran, Michael Ufferman, and Jeff Schumm. I am grateful for their help and encouragement during this difficult time.

We released our initial opinion on November 21, two days before Thanksgiving. My entire family went to Callaway Gardens in Georgia for the holiday. While there watching a bird exhibit I got a phone call from Chief Justice Wells telling me that additional pleadings had been filed and the election cases were not over. We returned to Tallahassee on Sunday. Monday morning, November 26, the Tallahassee Democrat printed an editorial by George Will strongly criticizing the Court's decision. The headline for the article read: Ground control to Major Harding: Don't legislate from the bench. My picture was in a World Magazine article condemning the Court's decision with the words, Consistent Liberal, underneath.

On December 7, we heard oral arguments in the last case. We released the opinion the next day, which was a Friday. On Saturday, the U.S. Supreme Court accepted jurisdiction, set oral argument for Monday, and directed the Court record from our Court be delivered to it on Sunday. Because all next-day delivery services were closed by the time he got this request, Tom Hall arranged the use of a state plane and delivered the record to the Supreme Court on Sunday. A joke went around that Tom was disappointed that the U.S. Supreme Court did not ask for the many boxes of ballots that had been delivered to his office and had been under guard 24 hours a day.

On a personal note, I have many memories of letters I received from friends and acquaintances after the case came to the Supreme Court and after the Court opinions were released. I heard from several people who indicated they were praying for me in this difficult time. After the first decision was released, I received several letters from unknown senders expressing unhappiness with the Court's decision. One was addressed to the Florida Supreme Court (The Seven Dwarfs). One came unsigned from Memphis reading: "You evil, liberal, Godless Democrat. How dare you think you are above the law. You need to stop and think about where you will spend eternity. I pray for you." (I was a registered independent.) Another from Pennsylvania said that I may call myself a judge, but I was "in reality one of seven dungheaps of injustice." He concluded that he prayed that God would banish me to burn in hell! I also received letters from people who were pleased with the way the Florida Supreme Court handled and decided the cases.

As we began our research into the election issues of 2000 I was reminded of courts' involvement in election issues over the years. As in the past and in 2000, the press and the public often sought to characterize rulings of the courts as political ones. In my 34 years of judicial experience, I have known personally, and from many other judges, that judges have had to make decisions they felt the law required when they personally would have liked to have done something differently. Thankfully, we have lived in remarkable peace and order in our country because we have complied with the law, even those judicial decisions we did not agree with. It is my hope that we will continue to comply with the law as interpreted by the courts if the courts are involved in the election of 2020.

