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# Bush and Gore in Florida: The U.S. Supreme Court Got It Right

by James Dueholm

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At daybreak on November 8, 2000, George W. Bush led Al Gore in Florida by 1,784 votes out of nearly 6 million cast, with all but the overseas ballots counted. Each candidate needed Florida's 25 electoral votes to become president. With the presidency in the balance, the Florida margin precipitated thirty-six days of contest, contention, and indecision that consumed the media, roiled the public, roused the passions and the fury of the partisans, and bore the wait of the world. It is a story that will be told and retold, vying for historical place with the contested elections of 1800, 1824, and 1876. I propose to explore the legal issues involved.

## **Background: Counters and Courts**

Florida law requires a machine recount if the winning margin is less than one half of 1 percent. The statewide, county-by-county recount began on November 8 and proceeded slowly, with the news media snaring viewers and creating suspense by reporting dribbled-in results that showed Gore gaining on Bush. At the end on November 10, the Bush lead had narrowed to little more than 300 votes. Gore asked for a manual recount in Volusia, Palm Beach, Broward, and Miami-Dade Counties, each of which had gone heavily for Gore on Election Day.

Following a partial manual recount mandated by statute, the Palm Beach County canvassing board asked Katherine Harris, the Republican secretary of state who had been active in the Bush campaign, whether it could conduct a manual recount of all votes. She said no. The Democratic attorney general, who chaired Gore's Florida campaign, disagreed. The canvassing boards in the four counties, all controlled by Democrats, elected to proceed with manual recounts.

Their recounts examined so-called "undervotes." All four counties employ punch card ballots in which the voter uses a stylus to detach a perforated rectangle or "chad" opposite a candidate's name. Machines tabulate the votes by detecting light passing through the hole created by the stylus. If a ballot registers no vote for an office, it is an undervote for that office. The majority of the undervotes are on ballots on which there is no detachment of or indentation on any chad for the office. Some of the non-counted ballots, however, contain partially detached, or "hanging," chads, and some contain wholly attached "dimpled" chads, which are indented in some manner. All four canvassing boards examined hanging and dimpled chads to determine whether they should be counted as votes.

The Florida statutes state that the county canvassing boards "must" certify their returns to the secretary of state no later than November 14 (seven days after the election), but then provide that the secretary "may" ignore late-filed returns. It takes time to count

dimpled chads, and the seven-day deadline loomed with the recounts far from complete. Harris said she would not accept late-filed returns. Gore applied to Judge Terry Lewis in Leon County for an order compelling Harris to accept late returns. Lewis held that the returns had to be filed by November 14, but that Harris had to justify any refusal to accept amended returns filed after November 14.

Harris ordered the canvassing boards to explain why they needed more time. After receiving their explanations, she again refused to accept returns filed after November 14, and Judge Lewis upheld her decision. Volusia County completed its recount by November 14. The other three counties did not, and they submitted returns based upon the machine recount on November 14, and then continued their manual recounts.

Gore appealed Lewis's decision to the Supreme Court of Florida (SCOFLA). (I credit Ann Coulter for this fetching and fitting acronym.) In an opinion delivered November 21 (SCOFLA I), SCOFLA reversed Lewis and ordered Harris to accept recount returns filed by 5 p.m. Sunday, November 26. Despite the discretion seemingly conferred on Harris by the provision that she "may" accept late-filed returns, SCOFLA held that she was required by law to accept late-filed returns. Bush asked the United States Supreme Court (US Supreme) to review SCOFLA I. On November 24, US Supreme agreed to hear the appeal.

In the meantime, the recounts continued, kind of. Broward County

completed its recount before November 26. Palm Beach County completed its recount, but missed the SCOFLA I deadline by several hours. Miami-Dade County counted part of the day on November 22, the day after SCOFLA I was issued, but then stopped counting, stating that it could not complete the count by the SCOFLA I deadline.

In the late evening of November 26, the Florida Canvassing Commission certified Bush the winner by 537 votes, which included the overseas ballots. The commission accepted the Broward recount but rejected the Palm Beach recount and refused to include the votes counted in Miami-Dade's partial recount.

