



The Supreme Court & the Presidency

Theodore B. Olson

I HAVE BEEN PRIVILEGED TO have served twice in Department of Justice positions in which my role has included representing the President of the United States in the discharge of his constitutional responsibilities. And I have twice represented American Presidents in their private capacities: President Reagan both before and after his presidency, and presidential candidate George W. Bush in the unforgettable five-week saga that unfolded between election day on November 7, 2000 and the final outcome of that election, which came after the Supreme Court's announcement of its decision in *Bush v. Gore* on December 12, 2000.¹ Because of these experiences, I have special feelings for, and some intimacy with, the American presidency and American Presidents.

At the same time, I feel a bond with and closeness to the U.S. Supreme Court and its Justices. My private law practice has, for many years, included practice before that Court and my assignment as Solicitor Gen-

eral included presenting the position of the United States in that Court on a regular basis (the office participated in at least 81% of the Court's oral arguments during each term I was there and I had physical offices in both the Supreme Court building and the Justice Department).

This essay presents some of my observations regarding the Supreme Court and its remarkably interlocking connection with the three most closely contested presidential elections in our Nation's history.



Because it is so close in time and so indelibly etched into our memories, most people think that the 2000 presidential election was the closest in our Nation's history. That is not necessarily true. In many ways, the elections in 1800 and 1876 were equally, and in some respects even more, spell-binding and dramatic.

Hon. Theodore B. Olson is a partner at Gibson, Dunn & Crutcher LLP. He served as Solicitor General of the United States in 2001–04, and as Assistant Attorney General in the U.S. Department of Justice's Office of Legal Counsel in 1981–84. This essay is a revised version of a speech he gave on May 8, 2002.

¹ 531 U.S. 98 (2000).

The drama in all three elections stemmed from the fact that the framers of our Constitution did not vest the election of the President directly in the people. The American Revolution was not only against King George III, but also in reaction to oppression by the British Parliament for what the Declaration of Independence referred to as its “Acts of pretended Legislation.” Our forebears distrusted monarchy, but many of them were aristocrats, and they were equally wary of government by the masses. Indeed, their reservations about vesting too much power in the people were vindicated just a few years later when the French Revolution turned into a bloody anarchy, and then to despotism.

In Philadelphia in 1787, the framers were thus creating, in the words of James Madison, a “representative republic, where the executive magistracy is carefully limited,” but also where the legislative power, capable of being inflamed by “all the passions which activate a multitude,” would be held in check by the powers given to the other branches.² Indeed, Madison had warned, on the basis of American experience, that the legislature was particularly susceptible to despotic tendencies, “every where extending the sphere of its activity, and drawing all power into its impetuous vortex.”³ Various checks and balances were necessary because “[a]n *elective despotism* [whether executive, legislative, or judicial] was not the government we fought for.”⁴

So the framers provided that Senators

would be selected by state legislators, not elected by the people – a provision not changed until the Seventeenth Amendment was ratified in 1913. And they invented the Electoral College for the selection every four years of a President. Instead of election by the *people*, the framers provided that “[e]ach *State* shall appoint, in such Manner as the *Legislature thereof* may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”⁵ A proposal by James Wilson of Pennsylvania that the President be elected by “the people” was emphatically rejected by a vote of 9–1 by the state delegations in Philadelphia.⁶ Direct election of the President by the people was perceived by many delegates as the equivalent of mob rule. As George Mason explained, “it would be as unnatural to refer the choice of a proper character for chief magistrate to the people, as it would, to refer a trial of colors to a blind man.”⁷

Alexander Hamilton, in *Federalist* 68, explained that the Electoral College would allow the choice to be made “by men most capable of analyzing the qualities adapted to the [Presidency].”⁸ It would “afford as little opportunity as possible to tumult and disorder,” and ensure that “every practicable obstacle [was] opposed to cabal, intrigue and corruption.”⁹ “This process of election,” he concluded, would “afford a *moral certainty* that the office of president will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifica-

2 *Federalist* 48, in Jacob E. Cooke, ed., *The Federalist* 333–34 (1961).

3 *Id.* at 333.

4 *Id.* at 335.

5 U.S. Const. art II, § 1, cl. 2 (emphasis added).

6 See 2 Max Farrand, ed., *The Records of the Federal Convention of 1787* at 32 (1911); *McPherson v. Blacker*, 146 U.S. 1, 28 (1892).

7 Farrand, *Records* at 31.

8 *Federalist* 68 at 458.