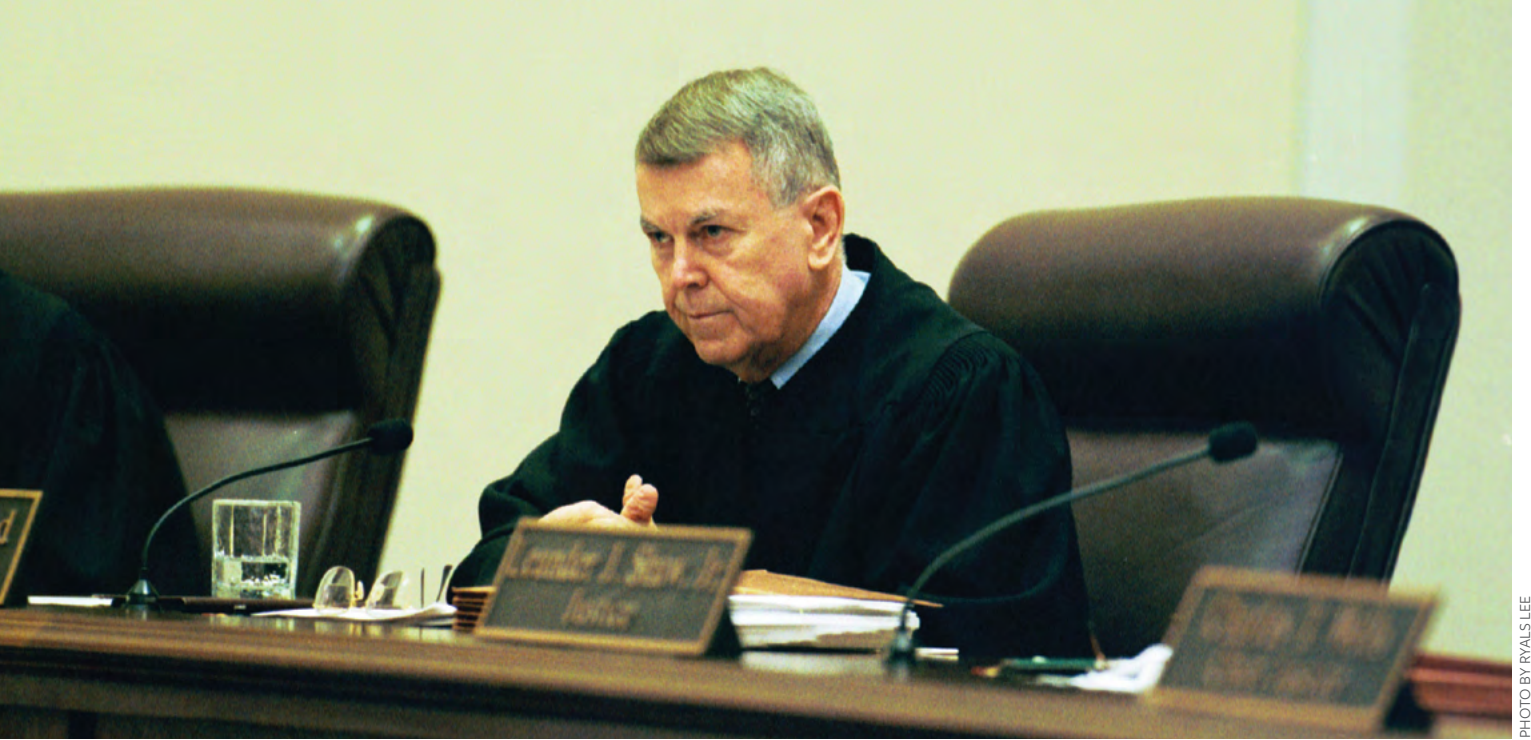


PHOTO BY RYALS LEE

Justice Anstead leans forward as he listens to counsel's presentation during oral arguments on December 7, 2000, in a case related to the 2000 presidential election.

 FLORIDA LEGAL HISTORY

Bush v. Gore Revisited: A Lesson in Civics

By **The Honorable Harry Lee Anstead**

Harry Lee Anstead was the 76th Justice on the Supreme Court. He was appointed to the Court in 1994 and retired in 2009. He served as Florida's 50th Chief Justice from July 1, 2002, to June 30, 2004.

Fattered when asked to do a piece on *Bush v. Gore* 20 years later, I have put on my rose-tinted glasses in hopes of putting a civics gloss on the experience. The state and federal litigation in the case known as “*Bush v. Gore*” captivated the attention of the nation and the world, and the merits of the decisions rendered at both the state and national levels are still subject to debate today. Arguably, however, many of the important civics lessons flowing from those cases were obscured by the attention the media gave to the partisan nature of the contest and the bottom-line outcome. The importance of the example this country sets for the rest of the world in its election

practices, for good or ill, cannot be overstated, especially as we face another presidential election in 2020.

Bush v. Gore

At issue before the Florida Supreme Court in *Bush v. Gore* was the propriety of the recounting of votes across Florida in the contest between the Democratic and Republican nominees for President. The overall vote difference the Florida Secretary of State reported reflected a razor-thin margin in favor of the Republican candidate. The closeness of the vote counts had already triggered automatic recounts in many Florida counties and reflected numerous “under-votes”—instances where voters had seemingly failed to vote at the top of the ticket (for President) while voting for lesser offices.

Florida Voting

Florida's statutory scheme for voting in 2000 vested great discretion in local elections officials as to the method of voting. As a result, there was great variety in the kinds of ballots and voting methods, from simple paper ballots to electronic punch cards. Some form of recounts were virtually automatic in close elections, both at the state and county levels. As it became apparent that Florida's vote would determine the outcome of the national election, the partisan furor rose to record levels as contested recounts and other election challenges reached the Florida Supreme Court. The media focus often fixed on the fact that state election offices were controlled by one political party while local election offices were a mixed bag.

While outwardly the Court appeared at the center of the storm, it was business as usual inside, where the judges could rely not only upon each other but also upon an incredibly talented and experienced staff. The Court was, of course, virtually always the last stop for resolving the most important and critical legal issues facing the state. Indeed, the crisis mode the court would routinely adopt when a Governor would issue a death warrant is but one example of the Court's ability to quickly and confidently respond to a perceived crisis on a critically important issue. So the Court was well prepared to take on the election cases.

Recounts

Recounts are universally recognized not only as a fundamental part of the election process, but as a necessary quality control to legitimize the outcome of a contest, especially where large numbers of votes are cast, but the margin of victory is small. The purpose of a recount is to simply look again at individual ballots in full public view. Florida, like most states, provides for automatic recounts in many cases, and for even closer scrutiny by hand recounts when the margin is extremely thin or other circumstances raise legitimate concerns as to election results. All a recount involves is a second look to be sure of the voter's intent to insure greater confidence in the election outcome.

Instant Replay

An understanding of recounts may be helped by a sports analogy. In the United States, we have had a popular (maybe not?) example of recounts in the use of camera replays of contested actions in popular sports such as tennis and football. There is a general consensus that of play-calling by sports officials has been improved by looking a second time at a close or disputed call. If a first serve in tennis is called one way, but a second look by a camera lens shows otherwise, most would agree the quality of the outcome is enhanced. The analogy also holds true for sports fans and candidate supporters whose first instinct may be to oppose

a replay or recount if their team or candidate benefitted from the original call. Human nature is what it is.

An historical example may also inform us. In ancient Greece, if voting by black and white stones was used, it would be a relatively simple task to dump all of the voting stones from the ballot box and recount the votes cast in full public view. Similarly, when a simple paper ballot is used and the ballots are visually examined a second time, all can see plainly for whom a vote is cast.