On November 27, Gore brought a "contest" action in the Leon County trial court challenging the certification on the grounds, among others, that the certified vote count did not include the results of the full Palm Beach or partial Miami-Dade recounts or a review of the undervotes in Miami-Dade that had not been counted manually. The case was assigned to Judge N. Sanders Sauls, who took testimony on December 2 and 3 and ruled from the bench on December 4, denying all relief requested by Gore. Gore appealed to SCOFLA even as Judge Sauls was announcing his decision.

On the same day that Judge Sauls rendered his decision, US Supreme delivered its opinion (US Supreme I) in the appeal from SCOFLA I. In a brief, unanimous opinion, the Court said that it could not tell from SCOFLA I whether SCOFLA had considered the effect of Article II, Sec-

tion 1 of the U.S. Constitution, which provides that presidential electors shall be appointed in such manner as the state legislatures may direct, and 3 United States Code Section 5, which deprives presidential electors of "safe harbor" protection from congressional challenge unless the electors are appointed by laws enacted before Election Day. It seemed possible, the Court suggested, that SCOFLA had not followed statutory law in effect on Election Day, thereby violating the federal constitution and jeopardizing the Florida electors' safe harbor status. The Court vacated SCOFLA I and sent the case back to SCOFLA.

On December 7 SCOFLA heard the appeal from Judge Sauls's decision, and on December 8 it delivered a 4-3 opinion (SCOFLA II) that largely reversed Sauls. It held that the Gore vote totals in the Palm Beach and Miami-Dade recounts had to be included in Gore's column, and it ordered an immediate manual count of all undervotes in the state that had not been manually counted, with the count to be conducted by public officials. It did not set any specific standards by which the dimpled chads were to be counted. Bush immediately asked US Supreme to review SCOFLA II and to stay any further counting until US Supreme had heard and decided the case.

Upon receipt of SCOFLA II, Judge Sauls recused himself and was immediately replaced by Judge Lewis, who ordered a statewide recount of undervotes to begin immediately and to be completed by late afternoon on December 10. The recount began the

morning of December 9. That afternoon, US Supreme stayed all further counting, agreed to review SCOFLA II, and set a hearing for December 11.

US Supreme heard the case on December 11 and delivered its opinions late in the evening of December 12. There were six opinions. A majority of the Court (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) held that SCOFLA's standardless recount violated the Fourteenth Amendment's equal protection clause because voters in different counties would be subject to different standards, and it concluded that there was no time for further counting because the December 12 deadline for resolving election disputes under the safe harbor statute was "upon us." Three justices (Rehnquist, Scalia, and Thomas) joined the majority opinion and delivered a concurring opinion in which they said they would reverse SCOFLA II on a number of other grounds. Souter and Breyer agreed that a standardless recount would violate the equal protection clause, but they said that the real deadline was December 18, when the electors were scheduled to vote, rather than December 12, and then suggested there was time before December 18 to develop a standard and count the votes. Two justices (Stevens and Ginsburg) would have affirmed SCOFLA II.

US Supreme II ended the election contest. After sleeping on the decision, Gore conceded at 8 p.m. December 13, and an hour later George W. Bush addressed the Texas Legislature (and the world) as president-elect. Indecision 2000 was over.

## ***Analysis: Dimpled Chads and Dueling Courts***

For the first several weeks of the contest, the most debated questions were whether Gore was entitled to a manual recount by the canvassing boards, whether and how dimpled chads should be counted, and whether the statutory time deadlines bound the counters. In the end, these questions were moot because, in the canvassing board counts, Bush led after every count and recount, regardless of what votes were counted or when they were counted. The story is in the duel between SCOFLA and US Supreme in the contest proceedings.

Many Bush supporters vigorously attacked SCOFLA II as a deeply flawed, partisan decision by a Democratic court. Many Gore supporters, joined by academics and media commentators, rose in furious response to US Supreme II, contending that it was an ill-reasoned, illegitimate, politically motivated exercise of judicial power that would permanently damage the Court. These charges are of enduring significance because they affect the reputation of the two courts and, in the case of the charges against US Supreme, prompt many people to question the legitimacy of Bush's presidency. The best way to assess the charges against the two courts is to analyze SCOFLA II and US Supreme II.