9 *Id.* at 458–59.

tions,” and would keep from office those persons with only “[t]alents for low intrigue and the little arts of popularity.”¹⁰

From our current vantage point, it is certainly debatable whether the Electoral College process has invariably weeded out presidential candidates with talents for “low intrigue and the little arts of popularity.” But that was, at least, an integral part of the theory supporting its adoption – a theory that responsible, prudent and knowledgeable individuals would be selected by each State, in the manner determined by its legislature. Political parties were not anticipated, so it was presumed that numerous potential candidates would be available every four years and that the typical member of the public simply would not know much about candidates who came from distant States. The electors, who would have a better sense of the candidates’ qualities, would then meet, cast their ballots for two persons and transmit their ballots to the Congress. The ballots would be opened and counted, the person having the greatest number of votes, if a majority of the electors, would be President and the person with the next number of votes would be Vice President.¹¹

At the first presidential election in 1788, the electors were selected directly by state legislators in several of the States, by popular election (either by district or at-large) in other States, and by some combination of popular elections and legislative appointment in still others.¹² Four States employed direct popular elections.¹³ New York found itself

“deadlocked between its Federalist senate and its Anti-Federalist house ... and chose no electors. North Carolina and Rhode Island had not yet ratified the Constitution and therefore did not participate.”¹⁴ George Washington, of course, was the unanimous choice of the electors who were selected.¹⁵

By 1800, the number of States participating in the election had increased to sixteen. Electors were selected by popular vote in six States, and by various other means in the other ten States.¹⁶ It was in this election that the original Electoral College system broke down. Notwithstanding the framers’ intentions, political parties had sprung up during Washington’s presidency and begun nominating national tickets for President and Vice President. In 1800, John Adams’ campaign for re-election as President on the Federalist ticket was defeated when each of the 73 Democratic-Republican electors cast one of his votes for Thomas Jefferson and one for Aaron Burr. Jefferson was the intended presidential candidate, but one elector apparently forgot that for the system to work, he had to withhold his vote for Burr. The result was an Electoral College tie, and Burr refused to concede the election to Jefferson. Thus, under Article II of the Constitution, the House of Representatives was required to vote to break the tie, with one vote allocated to each State.¹⁷

Figuring that Burr was the more pliable of the two Democratic-Republican candidates, a lame-duck Federalist-dominated Congress denied Jefferson the election for 35 ballots,

10 *Id.* at 460.

11 U.S. Const. art II, § 1, cl. 3.

12 *McPherson*, 146 U.S. at 29–30.

13 Michael Nelson, ed., *Congressional Quarterly’s Guide to the Presidency* 155 (1989).

14 *Id.* at 155–56.

15 *Id.* at 1403.

16 *McPherson*, 146 U.S. at 31.

17 U.S. Const., art. II, § 1, cl. 3.

each ballot resulting in 8 votes for Jefferson, 6 votes for Burr, and 2 States deadlocked by evenly divided delegations, leaving Jefferson one State short of the majority he needed to prevail. Finally, on February 17, 1801, after a week of controversy and deadlocked balloting, thanks to encouragement by Alexander Hamilton, despite his longstanding personal and political animosity toward Jefferson, the 36th ballot elected Jefferson President and Burr Vice President.¹⁸

Burr was to become the first Vice President who did not go on to become President. And the first, and, to date, the only, Vice President to commit murder. He shot and mortally wounded Hamilton in a duel three years later. He was subsequently tried for treason in 1807 for other dubious conduct, in a trial presided over by Chief Justice John Marshall. Although acquitted, his reputation was destroyed and his political life ended.

Among other things, the Jefferson-Burr contest of 1800 produced two interesting and historically important footnotes. One was the Twelfth Amendment, which amounted to a constitutional recognition of political parties, requiring separate ballots for President and Vice President. The Amendment requires the Electoral College ballots to be sent to the President of the Senate for tabulation in the presence of the Senate and the House of Representatives. If no person receives a majority, the House of Representatives, with one vote per State, selects the President. The same process is followed in the Senate for the Vice President. A statute adopted after the 1876 election (more about this later) provides that the President of the Senate presides over the counting of the Electoral College votes and the resolution of any contests over the selection of actual electors.¹⁹