Punch Card & Electronic Voting

As noted above, Florida permitted local officials to choose the method of voting. Unfortunately, as it turned out, many chose electronic punch cards where a hole is punched on the ballot card for the chosen candidate and an electronic reader can then quickly process the ballot card. But what if the hole is not punched cleanly through? This may result in a "hanging chad" with paper still attached. How does the electronic reader treat these partial punches? And how does an election official in a recount treat these partial punches? The resulting problem is best illustrated by a petition filed in the Florida Supreme Court by one county claiming that an automatic recount had actually resulted in a smaller vote total than the original count. Which vote total is to be reported as official?

This question and others raised in the recounts were never answered because the U.S. Supreme Court quickly acted to quash the Florida Supreme Court's order for a hand recount and ended all election contests in the Florida courts. Subsequently, having won in Florida, Mr. Bush became President and the rest is history.

Some Civics Lessons

In view of the narrowness of the Florida vote in *Bush v. Gore*, the importance of every vote and the notion that "every vote counts" should constitute the first and most important civics lesson learned from *Bush v. Gore*. Some five hundred votes out of six million cast in Florida ended up making the difference in electing a president. WOW!

Another lesson from *Bush v. Gore* is the need for increased oversight by the legislature in ensuring uniformity in the method of voting across all counties. Ideally, this would not only make voting easy to understand by the voter and the public, but also make recounts simple and easy to accomplish. As noted above, the paper ballot is the current best example, where a vote for John Doe or Mary Moe can be clearly viewed in a recount.

So far as we know one certain positive after the 2000 election was the demise of the punch card and the "hanging chads" identified in the recounts. It is a tribute to the legislature and state and local elections officials that we have not had another *Bush v. Gore*. Keep your fingers crossed.

History of Voting Rights

As we reflect on our civics review, we should note that another, even more important civic event shares this 2020 anniversary: the Constitutional right of women to vote was enacted 100 years ago, in 1920. In our rightful pride of our democratic traditions we should not overlook the history demonstrating that the fight for civil rights, and especially the right to vote, has never been easy. Unlike our other “rights” set out in the Bill of Rights and our Constitution, our founding fathers did not adopt a universal right to vote. Ironically, in our democracy voting has been treated as a privilege, first given to select white male landowners while denied to women, slaves, people of color and others. This struggle for voting rights is epitomized by the history of these same people seeking to gain equal rights in America, including voting rights, a struggle that continues today.

Florida After *Bush v. Gore*

More good news on the civics front has been the positive actions by Florida voters after *Bush v. Gore* to improve our democracy and the election process in Florida. Unfortunately, one common practice around the country has been the abuse by state legislatures in redrawing political district lines every ten years after a census. In Florida and elsewhere the majority party in control of the legislature has regularly used its authority to redraw political districts by blatantly doing so in a partisan manner to keep that majority party in power. This process is often called “gerrymandering.”

To their credit Florida voters have now voted to end this partisan practice by passing a constitutional amendment setting non-partisan standards for drawing district lines. Incredibly, after this vote, the Florida legislature chose to ignore these now constitutional standards and continued to draw district lines on a partisan basis. However, in a

court challenge to the legislature’s action, a courageous trial judge invalidated this attempted legislative end run. Thereafter, the Florida Supreme Court approved the trial court’s actions. Hence, Florida’s constitutional mandate for objective, reasonable and non-partisan standards for drawing district lines now has teeth. That is a major win for democracy and a significant civic accomplishment for the State of Florida.

There is yet more good news on the civics front from Florida voters. In the face of decades of the state’s executive branch refusal to restore ex-felons the right to vote, Florida voters overwhelmingly passed a constitutional amendment automatically restoring voting rights after a felon’s service of a sentence. This is consistent with the practice in most other states.

But, once again the Florida legislature interceded, claiming the constitutional amendment requires all court costs first be paid by the released felon before voting rights are restored. These costs historically have been assessed routinely without opposition in the face of a reality that they would never be paid because of the extreme and obvious poverty of the felon involved. A federal trial judge rejected the legislature’s claim that the costs must be paid by impoverished felons and characterized the statute as a modern day “poll tax.” Subsequently, after a three-judge panel approved the ruling, the Eleventh Circuit, in a divided *en banc* decision, reversed the trial court. So on this twentieth anniversary of *Bush v. Gore*, it looks like another important voting case from Florida is headed to the U.S. Supreme Court.

Despite these historic civic actions by Florida voters through constitutional amendment, the Florida legislature, in 2020, passed legislation further restricting the ability of our citizens to amend Florida’s constitution by ballot initiative. The struggle continues.

Conclusion

Bush v. Gore was a watershed moment in election law, and, to their credit, Florida voters have subsequently shown a strong preference for expanding the right to vote and for limiting partisan manipulation of our democratic system of government. Those actions should be applauded. More importantly, as we face another presidential election in 2020, we must honor our primary and foremost responsibility in a democracy and vote. While election officials with mail-in ballots and early voting have made our job easy, we are the only ones who can close the deal.

Ultimately, we all must be part of the continuous struggle to see that “a government of the people, by the people, and for the people shall not perish . . .” Abraham Lincoln’s words have been given renewed meaning by each generation as the right to vote has been fought for and gradually expanded. We cannot let our guard down if the democracy Lincoln dreamed of is to be realized.



Crowds gather outside the historical Capitol building in downtown Tallahassee, Florida, just across the street from the Supreme Court of Florida.