The Florida contest statute states that "the canvassing board shall be the party defendant" in an election contest. While the statute gives the trial court very broad discretion to fashion remedies, they must presumably be remedies

that can be effected by judgment or order against the “party defendant.” The parties defendant here were Palm Beach, Miami-Dade, Nashua, and Volusia Counties. In ordering a statewide recount that Gore did not request, SCOFLA II orders relief against canvassing board members of sixty-three Florida counties who are not parties to the contest. Such unprecedented relief against non-parties is in clear violation of the statute and in probable violation of the due process clause of the U.S. Constitution.

The “party defendant” requirement is not the only statutory provision that prohibits a statewide recount of undervotes in Gore’s contest action. The contest statute by its terms counts “legal votes.” Section 102.166 of the Florida statutes states that, if there is a manual recount, the canvassing board must recount “all ballots.” Under this statute, the canvassing boards in the sixty-three counties in which there was no manual recount of all ballots could not legally count the undervotes, since the undervotes could only be counted by a partial recount that is prohibited by the statute. It is absurd to read the contest statute to permit a court to count as “legal votes” votes that could not legally be counted by the canvassing boards. Indeed, the provision requiring the canvassing board to be named as party defendant in a contest makes no sense unless we assume that the purpose of the contest is to count votes that the canvassing board wrongfully failed to count.

If SCOFLA had properly concluded that the governing statutes did not

allow it to order a statewide manual recount, it presumably would have affirmed Judge Sauls, since SCOFLA II held repeatedly that the partial recount that Gore sought was not appropriate. SCOFLA’s misreading of the statutes was therefore a critical mistake, enabling it to fashion and justify a remedy that kept the Gore challenge alive and brought US Supreme into the fray. While this misreading is clear and critical, however, it is at least an error in statutory construction. The other major flaws in SCOFLA II create the impression that SCOFLA was in fact influenced by partisan considerations.

SCOFLA II purports to order a statewide judicial examination of all undervotes, but it excludes from the examination all of the undervotes that the canvassing boards in Broward, Miami-Dade, Palm Beach, and Volusia Counties had examined, finding about 800 votes for Gore. This exclusion accepts a nonjudicial evaluation of ballots in a judicial contest, insulates the ballots from the scrutiny and evidentiary evaluation to which all other undervotes are subject, and deprives Bush of any opportunity to challenge these 800 votes. This shielding of 800 Gore votes from the uncertainties of the judicial recount was too much even for Breyer and Souter, who said in US Supreme II that a recount of undervotes had to include *all* undervotes.

SCOFLA II ordered a recount that, with only four days remaining until the December 12 deadline for completing the contest, could not possibly be conducted in a manner consistent with the due process clause of the Fourteenth

Amendment. Under Florida law, a contest is a judicial proceeding, and due process requires that the parties be given an opportunity to assure that the undervotes to be counted will be accurately and fully identified; that the evidence—the undervotes—will be examined by the court or by court officers appointed by and answerable to the court; and that there will be a hearing to consider each contested ballot. SCOFLA II ignores all of these requirements. It provides for a count by functionaries scattered throughout the state who are not officers of the court or subject in any realistic way to its supervision or control. Several canvassing boards complained that their software programs were not designed to identify undervotes, but they were required to do the best they could. The parties could not object to individual “votes” as they were tabulated by the functionaries, and SCOFLA II makes no provision for, and realistically there was no time for, a hearing in which the trial court could examine and consider objections to individual contested ballots, which could run in the thousands. It is hard to avoid the conclusion that SCOFLA contemplated an all-hands count and a streamlined process that, whether it was constitutional or not, would bring the trial court’s decision to SCOFLA in time for it to render an opinion by midnight on December 12. And given SCOFLA I and II, it seems likely that, if the trial court had found enough votes to push Gore over the top, SCOFLA would have at last found a trial court decision it could affirm.

SCOFLA II is a flawed decision. It

fashions a remedy that is contrary to Florida statutes and violates both the equal protection and the due process clauses of the U.S. Constitution, and it improperly husbands and protects 800 Gore votes that reduced Bush’s lead to little more than 100 votes. Its disposition of the 800 votes and the unconstitutional ramrod procedures it employs to count votes and force a quick decision that could well favor Gore creates the impression that it is not only wrong but influenced by partisan considerations.