The other fascinating footnote to the 1800

election was the desperate effort by the losing Federalists to retain control over the federal judiciary. In January of 1801, just before the new President and Congress took office, they enacted the Judiciary Act of 1801, which increased the number of federal judgeships. The new positions were then filled with “midnight appointments” by outgoing Federalist President John Adams on March 2, 1801, two days before his successor was sworn in. At the same time, although he was not one of the newly created judicial officers, John Marshall was nominated to be Chief Justice of the Supreme Court on January 20, 1801, to replace Oliver Ellsworth who had resigned due to ill health on December 15, 1800. At the time, Marshall was Adams’ Secretary of State, and he even retained that position for several weeks after he was confirmed as Chief Justice by a lame-duck Senate on January 27, 1801. He took the oath of office as Chief Justice on February 4, 1801, just two weeks before his arch-enemy Thomas Jefferson was finally elected President and one month to the day before Jefferson took office. He held office for 34 years – a tenure that spanned six presidencies and was six years longer than any other Chief Justice to date.

Perhaps the most fascinating and barely believable part of this history is that through an oversight in his waning hours as Secretary of State, Marshall neglected to deliver a number of the commissions of the midnight appointee federal judges, including one for William Marbury. Marbury asked the new Secretary of State, James Madison, to deliver his commission. Madison (in accord with Jefferson’s instructions) refused, and the statute creating Marbury’s position was repealed by the new Congress.

Marbury filed an action directly in the Supreme Court for a writ of mandamus re-

18 John Ferling, *Adams vs. Jefferson: The Tumultuous Election of 1800 at 187–93* (2004).

19 3 U.S.C. § 15.

quiring Madison to deliver his commission, a proceeding made possible by a provision in the Judiciary Act of 1789 giving the Supreme Court *original* jurisdiction in such cases. As incredible as it may seem today, his case was thus brought before a Supreme Court presided over by Chief Justice John Marshall, the man who, wearing his Secretary of State hat, had failed to deliver the commission in the first place. In its landmark decision of *Marbury v. Madison*, the Supreme Court decided that Marbury's commission did not have to be delivered to be effective but that the provision purporting to give the Court original jurisdiction to make that ruling was unconstitutional. In doing so, the Court handed a temporary victory to Jefferson by keeping President Adams' midnight judicial appointees off the bench, but claimed an immense and lastingly important victory for the Supreme Court, holding that it had the ultimate power under the Constitution: to be its final arbiter, to declare "what the law is," and to declare acts of Congress unconstitutional. *Marbury v. Madison* is the Supreme Court's most important decision, creating a powerful independent judiciary, which has repeatedly changed the course of our Nation's history.

Before moving on to the election of 1876, let me make some additional preliminary observations about the Electoral College and the popular vote. In the 2000 election, much was made of the fact that candidate Bush not only did not get a majority of the popular votes cast for President, but also lost the popular vote contest to candidate Gore. This phenomenon is far from unprecedented. Because of third- and fourth-party candidates, 18 of our 42²⁰ Presidents have taken office without winning a majority of the popular vote. (Some, such as Andrew Johnson and Gerald Ford, served as President without

ever having been elected because they were Vice Presidents who succeeded to office on a President's death.) Among those who have been elected President with under 50% of the popular vote are John Quincy Adams (31% in 1824); Abraham Lincoln (40% in 1860); Woodrow Wilson (42% in 1912); Richard Nixon (43% in 1968); and Bill Clinton (43% in 1992 and 49% in 1996).

And three Presidents have been elected despite being out-pollled in the popular vote: John Quincy Adams with only 31% of the popular vote was elected President by the House of Representatives in 1824 over Andrew Jackson, who had 41% of the popular vote. The other two were Hayes over Tilden in 1876, and Bush over Gore in 2000. Because the smaller, less populous States have Electoral College votes in larger numbers than their share of the population, candidates are discouraged from spending all their time in the big, heavily populated States like California, New York and Texas. The inevitable consequence is that a huge victory in a State like California can be offset by narrow victories in numerous less-populated States like Wyoming and North Dakota. That is precisely what happened in 2000. We all saw those color-coded maps with candidate Gore's States concentrated in the populous East and West Coasts and with George W. Bush winning a considerably larger number of less populated states in the South and middle-America.

That sets the stage for an excursion into the exceedingly close and hotly contested 1876 election between Samuel Tilden and Rutherford B. Hayes.



For the first time since the Civil War, the

20 Although George W. Bush is thought of as the 43rd President, Grover Cleveland is considered both the 22nd and 24th President, so we have had only 42 Presidents.

