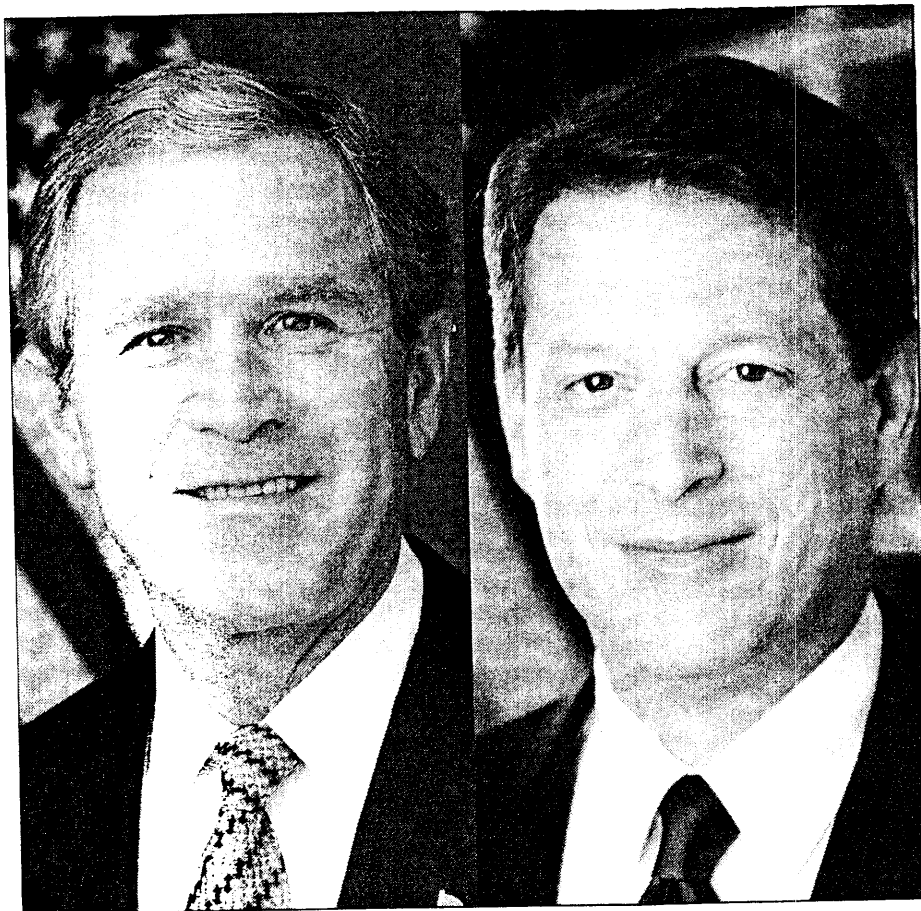


***Bush v. Gore* (2000)**

The Contested Election of 2000



The 2000 election was one of the closest in U.S. history. Democrat Al Gore won the popular vote, but Republican George W. Bush eventually won the electoral vote.

On December 12, 2000, the U.S. Supreme Court for the first time in American history essentially decided a presidential election with its ruling in *Bush v. Gore*. The day after the Supreme Court's ruling, candidate Al Gore conceded defeat to George W. Bush.

The Events Leading Up to *Bush v. Gore*

The presidential election of Tuesday, November 7, 2000, was one of the closest in U.S. history. By early Wednesday morning, it was clear that the Democratic candidate, Vice President Al Gore, had won the national popular vote, but the outcome of the electoral vote was uncertain. The presidency turned on Florida and its 25 electoral votes. Early on election night, the networks called Gore the winner in Florida, only to retract their prediction later in the evening. In the early hours of Wednesday, November 8, the networks declared Bush the winner of Florida and the presidency, only to recant that a short time later and to conclude that the outcome in Florida, and thus of the national election, was too close to call.

On November 8, the Florida Division of Elections reported that Bush had received 2,909,135 votes and Gore had received 2,907,351 votes. Florida law provides for a recount of votes if the election is decided by less than

one-half of a percent of the votes cast. Because the difference in votes between the two candidates was less than one-half of a percent, Gore immediately asked for a machine recount of the tally of votes in four counties: Volusia, Palm Beach, Broward, and Miami-Dade. Florida law set November 14 as the deadline for county vote totals. On November 9, Florida's Secretary of State Katherine Harris declined to extend this deadline. By this point, the machine recount had narrowed Bush's lead to a mere 327 votes.

Upon learning of the close margin between him and Bush, Gore petitioned and received permission to have a hand recount in the four counties in question. On Saturday, November 9, Bush sued in federal district court to block the manual recount, but his request was denied.

Secretary of State Harris, however, declared that November 14 was the deadline for counties to submit their vote totals and that she would not accept late recounts. She said that the Florida election statute required counties to report their votes within one week of the election.