We come now to US Supreme II. The commentators and academics characterize US Supreme II as the product of a deeply divided Court, but if we work through the opinions we find that, despite the contention and the occasional sound and fury, seven justices agree that the standardless count ordered by SCOFLA II deprives George W. Bush of equal protection of the laws. The seven disagree only on the deadline for resolving the dispute. The majority concludes that December 12 is the deadline because the Florida Legislature intended to take advantage of the “safe harbor” protection that federal law extends to electors who are not subject to challenge on December 12. Souter and Breyer claim that the deadline is December 18, when the electors are appointed.

The deadline is a matter of Florida law, to be decided by Florida courts. Gore’s attorney conceded in the oral argument in SCOFLA I that the December 12 deadline applied, and both SCOFLA I and SCOFLA II hold that the December 12 deadline applies. In SCOFLA I, SCOFLA held that

election returns could not be filed so late that they would “preclude Florida voters from participating fully in the federal electoral process.” An accompanying footnote includes the safe harbor law as part of the “federal electoral process.” In the “Applicable Law” discussion in *SCOFLA II*, *SCOFLA* quotes the safe harbor statute in full and states that the Florida presidential election statutes are “derived from” the safe harbor law. Later in the opinion, *SCOFLA* says that “because the selection and participation of Florida electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law must yield” in the case of a conflict with federal law. The December 12 safe harbor deadline is of course part of that “stringent calendar.” (It is ironic that the four justices who passionately insisted on deference to *SCOFLA*’s construction of Florida law rejected *SCOFLA*’s holding that December 12 was the contest deadline under Florida law. Souter and Breyer opted for December 18, while Stevens and Ginsburg said the contest could drag on until January 6.)

Even if the deadline was December 18, Souter and Breyer were wrong in concluding that the contest could be resolved by that date if the counting proceeded. The opinions in *US Supreme II* were delivered late in the evening on December 12, so no Florida proceedings could have begun until the morning of December 13. Florida statutes require the Florida electors to meet in Tallahassee on December 18 and cast their votes at 10 a.m. Since

the electors must get to Tallahassee from throughout the state, a final resolution of the contest would have to be made by, say, noon on December 17 at the latest. This leaves four days for a hearing to establish the counting standard, the conduct of the recounts in sixty-seven counties, a hearing to consider any disputed ballots, a decision of the trial court, an appeal to and decision by *SCOFLA*, and, if necessary, an appeal to and decision by *US Supreme*. Souter and Breyer admit that this is a “tall order,” but it is more than that. It could not be done in any manner that satisfied the requirements of due process.

Reading *US Supreme II*, it is hard to see what the fuss is about. It is a well-reasoned case, solidly grounded in constitutional law. *SCOFLA II*’s denial of equal protection is obvious and was recognized by nearly half the *SCOFLA* judges and by nearly all of the Supreme Court justices, including two liberals (Souter and Breyer) and two moderates (O’Connor and Kennedy), as well as three conservatives (Rehnquist, Scalia, and Thomas). *SCOFLA* decided the only state law issue involved (the contest deadline), so there is no question of poaching on state authority, as the dissenting justices and others contend. The deadline that forced the Court to forbid further counting was acknowledged by *SCOFLA* itself, and the fact that the decision came when, as the majority said, the deadline was “upon us” was an accident of time caused by the tight time demands of the election laws and by Gore’s decision to delay the election certification, which

robbed the judicial process of ten of the twenty-five days that otherwise would have been available to contest the election. And far from being a “political” decision that exercised power entrusted to other branches of government, as many have charged, its resolution of a constitutional challenge discharged a duty clearly entrusted to the judicial branch.

The Court has been loudly and persistently criticized for taking the case, but the fact is that the Court would have been shirking its duty if it had not taken and resolved the case. SCOFIA II brought to the Court a decision that threatened to reverse a presidential election by unconstitutional means. The stakes were national and momentous, greater than any that had previously come to the Court. The federal issue was obvious, and with a constitutional claim involved, judicial action was appropriate. The Florida Legislature, spurred to action by SCOFIA II, was in the process of appointing its own electors, threatening a constitutional train wreck if the unconstitutional recount ordered by SCOFIA II handed the election to Gore. The indecision in Florida, by rapidly consuming the time available to the incoming president to put his administration in place, was disrupting the orderly transition of power. It would have been irresponsible for the Court to refuse to take this case.