Historical Society Trustees, Tom Hall (left) and Robert Craig Waters (right) were intricately involved in the 2000 election litigation serving as the Clerk of the Court and Public Information Officer, respectively. On the left, Tom is pictured in his office on the phone. The volume of phone calls the Court received increased dramatically during the *Bush v. Gore* litigation. On the right, Craig is pictured meeting with members of the media, as he did multiple times a day during the 2000 election litigation because the Public Information Office did not have social media platforms to quickly distribute news and information.

FLORIDA LEGAL HISTORY

How *Bush v. Gore* Changed Courts Across the World

By **Robert Craig Waters & Thomas D. Hall**

Robert Craig Waters is the Director of the Public Information Office of the Florida Supreme Court. Mr. Waters was the official spokesperson for the Florida Supreme Court during Bush v. Gore and remains the head of the Public Information Office today.

Thomas D. Hall served as Clerk of the Florida Supreme Court from 2000 to 2013. Mr. Hall managed Clerk's Office operations during Bush v. Gore, including scheduling, transmission of records, tracking cases likely to come before the court involving the election, and courtroom logistics. Mr. Hall is now in private practice with Bishop & Mills, practicing exclusively appellate law in all six of Florida's appellate courts.

From the perspective of 20 years later, one of the most striking aspects of the *Bush v. Gore* cases is that they marked a major historical shift in how courts in the United States and around the world operate and, in particular, deal with the public. This shift was rooted in rapid advances in technology in the 1990s and the acceptance of the Internet as a means of transacting business and accomplishing communication. *Bush v. Gore* served as the main catalyst that brought these changes to the fore in a sudden, dramatic manner. In particular, five major factors dramatically affected Florida's 36-day election dispute in the fall of 2000 and ultimately forever changed courts.

After *Bush v. Gore*, the changes the Florida Supreme Court implemented or expanded during *Bush v. Gore* would become standard operating procedures for most courts. They would have major implications for the way courts around the world would operate. But before *Bush v. Gore*, they were often viewed as impossible, impracticable, inappropriate, or as mere frills

or wish-list items for a far more distant future. Together, they constitute one of the great shifts in daily court operations in the last half century. And they were created by the confluence of two factors: an historic legal dispute over the American presidency and technological changes that had begun less than a decade earlier, most especially the advent of the World-Wide Web.

First and foremost, these changes occurred because the Florida Supreme Court was a court that was more than willing to embrace technology and take advantage of all it had to offer, a court that was willing to innovate and not just do things as they had always been done, and a court that deeply believed in transparency. That mindset, which had already led to the groundbreaking innovation of cameras in courtrooms created an atmosphere that allowed the other innovations to happen; in fact, it drove those innovations. The five major changes to court operations were: (1) courts creating professional Public Information Offices to oversee communications with the public on a daily basis, (2) courts routinely using websites and the Internet as direct communications tools with the public, (3) courts accepting case filings electronically using web-based connections, (4) courts processing the cases electronically including internal circulation and voting on opinions, and (5) courts broadcasting their own proceedings live, in real time, on a global basis using the Internet as well as more traditional media.

1. COURT PIOs

Although the Florida Supreme Court named its first one in 1996 under then-Chief Justice Gerald Kogan, court Public Information Officers (PIOs) were relatively rare before 2000.

Bush v. Gore changed all of that. It marked the first time that

court PIOs became a primary focus of news coverage caused by intense worldwide demand for information about court proceedings. This happened in part because the 24/7 news cycle that, at the time, was evolving from its origins in television news toward a much broader and more pervasive web-based phenomenon.

As a result, Florida's approach to public communications in *Bush v. Gore* changed the way courts viewed the proper role of a court PIO. Before 2000, the consensus among courts employing PIOs was that they should be used as seldom-seen facilitators who fielded routine press questions behind the scenes but obscured their own identities. Under this model, if anyone appeared on television or was quoted in a newspaper, it was one of the judges at the court, or maybe the Clerk, not the PIO. The PIO simply laid the groundwork and nothing more.

Moreover, the intense press scrutiny in *Bush v. Gore* occurred while the Florida Supreme Court Justices and their staffs were confronting some of the most time-sensitive and difficult cases in the Court's 155-year history. Responding to the press became more than a full-time job by itself. It would have been an impossible burden to expect judges and their judicial staff or the Clerk to manage press relations without help from a professional PIO.

It is not surprising in retrospect—although some judges thought differently at the time—that having a full-time PIO who was fully attentive to the informational needs of the press and the public paid dividends. Despite controversy over its rulings, the Florida Supreme Court was widely praised for its commitment to openness and transparency in a matter of urgent importance to millions of people around the globe. This was especially true with the public announcements of court decisions on live television from the front steps of the Florida Supreme Court Building. These live announcements created an appearance of order at the Court and of sincere responsiveness to public demand for timely information about history-changing decisions. Most critically, it allowed the Court, through its PIO, to make clear what the Court's decision was. It was not left to the press to guess.

By contrast, the U.S. Supreme Court adhered more closely to the traditional model in its own handling of press relations. It eschewed public announcements like those made by its Florida counterpart. As a result, the nation's highest Court was widely criticized for its lack of openness and transparency at a critical point in world history.

