

IN THE
SUPREME COURT OF FLORIDA

PALM BEACH COUNTY CANVASSING BOARD V. KATHERINE HARRIS, *ET AL.*
CASE NO. SC00-2346

VOLUSIA COUNTY CANVASSING BOARD, *ET AL.* V. HARRIS, *ET AL.*
CASE NO. SC00-2348

FLORIDA DEMOCRATIC PARTY V. HARRIS, *ET AL.*
CASE NO. SC00-2349

**SUPPLEMENTAL BRIEF OF
THE PALM BEACH COUNTY CANVASSING BOARD,
FOLLOWING REMAND FROM THE
SUPREME COURT OF THE UNITED STATES**

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CERTIFICATE OF FONT SIZE AND STYLE

This Brief is typed in Times New Roman 14 point font.

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STATEMENT OF THE CASE

This Court's November 21, 2000 judgment, construing conflicting provisions of the Florida Election Code in disputes arising from the recent Presidential election, was reviewed by the Supreme Court in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. ___, 2000 WL 1769093 (2000) (per curiam). After expedited briefing and oral argument, on December 4, 2000, the Supreme Court "decline[d] at this time to review the federal questions asserted to be present" (*id.*, slip op. at 6), vacated this Court's judgment, and "remanded for further proceedings not inconsistent with this opinion." *Id.*, slip op. at 7. The same day, this Court ordered that supplemental briefs would be accepted from the parties "on the implementation of the Mandate to this Court from the United States Supreme Court."

STATEMENT OF THE FACTS

We do not restate the facts, which are set forth in detail in this Court's November 21, 2000 opinion.

ARGUMENT

THIS COURT’S NOVEMBER 21, 2000 DECISION DID NOT USE THE FLORIDA CONSTITUTION TO OVERRIDE THE WILL OF THE LEGISLATURE, NOR DID IT CHANGE THE LAW. THE DECISION POSES NO CONFLICT WITH ARTICLE II, § 1, CL. 2 OF THE UNITED STATES CONSTITUTION OR TITLE 3 U.S.C. § 5

The Supreme Court of the United States stated:

[W]e are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, § 1, cl. 2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5.

Bush v. Palm Beach County Canvassing Board, 531 U.S. ___, slip op., p. 7 (Dec. 4, 2000).

This Court’s statement of the issues presented to it demonstrates that neither the United States Constitution nor 3 U.S.C. § 5 were the focus of the arguments: “Under what circumstances may a Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary and Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?” *Palm Beach County Canvassing Board v. Harris*, ___ So. 2d ___, 2000 WL 1725434 (Fla. Nov. 21,

2000) (slip op., p. 10). A footnote noted “Neither party has raised as an issue on appeal the constitutionality of Florida’s election laws.” *Id.*, slip op. p. 10, n. 10.

The fact that this Court’s opinion discussed and emphasized the importance of the right to vote under the Florida Constitution (*see especially* slip op. 32, n. 52) cannot fairly be said to mean that the Court “saw the Florida Constitution as *circumscribing* the legislature’s authority under Art. II, § 1, cl. 2.” *Bush v. Palm Beach County Canvassing Board, supra*, slip op. p. 7 (emphasis supplied). This Court’s opinion repeatedly referred to the Florida Election Code as the source of the governing law and the source of the problems presented by the conflicting opinions of the Secretary of State and the Attorney General. The statutory construction principles utilized by the Court focused on the Election Code and were devoid of any use of the Florida Constitution.

First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general statute.

* * *

Second, it is also well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute.

* * *

Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision.

* * *

Fourth, related statutory provisions must be read as a cohesive whole.

Palm Beach County Canvassing Board v. Harris, supra, slip op. at 24-26 (footnotes omitted). And the Court's conclusions were tied to the Election Code, not the Florida Constitution:

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 electoral process.

* * *

CONCLUSION

According to the legislative intent evinced in the Florida Election Code, the permissive language of section 102.112 supersedes the mandatory language of section 102.111.

* * *

As explained above, the Florida Election Code must be construed as a whole.