Democrats, led by Tilden, had a chance to take the White House.²¹ The Republican, Hayes, had been a military hero for the Union during the Civil War, a member of Congress, and a three-time governor; but he was a lackluster campaigner whom Harvard history professor Henry Adams described as a “third-rate nonentity.”²² Tilden, however, was even less charismatic – a remote, aloof, never-married non-campaigner, who benefited greatly from a series of Grant administration scandals that tarnished Hayes.

Tilden won the popular vote by about 260,000 votes. But the votes in several States – South Carolina, Louisiana, Oregon and, believe it or not, Florida – were subject to dispute and challenge. Indeed, Florida with its three Electoral College votes turned out to be as decisive in the election of 1876 as it was with its 25 votes in 2000. At one point, a popular vote count in Florida gave Hayes the lead by only 10 votes out of 48,000.

Initial counts showed Tilden ahead in the Electoral College by a vote of 203–166, but only if he maintained his lead in the three disputed States (and kept the vote of a contested elector in Oregon). Hayes’ forces immediately went to work, and it apparently was not pretty on either side. Graft, corruption, bribery and other blatant misconduct were apparently the order of the day.

Ultimately, election contests were resolved by Republican election officials in all three of the contested southern States in favor of Hayes, and he pulled ahead by an Electoral College vote of 185–184. Not surprisingly, Democratic leaders in those three States were outraged. They accused Republicans of stealing the election, and sent competing slates of Democratic electors to Congress.

Congress, as it turned out, was at least as closely divided as the Nation. Indeed, it was deadlocked. Republicans controlled the Senate, and Democrats the House of Representatives. At that time either chamber could block acceptance of an Electoral College delegation, and so each chamber refused to accept the competing party’s slates of electors from those three States. After lengthy debate, Congress developed a compromise and created an electoral commission to investigate and recommend a solution to the voting in the disputed States. The commission was to consist of five Senators, five Representatives and five Supreme Court Justices. After a spirited debate as to how to select the representatives from the Supreme Court, the warring factions decided on two Republican Justices, two Democrat Justices and Justice David Davis, who was perceived as an independent. The plan was approved by a vote of Congress on January 26, 1877, nearly 12 weeks

21 William H. Rehnquist, *Centennial Crisis: The Disputed Election of 1876* at 32 (2004).

22 Roy Morris, Jr., *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876* at 83 (2003). It is interesting to note that Adams had supported Benjamin H. Bristow for the Republican nomination. Only a few years before, Bristow had been the first Solicitor General of the United States. In the first ballot at the convention, he received nearly twice as many votes as Hayes, but both of them were far behind James G. Blaine, and opposition from President Grant ensured that Bristow would not actually get the nomination. As reformers sought to coalesce around a candidate who could defeat Blaine, a pivotal point came when John Marshall Harlan, Bristow’s floor manager, withdrew Bristow’s name and cast Kentucky’s votes for Hayes. *Id.* at 79–80; Rehnquist, *Centennial Crisis* at 53, 57. There have long been rumors, recently reiterated by Roy Morris, that Harlan’s decisive act occurred only after the Hayes camp had confidentially promised Harlan a Supreme Court nomination in return for Kentucky’s support, see Morris, *Fraud of the Century* at 77, but there has never been evidence to substantiate such rumors, see Tinsley E. Yarbrough, *Judicial Enigma: The First Justice Harlan* 96 (1992). Whether there was a promise or not, President Hayes was indebted to Harlan and did nominate him for the Supreme Court in October 1877. He served with distinction on the Court for almost 34 years, and is now famous for having dissented in *Lochner*, *E.C. Knight* and *Plessy v. Ferguson*.

after election day.²³

But while all this was taking place, Justice Davis was being elected by the Illinois legislature to a vacant seat in the U.S. Senate, and he declined to serve on the electoral commission. His place was eventually taken by Justice Joseph Bradley – a Republican appointed by President Grant.

Bradley was heavily pressured right up to the end, and reportedly even wrote an opinion initially favoring Tilden, but he changed his mind and finally voted with the Republicans. The outcome in Florida was the first of the four states to be resolved. The commission decided it did not have the authority to judge the actual conduct of the Florida balloting, only the validity of the competing certificates presented to Congress, and it gave the nod to the Republican slate by an 8–7 vote. The same result followed for South Carolina, Louisiana and Oregon. Hayes thus claimed the Presidency with a one-vote Electoral College victory.