The issue of court communications with the public only intensified in the years ahead. After seeing what happened in *Bush v. Gore*, many courts realized they were totally unprepared if a major legal dispute came their way, brought by the kind of worldwide scrutiny the Florida Supreme Court had successfully faced. At that point in time, few people had anticipated the full scope of changes brought by the invention of the Internet. So, judges and court managers around the world scrambled to prepare for the future, taking lessons from Florida's use of technology and transparency.

The lesson of *Bush v. Gore* was that real transparency achieved through technological means *controlled by the courts themselves* was emerging as the new norm in the Twenty-First Century.

Other more traditional views of court decorum could create a harmful image of secrecy, mistrust, and disorder. Judges certainly should not be involved in press and public relations. But it still was wise for them to employ professional PIOs who could so do.

The model of a professional PIO, rather than judges, serving as the public face of a court in moments of high controversy has become the predominant one in the Twenty-First Century. Courts now recognize the inherent appearance of a conflict of interest if judges attempt to handle public communications themselves under such intense public scrutiny.

2. COURT WEBSITES

It is hard to remember today that in 2000, court websites still were a new phenomenon. Many courts, including the U.S. Supreme Court, lacked websites at that time. However, the Florida Supreme Court had one of the oldest court websites in the world, dating back six years to its first collection of just 16 webpages.

The Florida Supreme Court began posting opinions and filings in high-profile cases on its website two years later in 1996 as one of the first projects of the newly created Public Information Office. This use of a website to distribute free copies of official documents was an unheard-of novelty at the time. Although other courts were exploring the idea, most others planned to charge a fee to access their documents. At first, Florida was unusual in providing documents at no cost and without need of registration. This "public domain" approach to online court documents was a minority view at the time.

The stage was set for 2000. The Florida Supreme Court website would be used to distribute court filings and opinions. The particular webpage for election filings, is still located on the Florida Supreme Court website today. The 2000 presidential election website was online and available to the public by the Friday after the election, November 10, 2000, in time for filings coming to the Florida Supreme Court in the cases later known to history as *Bush v. Gore*. Sixteen election cases were decided by the Court during the *Bush v. Gore* period.

Today, obtaining documents off a court's website is so routine we think of it as part of the landscape. But the single historical event that marked the transition into this era of web-based self-service was *Bush v. Gore*. Staff at the Florida Supreme Court even noted a drop in the number of reporters gathering outside the courthouse as the election controversy approached its conclusion. Once the election controversy was finished, the Court itself soon stopped issuing any paper copies of opinions, relying entirely on web distribution instead. Today, of course, it is entirely possible for a reporter to cover a major lawsuit or appeal from start to finish without ever stepping inside the courthouse doors.

3. COURT EFILING

At the time of *Bush v. Gore*, electronic filing still was a far-away dream. The idea had been discussed since the first successful placement of court documents online, which began at the Florida Supreme Court with "high profile" cases starting in the 1990s. But there were many problems, including high cost.

Issues that continued to stall development of eFiling for many more years included authentication of filings, enforcement of procedural rules within a digital environment, and problems of public access to official documents that often contained private information made confidential by law. These problems would delay the launch of Florida's eFiling efforts another decade.

But *Bush v. Gore* brought an unexpected foretaste. As the controversy progressed, it quickly became apparent that there were a number of cases pending in the trial courts that involved presidential election matters. Then-Chief Justice Charles Wells, using a model developed in death penalty cases, asked the Clerk's office to start tracking those lower court cases, including getting copies of the filings in the trial court at the same time they were filed there so that the Court could have an idea of what was going on below and, more importantly, understand what might be coming to the Court. It also created a "pre-record" legal staff at the Court that could review in advance of the actual record reaching the Court so the Justices and staff could be prepared to act on cases under the incredible time-restraints that were becoming common place in the election cases.

The Supreme Court Clerk's office contacted the trial court clerks across the state and asked that, as pleadings in any election case pending in their court were filed, the local clerk fax copies to the Supreme Court Clerk's office. But it quickly became apparent that would not work. Fax technology, even in 2000, was outdated. The Clerk's office realized that email was the only way, at that time, to get electronic copies quickly and reliably. Email was in use at that time, but not for court filings. The Clerk's office asked technical staff at the Court to create an email address specifically for receiving such filings. The Clerk's office asked the trial court clerks to start sending all the trial court filings to that email address rather than use the fax machine. It worked.

Then increasingly, even after the election, the Clerk's Office asked attorneys to send their documents in PDF as soon as possible to that email account set up for that purpose, with courtesy copies to all attorneys and parties involved. This let the Justices begin to review arguments before paper copies could be officially stamped and placed into the Clerk's filing system. PDF documents created by the attorneys themselves also made it much easier to place the documents quickly online for access by the public worldwide. That email address stills exists and is used by the Supreme Court as a backup for filing in emergency situations, if Florida's E-Filing Portal stops operating.

This temporary system during *Bush v. Gore* was simple. It made no effort to address the many remaining problems involved in the final move toward a full eFiling system. But it worked in this specific context. In the rarefied environment of a dispute over a presidential election, the many remaining problems associated with eFiling, such as privacy in confidential data, were nonexistent or readily avoidable. Those problems have now been largely resolved and what was foreshadowed in 2000 became reality in 2013 when a cooperative agreement was reached between Florida's clerks of court and the Court and Florida's E-Filing Portal was launched.

