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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 10, 2000

Memorandum to the Conference

Re: 00-949 - *Bush v. Gore*

At the risk of adding to your burdens of reading, I am sharing my summary of my impressions in this case.

Our Constitution vests each state legislature with plenary authority to direct the manner of the appointment of that State's presidential electors. Art. II, §1, cl. 2; see also *Bush v. Palm Beach County Canvassing Bd.*, 531 U. S. ___ (2000); *McPherson v. Blacker*, 146 U. S. 1 (1892). This power is expressly granted to the "Legislature" of each State and not to any other arm of state government. Art. II, §1, cl. 2. As a result, any significant deviation from the state legislature's scheme for appointing presidential electors presents a federal constitutional question.

While principles of federalism embedded in our Constitution ordinarily militate against review of a state court's disposition of questions of state law, Article II requires a different approach here. Indeed, crude appeals to federalism as a reason for non-intervention in this case are of little avail when the Constitution expressly demarcates the allocation of power among the organs of state government on the question of the selection of our President. As we observed in *Anderson v. Celebrezze*, 460 U.S. 780, 794-795 (1983), "in the context of a Presidential election, state-imposed restrictions 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." Where such uniquely national interests are at stake, it is not inconsistent with the idea of federalism to vindicate the constitutionally ordained authority of a state legislature against usurpation by another branch of state government not so empowered. Quite to the contrary, it is what the Constitution requires.

Acting pursuant to its constitutional grant of authority, the Florida legislature has created a detailed, if not perfectly-crafted, statutory scheme that provides for appointment of presidential electors by direct election. Fl. Stat. §103.011. Under the statute, "[v]otes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates." *Ibid.* The legislature has designated the Secretary of State as the "chief election officer," with the responsibility to "obtain and maintain uniformity in the application, operation, and interpretation of the election laws." §97.012. The state legislature has delegated to county canvassing boards the duties

of administering elections. §102.141. Those boards are responsible for providing results to the state Elections Canvassing Commission, comprised of the Governor, the Secretary of State, and the Director of the Division of Elections. §102.111. Cf. *Boardman v. Esteva*, 323 So. 2d 259, 268, n. 5. (Florida 1975) (The election process . . . is committed to the executive branch of government through duly designated officials all charged with specific duties).

After the election has taken place, the canvassing boards receive returns from precincts, count the votes, and in the event that a candidate was defeated by .5% or less, conduct a mandatory recount. Fla. Stat. §102.141(4) (2000). The county canvassing boards must file certified election returns with the Department of State by 5 p.m. on the 7th day following the election. Fla. Stat. §102.112(1) (2000). The Elections Canvassing Commission must then certify the results of the election. Fla. Stat. §102.111(1) (2000).

The state legislature has also provided mechanisms both for protesting election returns and for contesting certified election results. Section 102.166 governs protests. Any protest must be filed prior to the certification of election results by the county canvassing board. Fla. Stat. §102.166(4)(b). Once a protest has been filed, "the county canvassing board may authorize a manual recount." Fla. Stat. §102.166(4)(c). If a sample recount conducted pursuant to §102.166(4)(d) "indicates an error in the vote tabulation which could affect the outcome of the election," the county canvassing board is instructed to: "(a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots," Fla. Stat. §102.166(5). In the event a canvassing board chooses to conduct a manual recount of all ballots, §102.166(7) prescribes procedures for such a recount.

Contests to the certification of an election, on the other hand, are controlled by §102.168. The grounds for contesting an election include "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. §102.168(3)(c). Any contest must be filed in the appropriate Florida circuit court, Fla. Stat. §102.168(1), and the canvassing board or election board is the proper party defendant, Fla. Stat. §102.168(4). Section 102.168(8) provides that "[t]he circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances."

Since the November 7, 2000, presidential election, the Florida Supreme Court issued two rulings with respect the appointment of Florida's twenty-five presidential electors. An examination of these opinions reveals that the Florida

Supreme Court has failed to give adequate consideration to the constitutional delegation of authority to the Florida legislature, and to the corresponding constraints our constitutional scheme places on its decisionmaking power in this realm.