Although Democrats objected to the commission's determination and threatened to prevent the matter from coming to a final vote in Congress, they finally agreed to accept the outcome in exchange for an acknowledgement – which came to be referred to as the compromise of 1877 – that a Hayes administration would remove all federal troops remaining in the South as a result of Reconstruction, appoint a Southerner to his Cabinet, and support more appropriations for infrastructure improvements in the South.²⁴

The Hayes-Tilden election was November 7, 1876, precisely 124 years to the day before the election of 2000. The final resolution

came on March 2, 1877, nearly four months after election day and just two days before the date then specified in the Constitution for when the new President had to take office.

The disputed election of 1876 had almost led to another civil war. Concern over the possibility of another such presidential election controversy ultimately spawned legislation for resolving disputes over the selection of electors, and that legislation would become pivotal to the outcome of the disputed election in 2000. These provisions may be found in Chapter 1 of Title 3 of the U.S. Code. They were enacted in 1887 for the explicit purpose, according to the remarks of one congressman at the time, of preventing a repetition of “the year of disgrace, 1876,” in which a “cabal ... had determined ... to debauch[] the Electoral College.”²⁵

A key provision of the 1887 law, now found in 3 U.S.C. § 5, provides that if a State enacts laws *prior* to a presidential election for the resolution of contests over the selection of electors on election day, and if those procedures are utilized to resolve any such disputes at least six days before the time specified by law for electors to come together to cast their ballots for President, “such determination ... shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution ... so far as the ascertainment of the electors appointed by such State is concerned.”

The post-election battles, corruption, bribery and questionable practices over the elections in South Carolina, Louisiana, Oregon and Florida in 1876 had left a lasting stain on that election. Therefore, as explained

23 Morris, *Fraud of the Century* at 218.

24 *Id.* at 234 (noting that historians have long argued “about the relative importance of the conference” held between Hayes’ representatives and Southerners); Rehnquist, *Centennial Crisis* at 178 (reprinting a letter stating that “we have the most complete confidence” that giving autonomy to “the people of the states of South Carolina and Louisiana” “will be the policy of [Hayes’] administration”).

25 18 Cong. Rec. 30 (Dec. 7, 1886) (remarks of Rep. Caldwell).

during the congressional debates in 1886 by Rep. William Craig Cooper of Ohio, “these contests, these disputes between rival electors, between persons claiming to have been appointed electors, *should be settled under a law made prior to the day when such contests are to be decided.*”²⁶ The so-called safe-harbor provision now found in 3 U.S.C. § 5 thus provided that if disputes in a particular State over the selection of electors by that State were resolved at least six days before the electors were to come together to cast their votes for President, under a legal system adopted prior to the election, the certification as to who had won the election pursuant to that determination would have to be accepted as “conclusive” when Congress gathered to count the votes. In other words, the House of Representatives could not vote to select a competing slate.

The 1887 law went on to provide that electors were to meet and cast their ballots the first Monday after the second Wednesday in December.²⁷ In the year 2000, that date was December 18, meaning that the final day for States to conclusively resolve election contests under the safe-harbor provision was December 12, 2000.

Remember that date.

With this background, we can now turn to the 2000 presidential election and the five weeks it took to resolve the controversy over the balloting in Florida.



The metaphor that I have used to describe the election in 2000 comes from the book and the movie called *The Perfect Storm*. You will recall, if you read the book or saw the movie, that a storm of epic proportions occurred a few years ago off the coast of New England

as a result of the unprecedented convergence of three separate massive storms: a hurricane from the South Atlantic which was heading north, a fierce winter storm from Canada moving southeast, and a nasty nor'easter coming toward New England from the mid-Atlantic. Those three storms collided to create a spectacular monster with immense waves, winds and chaotic conditions at sea, throwing boats about like toys and causing immense damage and turmoil.

The 2000 presidential election was like that: three man-made storms coming together at one place: a political hurricane, a media tornado and a legal typhoon.

From the political standpoint, we had America's most important quadrennial election, with immense amounts at stake for the competing candidates and political parties. Nearly every major political figure from either party rushed to Florida or joined the fray from a distance. Competing former secretaries of state were enlisted to be battlefield commanders on behalf of their respective candidates. In their own unique styles, the candidates, themselves, directed their post-election-day campaigns from Washington, D.C. and Austin, Texas. And, before it was over, the political battle involved, or potentially involved, all three branches of the federal and Florida governments.