### ***Count All Votes!***

Many Democrats contend that, because some of the dimpled chads in

Florida were not counted, George W. Bush is not a legitimate president. Several congressmen objected in the well of the United States Senate to Bush’s election by the Electoral College. Jesse Jackson made the rounds of the talk shows asserting that Gore would be president if the dimpled chads had been counted, and President Clinton repeated this claim again and again in his taxpayer-financed farewell tour of the country.

Before the 2000 presidential election, Florida had never counted any undervotes, let alone dimpled chads. In 1990, the Palm Beach County canvassing board adopted a policy that it would not count dimpled chads. In a 1991 sheriff race decided by five votes, the Broward County canvassing board refused to order a manual recount, and its decision was upheld by the Florida Court of Appeals. Dimpled chad counting was not favored in Florida, and with good reason, for it does not produce an accurate vote count.

In a primary race for a congressional seat in Massachusetts, Johnston emerged with a narrow victory. His opponent, Delahunt, contested the election, asking for a recount of all votes, including dimpled chads. The trial court examined the dimpled chads, found that they contained enough votes to erase Johnston’s margin, and declared Delahunt the victor. On appeal, the Massachusetts Supreme Court upheld the trial court and preserved Delahunt’s victory, but it made its own examination of the dimpled chads and found that about 3 percent of the chads that the trial court included

in its vote total were not, in fact, votes. Thus, one nonpartisan counter in an unpartisan (primary) election found 3 percent more votes in the dimpled chads than another nonpartisan counter. Imagine how many more votes might be found in a general election count by canvassing boards who are no more detached than the chads.

The uncertainty in identifying chads indented enough to indicate a possible vote undermines the credibility of a dimpled chad count, but it is not the only, or even the most serious, difficulty in attempting to make the dimpled chads speak. A dimpled chad could be a vote, but it could also reflect a mistake realized or a mind changed or an abrasion caused by counting or handling the ballot. These alternatives may be unlikely, but it is also unlikely that a voter who clearly detached nine chads would dimple the tenth in an attempt to vote. (The only explanation offered for the solitary dimple as a vote is the "chad build-up" theory that detached chads pile up in the voting machine beneath a candidate's name to the point that they impede the stylus. However, testimony before Judge Sauls indicated that it would take several elections to build such a pile, and that the chads drop to a recess at the end of the voting machine when it is upended for storage after each election.) There is simply no way to force a dimpled chad to divulge its secret, so no such chad can be counted as a certain vote.

On the other hand, when the problem of the inscrutable chad is coupled with the uncertainty of identifying pos-

sible votes in the first place, we know with absolute certainty that a vote count based upon dimpled chads will be inaccurate, and that the more chads we count, the greater the error. And since dimpled chads will be counted only in close races, there will almost always be a possibility that the error in the count will exceed the margin of victory, handing the election to the real loser in the race. That was a distinct possibility in Florida, where the vote was so close that even a small inaccuracy in the dimpled chad count could wrongfully deliver the race to Gore.

This is election by crapshoot. It does not count all votes, it is susceptible to partisan manipulation, it is not fair to the voters who properly cast their ballots, and it is not fair to the defeated candidate, as Mr. Johnston, the loser in the Massachusetts race, attested. In a column he wrote during the Florida contest, he discussed his experience. He is a Democrat, so the dimpled chad counting then going on favored his candidate, but he did not speak for a recount. On the contrary, while his words were measured, he obviously harbored a deep and abiding conviction that an errant process had cost him a seat in Congress.

The right to vote is a fundamental right, and a voter is entitled to have his or her vote counted if the vote is clear or can be determined with reasonable certainty. A voter who fails to follow simple and prominently displayed instructions is not entitled to have his uncertain vote counted by a process that can be manipulated, will produce an inaccurate count, and could well

pick the wrong winner. The mistake in Florida lies not in failing to count all of the dimpled chads but in counting any at all. George W. Bush was the legitimate winner in Florida and is our legitimate president. ■