4. FULLY ELECTRONIC CASE PROCESSING

In 2000 it was certainly not uncommon for courts to have electronic case management systems (CMS). But, at that point, CMS were largely limited to docketing. Few courts had the documents themselves in an electronic format and few, if any, used their CMS to actually process their cases, meaning (at the appellate level at least) assign the case, allow for reading of briefs and law clerk summaries on the computer, circulate draft opinions, and even vote electronically. In other words, court files and paper still moved around the Court. But with a fully electronic system, everything related to processing of a case from the filing of the notice of appeal to release of an opinion could take place electronically.

In 2000, the Florida Supreme Court was in the midst of rolling out such a complete electronic system called Evote that the Court would use internally. Evote was designed to eliminate paper from the internal court system. An opinion could be drafted and circulated to the other justices for comment, suggestions, and even voting—all on the computer. There was no need for paper at all. Once voting was complete, the opinion was processed by the clerk's office, reviewed by the Reporter of Decisions, and then released to the public electronically.

It seems almost silly now to say that is how to process a case because today that is how almost every court operates, but not in 2000. Even at the Florida Supreme Court where the Evote system was in place in 2000, the Court for the most part still circulated paper court files from the Clerk's office to the Justices' offices and back.

In total, the Court processed and disposed of 16 election-related cases during those 36 days. It might not have been possible, certainly not possible for it to have gone so smoothly, had the Court not had all the technology already in place. Learn and adapt became a motto, certainly in the Clerk's office, but for the entire Court as well. Twice-a-day meetings between the Chief Justice, the Clerk, the PIO, and the Marshal allowed the Court to continue to adapt as necessary, to handle not only the *Bush v. Gore* cases but all the Court's other workload as well.

5. COURT BROADCASTS

The one area in which the Florida Supreme Court especially stood out in 2000 was its ability to make a broadcast-quality feed of all its arguments in *Bush v. Gore* available on a global basis. In this sense, the happenstance of the election dispute occurring in Florida was fortuitous. By 2000, the Florida Supreme Court already had three years' experience broadcasting gavel-to-gavel coverage of its oral arguments by three methods: (a) a feed distributed on Florida's state-operated cable news network, The Florida Channel; (b) a direct link to a state-owned satellite transponder available for downlink anywhere in North America; and (c) a web-based livestream from a video web portal called Florida Gavel to Gavel. Redundancy was built into the system to ensure broadcasts could be delivered under almost any circumstances, including during a crisis.

Livestreaming of *any* video and audio feed at the time was considered exotic technology, but even more so for court arguments. The practice even produced some controversy. Most people still had Internet connections that lacked enough



Tom Hall - Clerk of the Court (left), Gary Robinson - Library Staff (middle), and Craig Waters - Public Information Officer (right) stand with a TV displaying the Court's website where those interested could access documents related to the election litigation online.

bandwidth to make livestreaming workable on their own personal or office computers. Livestreaming, in other words, still had an elitist quality because it was not yet widely available to people of more modest means—although that situation would change in just a few years.

Even with this limitation, the Florida Supreme Court's redundant approach to its broadcasts still worked in a way that surprised even the big corporate television news networks in New York. Florida's satellite feed was more than adequate to fill their needs along with the needs of any foreign television networks with the ability to downlink a satellite transponder feed in any North American city. And that included every major and minor international network because all of them had access to downlink facilities in places like New York, Atlanta, and Miami.

When many news networks representatives first arrived in Tallahassee at the start of the presidential election dispute in November 2000, their first act was to file legal demand letters with the Florida Supreme Court for placement of their own cameras inside the courtrooms. This would have been a cumbersome arrangement fraught with security problems. It would have meant cables running down court stairwells and out doorways to the large fleet of satellite trucks that soon arrived in Tallahassee and surrounded the capitol complex.

These networks were stunned to learn that the Court already had four robotic, broadcast-quality cameras installed in the courtroom that could feed video and audio wirelessly to their corporate home offices in other cities by satellite. No other court had anything like it. Some of these representatives were so shocked they refused to believe such a system could work. They insisted upon meetings with FSU technicians and test runs to assuage their worries. But at broadcast time, the satellite relay directly from the Florida Supreme Court worked without any problems.

Two separate oral arguments were heard in the *Bush v. Gore* cases in the fall of 2000, on November 20 and December 7. Both were broadcast to a worldwide audience live, unedited, and from start to finish. No changes of any kind were needed to make these broadcasts possible because everything needed already was in place. It was the Court's system that was used, not the systems of the broadcast networks.

6. CONCLUSIONS

This impression of a fair and open process helped counter an opposing narrative put forward by some of the political operatives involved in *Bush v. Gore*. They clearly hoped to create a public-relations impression that the Florida Supreme Court was a rogue tribunal aiming to resolve the presidential election according to its own preferences. The apparent objective of this public-relations effort was to lay part of the groundwork for a claim in the U.S. Supreme Court that it must step in and reverse its Florida counterpart in order to set things "straight."