Palm Beach County Canvassing Board v. Harris, supra, slip op. at 36, 38-39.

This Court did what a court properly does. Karl Llewellyn, speaking of courts and statutes, wrote:

But a court must strive to make sense *as a whole* out of our law *as a whole*. It must, to use [Jerome] Frank's figure, take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and to play it in harmony with the other music of the legal system.

KARL LLEWELLYN, *THE COMMON LAW TRADITION* 373 (1960) (emphasis in original).

This Court's decision achieved that harmonious result. The Court did not carve out a new rule of law; it sought to make sense out of the conflict between section 102.111(1), enacted in 1951, and sections 102.112(1) and (2), enacted in 1989.

[I]ncreasingly, as any statute gains in age [,] its language is called upon to deal with circumstances utterly un contemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation. Broad purposes can indeed reach

far beyond details known or knowable at the time of drafting.

LLEWELLYN, *supra* at 374 (emphasis in original).

What the Court did was not legislative, it was ordinary judging.

More specifically, the judge is uniquely competent to place statutes in their temporal setting, taking account of what happens both before and after a statute is passed. Moreover, the exercise of this competence inevitably results from applying texts to facts, an exercise that forces the judge to think about how a text's meaning interacts with the past and the future (about the statute's intent). Once this thought process begins, judgment requires thinking about substantive values and comparative institutional competence; however, these are the results of ordinary judging. . . .

WILLIAM D. POPKIN, *STATUTES IN COURT, THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* 246 (1999).

This Court's November 21, 2000 decision recognized the substantive values of the Florida Constitution, but those values did not dictate the outcome. The result – reconciliation of the conflicting election statutes and a date for certification of election results – was “to make sense rather than nonsense out of the corpus juris.” *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101, 111 S. Ct. 1138, 113 L. Ed.2d 68 (1991). Justice Frankfurter put it another way, quoting Lord Justice Denning in

Seaford Court Estates, Ltd. v. Asher [1949] 2 K.B. 481, 499 (C.A.): “A judge must not alter the material of which it [an act] is woven, but he can and should iron out the creases.” Felix Frankfurter, *A Symposium on Statutory Construction, Foreward*, 3 Vand. L. Rev. 365, 367 (1950).

This Court tailored its decision to preserve every aspect of the Florida Election Code. The opportunity to ensure the accuracy of the vote was preserved. The duty of the Secretary of State to certify election results was preserved. The opportunity to lodge a statutory post-certification election contest was preserved. All of this was done under laws that were enacted prior to November 7, 2000.

CONCLUSION

This Court’s resolution of the subsequent-to-election dispute did not use the Florida Constitution to “circumscribe the legislative power.” Thus, there was no conflict with Article II, § 1, cl. 2. Nor did the November 26, 2000 certification date constitute a “law enacted prior to the day fixed for the appointment of electors.” Thus, there was no conflict with 3 U.S.C. § 5. Only this Court can say what “consideration” it gave to that statute, but the decision and the common law rules of judging support the conclusion that the Court did not offend it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) ROBERT BUTTERWORTH, ATTORNEY GENERAL, PL-01 THE CAPITOL, TALLAHASSEE, FL 32399, (2) KATHERINE HARRIS, SECRETARY OF STATE, THE CAPITOL, TALLAHASSEE, FL 32399-0250, (3) BARRY RICHARD, Greenberg Traurig, P.A., 101 E. College Ave., P.O. Drawer 1838, Tallahassee, FL 32302 (Counsel for George W. Bush), (4) MITCHELL W. BERGER, Berger Davis & Singerman, 350 E. Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301 (Counsel for Albert A. Gore and the Florida Democratic Executive Committee), and (5) SAMUEL S. GOREN, MICHAEL D. CIRULLO, Josias, Goren, Cherof, Doody & Ezrol, P.A., 3099 E. Commercial Blvd., Ste. 200, Ft. Lauderdale, FL 33308 (Counsel for Broward County Canvassing Board and Broward County Supervisor of Elections), and to those counsel on the list below by U.S. Mail this 5th day of December, 2000.

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