University of Florida Journal of Law & Public Policy

Volume 13 | Issue 1 Article 1

2001

In Defense of Two Supreme Courts

Barry Richard

University of Florida Journal of Law & Public Policy

VOLUME 13 FALL 2001 NUMBER 1

IN DEFENSE OF TWO SUPREME COURTS

Barry Richard[*]

I. INTRODUCTION

History will pass judgment on all key participants in the 2000 presidential litigation, but none will receive greater scrutiny than the justices of the Florida and United States Supreme Courts. Both institutions and all sixteen justices already have been subject to criticism from

* Barry Richard is an attorney with the law firm of Greenberg Traurig in Tallahassee, Florida. He was a member of the Bush/Cheney legal team in the election litigation in Florida. For a detailed account of Mr. Richard's involvement in the election litigation, *see* Barry Richard, *Litigating History*, 28 No. 1 Litigation 8 (Fall 2001).

scholars, lawyers and politicians on opposing sides of the political and ideological spectrum.

Continued public confidence in the two institutions and in our entire judicial system requires a broader and more widely disseminated defense. Because justices are naturally and properly reluctant to defend their decisions outside the scope of the opinions themselves, the defense falls to the lawyers who argued before them. The task is not difficult. A careful analysis of the courts' decisions and the legal strategies that brought the cases before them will illustrate that neither court was motivated by political partisanship.

II. THE FLORIDA SUPREME COURT

A. *The Case As It Reached the Court*

Florida's statutory scheme for challenging election results is not well-suited to the peculiarities of choosing presidential electors. Enacted in bits and pieces over a period of 154 years, it is 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.

There are two ways to challenge election results under Florida law. Prior to the results being certified by a county canvassing board, a candidate or person qualified to vote in the election can file a protest and request that one or more counties conduct a manual recount.[1] After the vote has been certified, an election contest can be filed in the trial court.[2] The final machine tally had given Bush a 327 vote lead in Florida, and Gore chose to file a protest and request manual recounts in four counties in the hopes of making up the difference. The chosen counties shared two factors. They each had a relatively high vote total, and the machine total had given Gore a substantial margin of victory in each of them. By November 13th, the Gore game plan was in trouble. With the manual recounts only partially completed, and many heavily Democratic precincts not yet counted, the Bush lead had actually grown to 388 votes, and Gore was facing a looming deadline.

Two separate, and apparently conflicting, statutes dealt with the date of submission of returns by the county canvassing boards to the

1. FLA. STAT. § 102.166(1) (2000).
2. FLA. STAT. § 102.168(1) (2000).

Department of State.[3] Both statutes required that the returns be received by 5:00 p.m. on the seventh day after the election, in this case November 14th. Section 102.111 provided that, as of the deadline, "all missing counties shall be ignored, and the results shown by the returns on file *shall* be certified."[4] Section 102.112, on the other hand, provided that "such returns *may* be ignored and the results on file at that time may be certified by the department."[5] The Secretary of State exercised her discretion to deny additional time for manual recounts. This was the position of the case when it reached the Florida Supreme Court on the first of two appeals.

No Federal constitutional issues were raised in the Bush brief, a fact reiterated at oral argument and noted in the Court's opinion.[6] The Bush team was unwilling to place all of its legal eggs in the state basket. The team had filed a lawsuit in the United States District Court for the Southern District of Florida seeking to enjoin manual recounts on equal protection and due process grounds. The district court dismissed the case and Bush appealed to the Eleventh Circuit, which agreed to hear the case *en banc* on an expedited basis.

The federal appeal was pending at the time of the Florida Supreme Court appeal, and there was concern that if the Florida Supreme Court passed on the constitutional issues, the Federal court would lose jurisdiction to address them. Under the *Rooker-Feldman* doctrine, a lower federal court has no jurisdiction to review a decision of a state high court, even on a federal constitutional issue.[7] The only available review is directly to the United States Supreme Court, and the Bush team had no reason to assume that the U.S. Supreme Court would grant certiorari. Thus, the case that reached the Florida Supreme Court in November was one of statutory construction and nothing more.