On one side, there was the view that the way to remedy the problem was by hand-counting ballots to discern voter intent after the voting technology had failed. This was a view that most clearly corresponded with a longstanding series of Florida election cases going back more than a century making the "intent of the voter" the preeminent legal concern for a Florida court. In that sense, it was not surprising that the Florida Supreme Court adhered to its own precedent. At the very least, transparency in oral arguments and court filings helped show the public that this was so, as the Court's Justices repeatedly called attention to Florida precedent that predates *Bush v. Gore* by many decades.

On the other side, there was the view that Florida should only get one bite at the apple. Election day was November 7, 2000, and any serious errors that occurred on that day were regrettable but not subject to further remedy, under this view. It was an argument for finality. And it elevated finality to a position more important than voter intent. Florida had chosen faulty election procedures, in other words, and its voters would pay the price. There was precedent supporting this view, too, along with the constitutional equal protection arguments the U.S. Supreme Court ultimately marshalled when it adhered forcefully to the principle of finality and reversed the Florida Supreme Court.

There are clear lessons here for courts in the future. Transparency helped the Florida Supreme Court establish its own good faith for the history books. And transparency was achieved through the technology the Court employed. Without this technology, the public relations campaign launched to attack the Florida Supreme Court's rulings might have gone unanswered. It is no coincidence that these same technological innovations now have become standard operating procedures for courts throughout the nation. This use of technology is good for public understanding and thus tends to promote public trust and confidence in the courts.

The bottom line of *Bush v. Gore* though is that Florida was prepared because the mindset in Florida was to embrace technology and use it. Florida was not afraid to innovate including the use of a full-time PIO, broadcast quality cameras in the courtroom and technology in place that allowed receipt of electronic documents and then the ability to process those electronic documents efficiently and effectively. Courts around the world now do the same, in large part because of what they saw at the Florida Supreme Court during *Bush v. Gore*.

The above is an excerpt of the full article, which is available online at www.flcourthistory.org/Historical-Review/Extended-Articles.

Bush v. Gore: The Too-Close-To-Call Election

By **Herman Russomanno**

Herman J. Russomanno is the President and Managing Partner at Russomanno & Borrello, P.A. in Miami, Florida. He served as President of The Florida Bar in 2000 during the Bush v. Gore contested election. He is also a past President of the Florida Supreme Court Historical Society and several other legal and civic organizations.

November 2000 marks the 20th Anniversary of *Bush v. Gore*. Earlier in the year I was sworn in as President of The Florida Bar by then-Chief Justice Major B. Harding. And on June 29, with the Passing of the Gavel, I served under Chief Justice Charles T. Wells. Before the November election, The Florida Bar was facing the greatest threats to the independence of the legal profession. After *Bush v. Gore*, the threats intensified. I vividly recall the Speaker of the House, for the first time in memory, clearly indicated that he was going to push at the top of his agenda what he referred to as “judicial reform.” The Florida Bar would oppose any legislation or proposals that would diminish or take away the Supreme Court oversight of the legal profession, including supervising Bar operations. Justice was indeed under fire.

The Florida Bar sounded the alarm for lawyers to vigorously defend the independence of the judiciary, especially at a time when two political action groups had launched campaigns to oust Florida Supreme Court justices they viewed as “liberal” during the contested presidential election. The overwhelming national trauma flowing from the 2000 presidential election had massively accelerated attacks on our judiciary.

We were entering some of the most crucial months in our judicial history. We had to protect our constitutional heritage. Our message was loud and clear: *The rhetoric must stop. Trashing constitutional principles must stop. This was a time for healing and not attacking judicial independence.* Fortunately, we defeated this draconian legislation.

After the November election, it became obvious that this would be a pivotal moment in our history involving our trial court, the Florida Supreme Court, and ultimately the United States Supreme Court. This would be high stakes litigation with lawyers from throughout the United States calling for eleventh-

hour strategies on behalf of Vice President Gore and Texas Governor Bush.

During November and December 2000, the Florida Supreme Court was elevated to the forefront. The world’s spotlight was shining on our Supreme Court. Every action taken, every decision rendered was examined under a microscope. Reporters and crowds gathered around the Supreme Court. On November 20 and 21, when the court held oral arguments on the emergency appeal on whether or when ballots should be recounted, and then issued its opinion, several hundred protestors waved signs outside the Supreme Court building. I recall Craig Waters, the Supreme Court Public Information Officer, did an outstanding job in briefing the press who were

hungry for news. Craig described his work as a “surreal experience.” He found himself vaulted to international fame as the post-election vote counting between *Bush v. Gore* engulfed the court’s November 21 opinion.

As Bar President working with the Supreme Court on other matters, I recall Court Marshal William Barnes stating that local police were hired in addition to the Court’s 13 full-time security officers to provide everything from crowd control to helping guard the justices themselves. The protestors, extra security, and lined-up TV trucks made it hard to recall that just a few years before, justices talked about being so anonymous they could walk unnoticed as a group across the street to have lunch in the Capitol cafeteria.

On a lighter note, there were some moments that were memorable. Right before the Court issued its November opinion, I recall walking to the Supreme Court with several newly elected Board of Governors. As we approached the Supreme Court, members of the press kept asking if we were privy to any decision to be made by the Court. Of course the answer was no. But the press—always questioning any comment—kept pressing. Finally, I told them that I had scheduled with Chief Justice Wells a date when the entire Court would meet as part of the new lawyer Board of Governors orientation. They questioned my statement. We did meet that day with the Court and had a wonderful luncheon orientation. Our meeting had nothing to do with *Bush v. Gore*.