In its first decision, *Palm Beach Canvassing Board v. Harris*, 2000 WL 1725434 (Fla. Nov. 21, 2000), the Florida Supreme Court changed the clear and unambiguous seven-day statutory certification deadline established by the legislature. Furthermore, it disregarded the Secretary of State's delegated duty to exercise her discretion to determine whether to accept late returns and whether the circumstances cited by the canvassing boards warranted a manual recount. In the normal course, state law empowers state courts to resolve perceived conflicts in statutory language. The Florida Supreme Court's decision in this case, however, went beyond the mere resolution of such a perceived conflict, and changed the manner in which the state appointed its presidential electors. This added dimension to its decision directly implicated Article II and 3 U. S. C. §5. Because we were unable to ascertain the extent to which the Florida Supreme Court considered these federal constitutional and statutory constraints on its decisionmaking power, we vacated and remanded its decision.

To date, the court has not responded to our remand. In the intervening period, however, the respondents have raised a contest to the certified results in four counties, as provided for in state law. State courts undoubtedly have a role in the contest period created by the legislature. Indeed, the Florida legislature has provided that such contests are to be adjudicated in a state circuit court. §102.168(1). But, as with the protest period, Article II commands and 3 U. S. C. §5 counsels that in entertaining these challenges, the state courts hew closely to the statutory scheme crafted by the state legislature.

Here, the Florida Supreme Court, in its second decision with respect to this year's presidential election, failed to abide by these constraints. The court reversed the circuit judge's determination that manual recounts were not authorized by the circumstances presented here. Specifically, it concluded that respondents had made an adequate showing that there was a "rejection of a number of legal votes sufficient to change or place in doubt the result of the election." §102.168(3)(c). The court included in the definition of a rejected ballot those ballots that were not read by machines. Faced with no statutory definition of what is a "legal vote," the court looked to another part of the statutory scheme which requires canvassing boards to count any ballot from which "a clear indication of the intent of the voter" can be ascertained. §101.5614. Accordingly, the Florida Supreme Court ordered selective manual recounts of "undervotes" in all counties in which such undervotes occurred. The vast majority of the counties subject to this order were not parties to the contest action, and thus never received the opportunity to be heard.

Hours after the Florida Supreme Court's decision, county canvassing boards had to begin segregating their undervotes. The Florida Supreme Court provided no uniform, statewide method for identifying and separating the undervotes. Accordingly, there was no guarantee that those ballots deemed undervotes had not been previously tabulated. More importantly, the court failed to provide any standard more specific than the "intent of the voter" standard to govern this statewide undervote recount. Therefore, each individual county was left to devise its own standards. Thus, anything from a complete punch, a hanging chad, a swinging chad, or even a dimple, could have been deemed a "legal vote" in the wake of the Florida Supreme Court's order. In addition, the Florida Supreme Court did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams comprised of judges from various circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.

The result the Florida Supreme Court reached in no way resembles the statutory scheme created by the Florida legislature. To be sure, that scheme does provide for manual recounts. But it does so in the protest period, not the contest period. Further, it requires a recount of all ballots, not just undervotes. Further still, the recounts are to be conducted by bipartisan panels, not ad hoc committees. Finally, the full manual recounts are to take place only if there has been an "error in vote tabulation." §102.166(5). Katherine Harris, the Florida Secretary of State, exercising the authority conferred by §97.012, determined that there had not in fact been an "error in vote tabulation" because such errors are limited to machine malfunction, whereas any problems with the votes cast in this presidential election were due to voter error. *Bush v. Palm Beach County Canvassing Board*, App. 52-55. The statute committed this determination to the Secretary of State, not the state courts, and the Secretary's interpretation of this provision should control, not only in the protest but also in the contest period.

I am concerned that the Florida Supreme Court transgressed the lines of authority drawn by Article II of the Federal Constitution in substantially changing the state legislature's statutory scheme for the appointment of presidential electors.

Sincerely,