B. *The First Decision*

The Florida Supreme Court resolved the apparent conflict between the "shall" and "may" language applying traditional rules of statutory construction.[8] The court reasoned that the permissive statute took preference because it was contained in the more specific and later enacted provision, and because the permissive language operated more logically

---

3. FLA. STAT. §§ 102.111(1), .112(1) (2000).

4. FLA. STAT. § 102.111(1) (2000).

5. FLA. STAT. § 102.112(1) (2000).

6. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1228 n.10 (Fla. 2000), *vacated by* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

7. D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149 (1923).

8. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d at 1233-36.

in par material with other connected election provisions.[9] Having determined, as had the trial court, that the Secretary of State possessed the discretion to accept manual recount returns after the statutory deadline date, the court addressed the circumstances under which she could exercise that discretion to reject such returns.[10]

The court began its analysis with the "guiding principle" that "the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases."[11] Upon that foundation, the court set forth the rule that would dictate the result: the Secretary of State's authority to ignore late-filed returns was a drastic measure that could be exercised only when inclusion of the returns would compromise the integrity of the electoral process, either by precluding a candidate from filing a judicial contest of an election under Section 102.168, or by "precluding Florida voters from participating fully in the federal electoral process."[12] The court extended the deadline for counties to file their returns until November 26, 2000.[13]

C. *Three Critical Rulings Against Gore*

One day after the Florida Supreme Court issued its opinion, the Miami-Dade County Canvassing Board, which had completed one percent of its manual recount, voted to stop counting. The decision was perceived at the time as a major setback for the Gore effort. The pace that Gore was picking up votes in the other three counties was insufficient to close the gap with Bush, and it was considered essential that he have access to the ten thousand undervote ballots that had been rejected in the Miami-Dade machine recount.

When lower courts refused to order the canvassing board to resume counting, Gore again sought help from the Florida Supreme Court. In a decision overlooked by those who accuse the court of being politically motivated, a unanimous Florida Supreme Court denied the Gore petition on November 23, 2000.[14] At that time, pressure was beginning to build on Gore to discontinue his legal battle. The denial of the petition to order resumption of the Miami-Dade recount might well have been the final blow to the Gore campaign, a fact surely not lost on the Florida justices.

When the Secretary of State finally certified the results on November 26th, Bush was declared the winner of Florida's 25 electoral votes by a

9. *Id.* at 1233-34.
10. *Id.* at 1237.
11. *Id.* at 1227.
12. *Id.* at 1237.
13. *Id.* at 1240.
14. Gore v. Miami-Dade County Canvassing Bd., 780 So. 2d 913 (Fla. 2000).

537-vote margin. Gore immediately filed his election contest under Section 102.168, and the case proceeded to trial before Circuit Judge N. Sanders Sauls.[15] Gore, running perilously short of time for manual recounts to be completed, urged Judge Sauls to order manual counting of the disputed ballots to begin immediately. When he refused, the Gore legal team once again asked the Florida Supreme Court to intervene and order that the manual recount proceed pending the completion of the trial. In its petition, the Gore lawyers argued "[t]ime is of the essence in this matter — this contest action must be resolved by December 12th to prevent 'precluding Florida voters from participating fully in the federal electoral process.'" On December 1st, the Supreme Court, which eleven days earlier had recognized that December 12th was the deadline to finalize Florida's selection of electors, and with no knowledge of how long the trial before Judge Sauls would take, unanimously denied this latest effort by Gore to jump start the manual recount.[16]

On the same day that the Florida Supreme Court refused to overturn Judge Sauls' order, the court dealt another setback to Gore. On November 20, 2000, Palm Beach County Judge Jorge LaBarga had dismissed a number of cases that had challenged the election based upon alleged flaws in the "butterfly ballot." The plaintiffs had sought a new election or, in the alternative, a "statistical reallocation" of the Palm Beach County vote. Because of the size of Gore's lead in the county, such a reallocation would have ended the judicial battle in his favor. On December 1, 2000, the Florida Supreme Court denied the petition, cutting off one more avenue for a Gore victory.[17]