And the legal typhoon was already forming in the first few hours after election day. Lawyers for the Gore-Lieberman campaign began arriving in Florida in the pre-dawn hours of Wednesday, November 8, and they were followed almost immediately by Bush-Cheney lawyers, and then by wave after wave of new legal reinforcements for both sides. There was litigation over the recount process in multiple counties, absentee ballot litigation, overseas ballot counting litigation, election

²⁶ 18 Cong. Rec. 47 (Dec. 8, 1886) (emphasis added).

²⁷ 3 U.S.C. § 7.

protests and election contests, suits in Florida trial, appellate and supreme courts, and cases filed in federal district courts in Florida, the Eleventh Circuit Court of Appeals and the U.S. Supreme Court. And all this was going on simultaneously! Cases were being filed hourly and *ad hoc* legal teams were being assembled daily among lawyers from across the United States who had never previously met one another.

I do not know the precise number, but someone counted 52 pieces of litigation going on simultaneously throughout Florida and the federal court system. There were ultimately four Florida Supreme Court decisions, two U.S. Supreme Court decisions and two Eleventh Circuit decisions. In the federal litigation alone, I counted 22 briefs, complaints or lengthy factual affidavits filed by just our side in the course of those 35 days.

At the same time as the political struggle and the unfolding and unpredictable legal drama, an unprecedented media spectacular took place. It was a 24-hour-a-day reality show and fireworks display, with the highest possible stakes, broadcast minute-by-minute on the nation's television and radio waves and filling the pages of the nation's magazines and newspapers, not to mention a deluge of website, chat room and email communications.

There was live gavel-to-gavel coverage of trials and appellate court arguments. There were news programs, interviews, and constant media "analysis," commentary, and talk show discussions, and media food fights disguised as debates. During a media frenzy such as this, broadcasters need a constant stream of new content. They collect themselves into an insatiable beast that must constantly be fed. Mindful that their fates and the outcome of the political and legal battles are dependant in no small part on the public's perception

of unfolding legal and political events, the protagonists must constantly tell, retell and revise their messages to keep up with events and find and send forth spokespersons and surrogates to tell their story. A media tornado is an apt metaphor because it is spin, spin, spin, all spin, all the time.

Lawyers became drafters of press releases, interviewees, spokespersons, courthouse-steps spinners and coordinators of media strategy – as well as writers of briefs, presenters of evidence and courtroom advocates. The media, political and legal storms in and around Tallahassee, Austin and Washington converged and became inseparable.

We don't have time to discuss all the details of the legal cases, but to give you a flavor of the flow and turmoil of just a segment of the proceedings, I will summarize briefly the schedule in the federal constitutional litigation in just the last two weeks of the contest. At approximately 10 p.m. on the Tuesday before Thanksgiving, the Florida Supreme Court in Tallahassee announced a decision requiring a recount of votes in four Florida counties and new timetables for the certification of the results of the votes in those counties. By 5 p.m. on Wednesday, the Bush-Cheney team asked the U.S. Supreme Court in Washington, D.C. to review that decision. On the day after Thanksgiving, the Supreme Court agreed to take the case and set an accelerated schedule for briefing. On Friday, December 1, the Supreme Court heard argument in that case. It rendered a unanimous decision setting aside the Florida Supreme Court's recount decision on Monday, December 4.²⁸

On December 5, the U.S. Court of Appeals for the Eleventh Circuit, in Atlanta, Georgia, with all twelve judges sitting *en banc*, heard oral argument regarding constitutional challenges by the Bush-Cheney team to the

28 *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (*per curiam*).

manner in which the ballots were being re-counted, alleging that the rules and methods of recounting were constantly in flux and subject to political manipulation. On Thursday, December 7, the Florida Supreme Court heard argument in the second of the cases to reach it, and the Eleventh Circuit handed down its decision from the Tuesday argument, rejecting the Bush-Cheney challenge to Florida's vote re-counting methods.

On Friday, December 8, at about 4:15 p.m., the Florida Supreme Court by a 4-3 vote ordered a new statewide recount of the presidential election ballots. Within five hours, the Bush-Cheney team had filed its challenge to that decision in the U.S. Supreme Court and asked for a stay of the recount. That stay was granted and the Court agreed again to take the case the next day, Saturday, December 9. The Court ordered both sides to file 50-page briefs simultaneously on Sunday afternoon and set oral argument for the morning of Monday, December 11. Later on the eleventh, after the arguments in the Supreme Court, the Florida Supreme Court rendered its third decision, affirming that the federal safe-harbor provision to which I referred earlier was incorporated into and a part of the Florida Election Code. The U.S. Supreme Court rendered its decision rejecting the methodology of the Florida Supreme Court statewide recount in the case of *Bush v. Gore* at 10 p.m. on December 12. The results in Florida, which had theretofore certified Bush as the winner, could thus become final. On December 13, Vice President Gore conceded.