Other Business Must Go On, Including Two Death Warrants

By **Melanie Kalmanson**

After graduating from the FSU College of Law in 2016, Melanie Kalmanson clerked for Justice Barbara J. Pariente until Justice Pariente's mandatory retirement in January 2019. After her clerkship, Melanie joined the Litigation Practice at Akerman LLP, where she represents business and individual clients in all phases of litigation in state and federal court, including appeals.

While the litigation involving the 2000 Presidential election was all-consuming, the Court's other responsibilities did not disappear or even slow down during those busy 36 days. Rather, in addition to handling the influx of cases caused by the election, the Court had to maintain its other operations.

When the storm of election-related cases started, it was oral argument week and the Court had a full schedule of arguments ahead—which, alone, required hours of preparation. It also required the Court to be on the bench hearing those cases every morning of that week. Of course, the Court also conferenced and decided other cases that were not heard at oral argument.

But if adding the *Bush v. Gore* cases to the Court's usual caseload was not enough, on November 14, Governor Jeb Bush signed two death warrants scheduling back-to-back executions for December 7 and December 8. The warrants scheduled the execution of Edward Castro for December 7 and the execution of Robert D. Glock for December 8. When a death warrant is signed, as retired Justice Quince recently said, “[t]here’s always last-minute litigation . . .” Defendants often raise last-minute claims regarding the constitutionality of the defendant’s sentence, death warrant, and/or scheduled execution. Those pleadings require thorough review by the

Court under incredible time pressure even under normal conditions.

While Castro had waived his right to raise any additional claims, Glock filed such a last-minute petition after his warrant was signed. The Court scheduled oral argument in Glock’s case for November 30 but later removed the oral argument from the calendar. On December 7—the same day the Court held its second oral argument on cases related to the Presidential election—the Court granted Glock a stay of execution.

Later that night around 6:00 p.m., Castro was executed—meaning that at least one Justice and the Clerk of Court were working on the execution that night because, during each execution, the Chief Justice (or the Chief’s designee) and the Clerk must be on the phone with the Governor’s office in case the Court is needed for something. Glock was ultimately executed on January 11, 2001.

When thinking about the monumental amount of work the Supreme Court of Florida completed throughout those 36 days in the winter of 2000, it is easy to lose sight of the fact that *Bush v. Gore* was just part of the Court’s duties during that time. Of course, the intricacies of the 2000 election are the most historically significant part of the story, but it is important to remember that the Justices also had to diligently maintain all Court operations—some of which were matters of life and death.

For ease of publication and reading, footnotes have been removed from this article. The full version, with footnotes, may be viewed on the Historical Society’s website at www.flcourthistory.org/Historical-Review/Extended-Articles



In Memoriam
THE HONORABLE
Leander J. Shaw, Jr.
1930 - 2015

The 70th Justice to serve on the Supreme Court of Florida, Justice Shaw became the State's first Black Chief Justice in 1990. He served as Chief Justice from 1990 to 1992 and retired from the Court in 2003. Justice Shaw was a member of the Court throughout *Bush v. Gore*. His concurring opinion in *Gore v. Harris*, which was issued on remand from the U.S. Supreme Court in the *Bush v. Gore* case on December 12, 2000, summarized the issues the Court and nation had faced in the three preceding months:

This case has torn the nation and the judiciary. It is quintessentially divisive and confounding. The problem, I believe, lies not in the partisan nature of the issues but rather in the deeply rooted, and conflicting, legal principles that are involved.

....

Our nation has been through an ordeal, but we have learned from the experience. At this point, I know one thing for certain: The basic principles of our democracy are intact.

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A Supreme Evening 2021

Join the Florida Supreme Court Justices, along with your friends and colleagues, for *A Supreme Evening*, as we continue our proud tradition of hosting the Florida Supreme Court Historical Society's annual fundraising and friend-raising event. This year Florida's premier judicial event will be virtual on **Thursday, January 28, 2021**, as a live broadcast experience and available statewide on multiple online platforms.

The Historical Society will announce this year's keynote speaker and additional guest presenters soon. Visit our website for updates and plan to attend and support the Historical Society as we continue to pursue our mission to preserve and honor the Florida Supreme Court's important history.

Additional information including registration and sponsorship opportunities at FLCourtHistory.org/SupremeEvening2021



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A MOMENT IN TIME



THE PHOTOGRAPHER'S PERCH

Around 4:00 p.m. on December 8, 2000, photojournalist Mark Foley photographed the crowds in front of the Florida Supreme Court from a “cherry-picker” lift that was raised in front of the Florida Capitol. One of the photos he took from the lift is featured on the cover of the magazine.

The Florida Supreme Court Historical Society is thankful for a recent donation of Mark Foley’s work, which helps to preserve the history of Florida’s judiciary, including the events that unfolded surrounding the 2000 Election.

“As I reflect back these 20 years, the eyes of the nation were on our state Capital.

It was my unforgettable privilege to be a part of the photography team that produced numerous images of events leading up to, and including, our Florida Supreme Court’s historic decision.”

MARK FOLEY