D. *The Second Florida Supreme Court Decision*

After a two-day trial, Judge Sauls ruled for Bush, finding that Gore had failed to demonstrate that the Canvassing Boards had abused their discretion and failed to prove that there was a reasonable probability that the results of the election would have been changed because of illegal votes being received or legal votes being rejected. The Florida Supreme Court's November 21st opinion had been unanimous.[18] Its second decision, seventeen days later, was sharply split four to three with strong dissenting opinions from Chief Justice Wells and Justice Harding.[19] The majority ruled that the Section 166, which provides for protests before canvassing boards, Section 168, which provides for contests in the circuit

15. Gore v. Harris, slip op., No. 00-2808 (Fla. 2d Cir. Ct. Dec. 4, 2000).
16. Gore v. Harris, 779 So. 2d 270 (Fla. 2000).
17. Fladell v. Palm Beach Canvassing Bd., 772 So. 2d 1240 (Fla. 2000).
18. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000).
19. Gore v. Harris, 772 So. 2d 1243 (Fla. 2000).

court, were unrelated, and that the circuit court should therefore have held a *de novo* proceeding.[20] Accordingly, the majority found that Judge Sauls had erred in deciding whether to order manual recounts by applying an abuse of discretion standard to the actions of the canvassing boards.[21] The majority further concluded that Gore had made a sufficient showing to place the results of the election in doubt, and satisfied the standard stated in the contest statute. The decision ordered an immediate statewide manual recount.[22]

In his dissent, Chief Justice Wells concluded that the two statutory sections should be interpreted *in pari material*, that abuse of discretion was the proper standard, and that the effect of the majority opinion was to entitle a person filing an election contest to a manual recount simply by filing a complaint.[23] He also expressed concern over the constitutional implications of the majority decision, particularly the lack of uniform standards.[24] Justice Harding agreed with the majority that the trial court proceeding was *de novo*. He concluded, however, that Gore had failed to show by a preponderance of the evidence that the outcome of the statewide election would likely be changed when the only evidence they produced was related to a selected subset of counties most favorable to the candidate.[25] Justice Harding also expressed serious doubts about the impact of the procedure ordered by the majority on due process and equal protection rights.[26]

The dissenting positions articulated by Justices Wells and Harding reflected the arguments I had vigorously advanced to the Florida Supreme Court on December 7, 2000, and, not surprisingly, I consider them the better-reasoned positions. I do not, however, believe that the justices in the majority were motivated by political partisanship. Such a notion is belied by the unblemished record and widespread reputation that each of the justices enjoys as an individual of high integrity, and by the record of their conduct throughout this process.

Certainly, there was a strong difference in emphasis and ideological approach among the justices. The majority began with the premise that ascertaining the true will of every voter was paramount. The court was consistent in its adherence to that principle, giving it precedence (in effect if not word) over traditional rules of construction and burden of proof. Those justices were equally consistent, however, in refusing to boost

---

20. *Id.* at 1252.
21. *Id.*
22. *Id.* at 1262.
23. *Id.* at 1266-67.
24. *Id.* at 1268.
25. *Id.*
26. *Id.* at 1272.

Gore's chances of success when doing so would result in disenfranchising voters. Thus, the court unanimously affirmed the judgments against the plaintiffs in two cases where Gore supporters sought to invalidate absentee ballots that favored Bush by over two thousand votes.[27] The effect of such an invalidation would have been to hand Gore Florida's twenty-five electoral votes without the necessity for any further recounts and, because the cases involved no federal issue, without the risk of U.S. Supreme Court review.

The majority also remained consistent in its statutory construction, regardless of which candidate benefitted. While the litigation remained in the protest stage, pursuant to subsection 166, and while the case was pending before Judge Sauls, the Florida Supreme Court refused to order manual recounts when such an order would have interfered with the exercise of discretion by canvassing boards or the circuit court. When the court refused to order recounts on November 23rd and again on December 1st, it was well aware of the fact that the clock was ticking against Gore.

III. THE UNITED STATES SUPREME COURT

A. *The Decision to Accept Jurisdiction*

Some critics of the U.S. Supreme Court's involvement in the presidential litigation charge that the Court's intervention was unprecedented and motivated by partisan politics. I believe that both charges are unjustified.