The U.S. Supreme Court had never acted more rapidly. Only fourteen days elapsed between the first Florida Supreme Court decision ordering a partial recount in four Florida counties and the unanimous U.S. Supreme Court decision vacating that decision. That was the fastest the Court had ever moved in

a major case. But it knocked ten days off that record the second time around, issuing a decision reversing the Florida Supreme Court decision ordering a state-wide recount just four days after that decision was rendered. These cases were the first time the Court allowed broadcast of audiotapes of oral arguments immediately after the completion of argument. So the arguments of counsel and the questions by the justices were heard throughout the world. People were riveted to television sets and radios everywhere: in their homes, offices, cars, taxicabs, classrooms and airports.

The legal decisions by the Court are not nearly as complicated as subsequent commentators would have you believe. Recall for a moment the constitutional provision that requires that electors be selected in the manner that *State legislatures shall provide*. And recall the 1887 federal safe-harbor law, which says that if a State wants its choice of electors to be deemed conclusive at the time of the counting of the Electoral College votes in Congress, *it must resolve contests over the selection of those electors by six days before the meeting of electors in a manner consistent with laws enacted prior to the election*.

In reviewing the first Florida Supreme Court decision, all nine justices of the Supreme Court concluded that the Florida Supreme Court may have altered, *after the election*, the Florida legislature's scheme and timetable for resolving contests over the selection of electors. If so, that decision might later, when Florida's slate of electors was presented to Congress, be deemed to change the method by which the votes of Floridians were to be counted and disputes resolved, and thus to deprive Florida of the presumption of conclusiveness accorded by the federal safe-harbor provision. Congress could thus ignore Florida's certification of its electors and select a competing slate. The Supreme Court

said that it was unclear whether the State of Florida had intended to design its Election Code in order to take advantage of the federal "safe harbor." It thus unanimously vacated that decision and remanded the case to allow the Florida Supreme Court to reconsider its actions in light of the requirements of the federal Constitution and statute.²⁹

When the Florida Supreme Court rendered its second decision, ordering a *new* statewide recount, with a *new* timetable, four days after the U.S. Supreme Court's first decision vacating the prior Florida decision, the Florida Supreme Court curiously made no reference to what the U.S. Supreme Court had asked it to do four days earlier. Yet here was another apparent change in Florida law as to how to decide who had won the election. And the process that was unfolding in Florida involved daily, if not hourly, changes in the manner in which votes were being counted, not to mention spontaneous and incompatible variations in methodology from county to county.

The U.S. Supreme Court found that process to be a violation of the Equal Protection Clause which, the Court concluded, required each person's ballot to be weighed equally, and not according to a fluid, dynamic process developed after the election. Seven justices expressed Equal Protection concerns regarding the recount process taking place in Florida, but two of those seven, along with two other dissenting justices, would have allowed Florida to get another opportunity to conform its recount process to the constitution.

Overlooked by many in the confusion and controversy surrounding the Supreme Court's December 12, 10 p.m. decision in *Bush v. Gore*, was the third Florida Supreme Court opinion, released on the afternoon of Monday, December 11 – after the arguments

earlier that day in Washington. In that decision the Florida Supreme Court responded to the first U.S. Supreme Court opinion and squarely acknowledged that it interpreted the Florida Election Code to have intended to comply with the U.S. Constitution and the safe-harbor provision in federal law by providing a pre-election mechanism created by the legislature for resolving disputes over the selection of electors and by making it mandatory that contests over the selection of electors be resolved six days before the meeting of the Electoral College. The Florida Supreme Court claimed that its recount decisions had merely been interpretations, not revisions, of the Florida legislature's recount system. But it also unequivocally acknowledged that Florida law had been intended to conform to the federal safe-harbor provision, and that contests over the selection on November 7 of the State's 25 electors had to be resolved, and recounts ended, by six days before the meeting of the Electoral College on December 18, to wit by *December 12, 2000*. According to the Florida Supreme Court's December 11 decision, therefore, the state-wide recount that it had ordered the previous Friday, December 8, would have to have been completed by December 12, the same day the U.S. Supreme Court, by a vote of 5–4, in fact, ordered that the process be brought to an end. Thus the two courts were consistent that the contests over the ballots had to be resolved by December 12.