Historically, the Court has not hesitated to intervene in cases involving significant issues of equal protection with respect to voting. Elections are likely the most frequent subject of U.S. Supreme Court equal protection review and surely one of the most frequent subjects of any review by the Court. In the twenty years prior to the presidential litigation, the high Court has granted certiorari to review equal protection claims in thirty election cases. Those cases are not limited, as some may suggest, to cases involving allegations of racial discrimination. Almost half did not involve a racial issue. Most notable were the apportionment cases.[28] The Court has

27. Jacobs v. Seminole County Canvassing Bd., 772 So. 2d 519 (Fla. 2000); Taylor v. Martin County Canvassing Bd., 773 So. 2d 517 (Fla. 2000).

28. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109 (1986); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962). *See* also Morse v. Republican Party of Va., 517 U.S. 186 (1996) (filing fee for delegates to vote at national convention held unconstitutional); Norman v. Reed, 502 U.S. 279 (1992) (petition requirement for minor party placement on ballot held constitutional).

also regularly granted certiorari to resolve issues involving the respective powers or duties of the other branches.[29]

Those who argue that the majority departed from precedent also ignore the fact that this case was truly unique. This was not just another election case. The country had not faced such a stalemate in the selection of a president since the Tilden-Hayes election of 1876.[30]

The Florida Legislature, both houses of which were controlled by Republicans, had already convened to name a competing electoral delegation in the event that a recount changed the results. Congress, also under Republican control, would have had to choose between the competing delegations and would undoubtedly have chosen the Bush delegates.[31] At that point, the high Court would again have been petitioned to grant certiorari. Had it declined again, critics undoubtedly would have charged that the Court failed to get involved because it was motivated by a desire to see Bush elected, albeit this time by failing to get involved. At that point, the country would have suffered through an extended period of uncertainty and Congress would have been drawn into the cauldron. The wounds would have been deeper and would have taken longer to heal.

The U.S. Supreme Court is the arbiter of last resort in our system. In an institutional stalemate of this magnitude, I believe it is the responsibility of the Court to act.

B. *The First Decision*

The U.S. Constitution does not provide for the direct election of presidential electors. Instead, it simply states that, "Each State shall appoint, in such Manner as the Legislature thereof may direct" its allocated electors.[32] In 1892, the Supreme Court recognized that the drafters of the Constitution, by express reference to the authority of the *legislatures* of the states to direct the method of selection, had reposed the power exclusively in the state legislatures, rather than the states themselves.[33] The effect of the provision is that even a state constitution

---

29. *See, e.g.*, Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999); Clinton v. City of N.Y., 524 U.S. 417 (1998); Mistretta v. United States, 488 U.S. 361 (1989); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Goldwater v. Carter, 444 U.S. 996 (1979); United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U. S. 486 (1969); The Pocket Veto Case, 279 U.S. 655 (1929); Myers v. United States, 272 U.S. 52 (1926).

30. The Court was not called upon to intervene in the Tilden-Hayes controversy, which was resolved by Congress.

31. Under federal law, if both houses of Congress were unable to agree, the decision would be made by Florida's governor, a Republican and brother of George W. Bush.

32. U.S. CONST. art. II, § 1, cl. 2.

33. McPherson v. Blacker, 146 U.S. 1 (1892).

cannot limit or override the legislature's prerogative with respect to the method of selection.

In its decision on December 4, 2000, the Supreme Court expressed concern that the Florida Supreme Court's November 21st opinion may have violated Article II, Section 1 in either of two regards.[34] The first concern arose because the Florida Supreme Court referred to several provisions of the Florida Constitution in addressing the circumstances where the Secretary of State could refuse late-filed returns from the canvassing boards.[35] Because Article II, Section 1 gave the states exclusive jurisdiction over the method of selecting presidential electors, any construction that disregarded legislative intent because of a state constitutional provision would violate the U.S. Constitution and be invalidated.

The second concern was rooted deeply in the history of presidential selection. In 1876, Samuel Tilden, the Democratic nominee, won the popular vote over the Republican nominee, Rutherford Hayes by a small margin. Before the presidency was finally determined four months later, the nation would witness a convoluted drama that makes the 2000 election look like a walk in the park.

Tilden was one vote short of a majority in the Electoral College, but twenty electoral votes in four states were disputed and two sets of results from each of them was returned. While Tilden needed only one of the disputed votes, Hayes needed all twenty to win. Congress established a commission composed of fifteen members, five each from the Senate, House and Supreme Court. The Commission's determination of disputed delegates was final unless overturned by both houses of Congress. The Commission was perfectly balanced, with seven Democrats, seven Republicans, and an Independent Supreme Court Justice. The balance was disrupted, however, when the Independent justice was elected to the Senate by his home state legislature, resigned from the Court, and was replaced on the Commission by a Republican. As a result, the Commission awarded each of the disputed delegations to Republican Hayes, and Congress, with the Senate under Republican control and the House under Democratic control, was deadlocked, leaving the Commission decision undisturbed.

In a desperate effort to derail the train, the Democrats objected to a single Republican elector from the undisputed Wisconsin delegation. The Republican Senate quickly overruled the objection, but the Democratic House engaged in a lengthy, unruly debate. Finally, at 3:38 a.m., the

34. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

35. *Id.*

House avoided a true constitutional crisis, by concurring with the Senate; thus electing Hayes president by one electoral vote.

In the aftermath of the Tilden-Hayes experience, Congress enacted the following:

> If any state shall have provided, *by laws enacted prior to the day fixed for the appointment of the electors*, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and *made at least six days prior to said time of meeting of the electors*, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.[36]

The provision was forgotten after its enactment until the Bush legal team discovered it and made it a centerpiece of its first petition for certiorari in the U.S. Supreme Court.

The provision itself would not have been an issue in the presidential litigation because it did not mandate the states to do anything. Referred to by the U.S. Supreme Court as the "safe harbor" provision,[37] it simply provided that the selection of electoral delegations in accordance with its provisions would be conclusive and thus not subject to challenge in Congress.[38] As with the Court's first concern, its second concern arose from a comment in the Florida's Supreme Court's November 21, 2000, opinion. The Court had stated:

> We conclude that, *consistent with the Florida election scheme*, the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or *preclude Florida's voters from participating fully in the federal electoral process*.[39]

---

36. 3 U.S.C. § 5 (2000).
37. Bush v. Gore, 531 U.S. 98 (2000).
38. 3 U.S.C. § 5 (2000).
39. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1239 (Fla. 2000).

The comment could be read as an acknowledgement of legislative intent to take advantage of the safe harbor provision. If the Florida Supreme Court decision extending the deadlines for submission of canvassing board returns had been a departure from "laws enacted prior to the day fixed for the appointment of the electors,"[40] Florida would have lost the benefit of the safe harbor, and its electors would have been subject to challenge in Congress. If the Florida Supreme Court decision had thus defeated legislative intent, it would have violated the exclusive delegation of determining the method of elector selection to the state legislatures by Article II, Section 1 of the U.S. Constitution.

If political partisanship motivated the U.S. Supreme Court majority, the Court's December 4, 2000 opinion's two concerns would have provided adequate opportunity to end the litigation and ensure the election of Bush. Instead, the Court exercised commendable judicial restraint and extended significant deference to the Florida Supreme Court. It remanded the case to the Florida Supreme Court for clarification of that Court's holding with respect to the U.S. Supreme Court's two concerns.[41]

C. *The First United States Supreme Court Decision*

The December 12, 2000, decision of the U.S. Supreme Court that ended the litigation was a reasonable, if not necessary, consequence of the application of legal principles that counsel for both candidates had agreed to early in the litigation to the facts as they subsequently developed.

In the November 20th oral argument to the Florida Supreme Court, David Boies, Gore's lead counsel, was questioned regarding the importance of uniformity in manual recounts:

> JUSTICE PARIENTE: Is the uniformity of how these manual recounts are conducted essential to the integrity of the process or, also, to the constitutionality of the statute?
>
> BOIES: Your honor, I think it is important to the integrity of the process. I think if you had very wide variations, you could raise constitutional problems.[42]

Considering the stage of the proceeding, Boies's response was not a concession, and certainly not a mistake of judgment. It was a candid and reasonable acknowledgment of a principle of constitutional law that could hardly be denied. Moreover, there was no reason for him to assume that

---

40. 3 U.S.C. § 5 (2000).

41. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000).

42. Fla. Sup. Ct. argument (Nov. 20, 2000), *also available at* http://news.findlaw.com/cnn/docs/election2000/fsc1120transcript.html.

uniform standards would not be set by the Court. In fact, a short time later in the argument, he urged the Court to do so:

> BOIES: For the reasons that you point out, it is quite important that this Court be as specific as possible in terms of the standard to be applied, so that it will have uniformity.[43]

As it turned out, the Court did not set uniform standards in either of its opinions. The occurrences immediately following the Florida Supreme Court's November 21, 2000, decision set the stage for the U.S. Supreme Court's final decision. On November 22, 2000, the Palm Beach County Circuit Court denied a Gore-team petition to impose a liberal standard on the canvassing board that allowed every hanging or dimpled chad on a ballot to be counted as a vote. Instead, the court allowed the board to proceed with a more conservative standard by which it considered the totality of the circumstances in determining whether to count a vote.

On November 23, 2000, the Florida Supreme Court refused to order Miami-Dade County to resume its manual recount.[44] Now desperate to increase Gore's chances of picking up votes, Mr. Boies personally appeared before the Broward County Canvassing Board on November 24th and persuaded it to adopt the more liberal standard that Palm Beach had refused to adopt. The result of the different standards was dramatic. Broward County recovered twelve percent of the machine-rejected ballots, sixty times that of Palm Beach County's two one-hundredth's of a percent. It is not surprising under these circumstances that seven members of the U.S. Supreme Court concluded that the lack of uniform standards in the Florida recount procedures violated the Equal Protection Clause.

The Court split 5-4 as to the remedy; the majority held that the Florida recount had to end because the deadline for the Florida delegation under the safe harbor provision, December 12, 2000, had arrived.[45] Here again, the majority's conclusion rested upon a premise to which both candidates' counsel agreed. In its brief, the Bush team argued that December 12th was the deadline for finalization of Florida's electors. Neither the Gore team nor the Florida Supreme Court ever disputed this proposition.

During the November 20, 2000, Florida Supreme Court argument, David Boies acknowledged that December 12, 2000, was the deadline:

> CHIEF JUSTICE WELLS: If the counsel for the Attorney General is correct, and December 12 is the date by which * * * the certification has to be made for the Electoral

43. *Id.*

44. Gore v. Miami-Dade County Canvassing Bd., 780 So. 2d 913 (Fla. 2000).

45. Bush v. Gore, 531 U.S. 98, 121 (2000).

> College, and as I read Section V of the U.S. Code, what that date means is that all of the controversies and contests in the state have to be finally determined by that date. * * * Do you agree with that?
>
> BOIES: I do, your honor.[46]

In its December 11, 2000, clarification opinion after remand from the U.S. Supreme Court, the Florida Supreme Court clearly acknowledged that a proper reading of the Florida Legislature's required adherence to that deadline:

> As always, it is necessary to read all provisions of the election code in pari material. In this case, that comprehensive reading required that there be time for an election contest pursuant to section 102.168, which all parties had agreed was a necessary component of the statutory scheme *and to accommodate the outside deadline set forth in 3 U.S.C. § 5 of December 12, 2000.*[47]

It is indisputable that from the beginning of the litigation, all of the major players agreed that the Florida Legislature intended to comply with the federal safe harbor statute, and that December 12, 2000, was therefore the deadline for all Florida activities relating to selection of its electors to conclude. Given this universal agreement, it is difficult to understand how the U.S. Supreme Court can be criticized for ending the litigation on that very date.

IV. CONCLUSION

The architects of the U.S. Constitution constructed a complex stage on which the drama of an inconclusive presidential election would be played out. All three branches at both state and federal levels of government were given roles. If either court refrained from playing its part, or for any of the justice modified an opinion out of fear of criticism, it would have been an abdication of the highest responsibility of the office. In the 2000 litigation, I believe both supreme courts played their roles in the manner intended by the architects.

---

46. Fla. Sup. Ct. argument (Nov. 20, 2000), *also available at* http://news.findlaw.com/cnn/docs/election2000/fsc1120transcript.html.

47. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1290 (Fla. 2000) (emphasis added).