Of course, this is a controversy that will never die, and everyone is entitled to his or her own opinion, but one can certainly see that the U.S. Supreme Court, which rejected what the Florida Supreme Court was doing by votes of 9–0 and 7–2, had plenty of reason to believe it had no choice but to rule as it did.

29 *Bush v. Palm Beach County*, 531 U.S. at 78.



Some have criticized the U.S. Supreme Court for intervening at all. After all, the critics say, this was a Florida dispute involving the Florida Election Code. And, they note the contest over Florida's electors could ultimately have been resolved by Congress as provided by the Constitution and as had been the case in 1800, 1824 and 1876. In that respect, it is interesting to note that if Congress had had to resolve the Florida controversy, the process would have taken place in January 2001, a very short time before January 20, when, according to the Constitution, a new President would have to take office. It would have been presided over by the President of the lame-duck Senate, a man whose term of office as President of the Senate – the Vice President of the United States – would have expired that same day, on January 20, 2001. That man had a keen personal interest in the outcome. That man was Al Gore.

But the Supreme Court has always regarded federal presidential elections as vital to all citizens. It said in a decision 20 years ago that presidential elections “implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States.”³⁰ Thus, the Court continued, the “national interest is greater [in a presidential election] than any interest of an individual State.”³¹ Interestingly, those words were written in 1983 by Justice Stevens, author of a vigorous dissent in *Bush v. Gore*. Dissenting from Justice Stevens’

opinion in that case were Justices Rehnquist and O’Connor, two members of the *Bush v. Gore* majority. But the underlying fact is that the Court has, in the past, intervened to assure the fairness and constitutionality of a presidential election.

In the end, a majority of the Court – all nine of them in the first case, and seven of the nine in the second – found that significant and important federal constitutional interests were involved in the two cases, which the Supreme Court Justices take an oath to protect and preserve. The Court could have declined to hear the case, but given the fact that important federal questions had been raised in a case involving paramount national interests, where a final decision affecting the governance of this country had to be made before January 20, 2001, it should not be too much of a surprise that the Court was willing to step up to the plate.

Chief Justice Rehnquist gave a speech to the John Carroll Society on January 7, 2001 in which he discussed the Hayes-Tilden election and the criticism that had been directed at Supreme Court Justices in the 19th century for participating in the electoral commission that resolved that election. He also referred to criticism that had been voiced because Justice Jackson had served at the Nuremberg trials after World War II, and toward Chief Justice Warren for heading the commission investigating the assassination of President Kennedy. Responding to these criticisms, at the end of his speech, Chief Justice Rehnquist made the following statement: “the argument on the other side of such criticisms “is that there is a national crisis and only you can avert it. It may be hard to say ‘no.’”³²

30 *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983).

31 *Id.* at 795 (quoting *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)).

32 See also Rehnquist, *Centennial Crisis* at 248 (concluding that the Supreme Court Justices who accepted membership on the 1876 commission “did the right thing”).

Whatever one might think of the Court's two decisions in the Bush-Gore election controversy, the sentiment expressed in that speech by Chief Justice Rehnquist is both understandable and consistent with the Court's precedents.



You can see now how all three of the Nation's closest presidential elections are interconnected in a fashion. The election of 1800 brought us the Twelfth Amendment and, in a strange way, led to *Marbury v. Madison*. The election of 1876 brought us the federal statute that ultimately proved to be pivotal in part in the Supreme Court's resolution of the legal issues surrounding the election of 2000, exercising in no small way, the constitutional power it announced in *Marbury v. Madison* to say "what the law is."

This is America, and the debate over the Supreme Court's role in the 2000 election will probably go on endlessly. Whatever one's judgment of the wisdom or correctness of the Court's decision, however, we must marvel at and respect the institution itself. People throughout the world have expressed awe that after such a close and intensely contested election and such a hard fought five-week battle, when the Court finally spoke, the combatants withdrew from the field, sent their lawyers and public relations operatives home, and the public went about the business of installing a new President in office. The process was peaceful, quiet and orderly.

We are blessed with a truly remarkable and remarkably successful form of government. It has endured and brought us both liberty and prosperity because of the strength and balance of our branches of government. *GB*