A suit was brought against Harris in Florida court to compel her to accept the time for the reporting of the results. On Friday, November 17, the Florida state trial court ruled in favor of Harris. On Monday, November 20, the Florida Supreme Court held a nationally televised hearing. On Tuesday night, November 21, the Florida Supreme Court unanimously reversed the trial court and ordered that the secretary of state accept hand recounts from the four counties if they were completed by 5 p.m., Sunday, November 26, or Monday morning, if the secretary of state was not open for business on Sunday afternoon.

The Florida Supreme Court ruled that Florida's secretary of state abused her discretion in refusing to extend the deadline for certifying elections to provide the needed time for the recounts. To carry out the law allowing recounts, the court concluded that 'there must be time for doing the recount. The court said that the secretary of state's refusal to accept hand recounts was wrong

because it completely negated the statute that expressly provided for them.

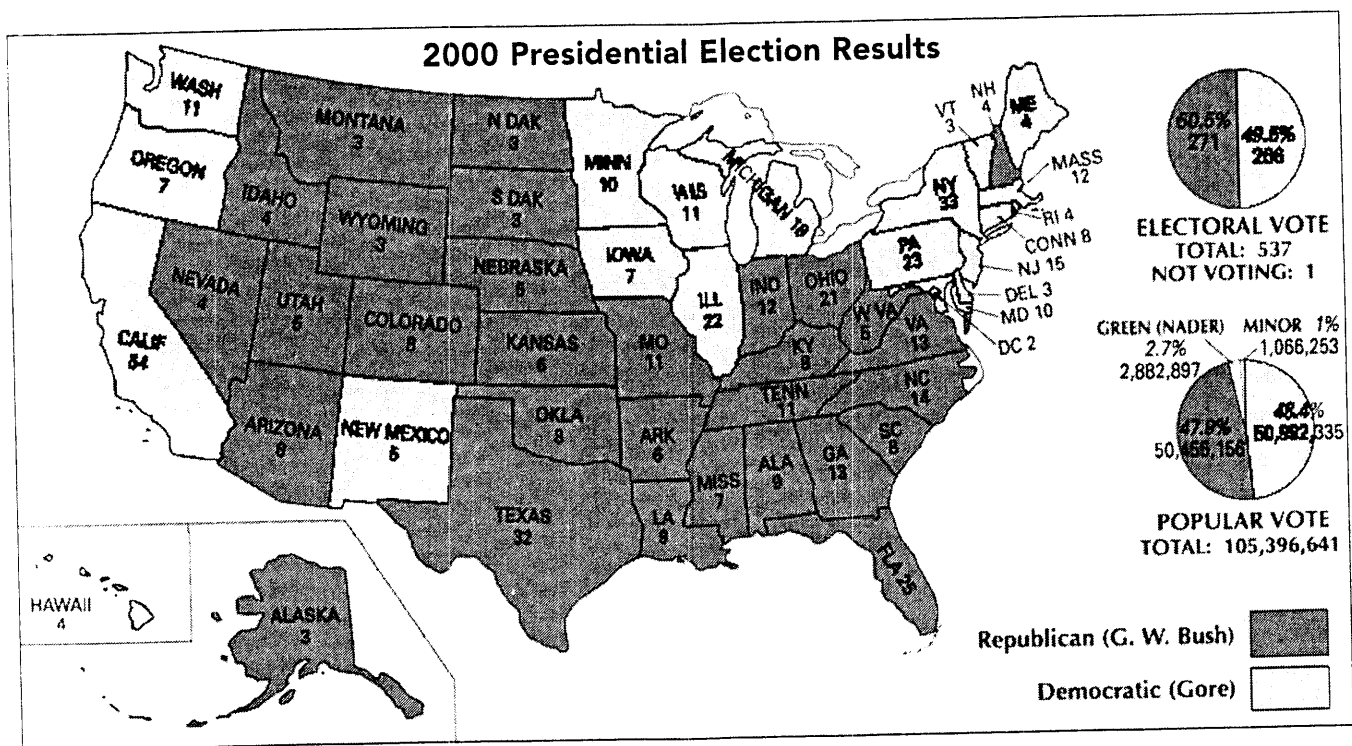
Bush appealed to the U.S. Supreme Court. On Friday, November 24, the day after Thanksgiving, the U.S. Supreme Court granted certiorari and scheduled oral argument for the following Friday, December 1. In an unprecedented order, the court permitted the broadcasting of the oral argument immediately after it was finished. A few days later, in *Bush v. Palm Beach County Canvassing Bd.*, the U.S. Supreme Court sent the case back to the Florida Supreme Court for clarification of its earlier decision.

Meanwhile, on Sunday, November 26, some counties asked for additional time to complete their counting. The secretary of state refused all requests for extensions. On Sunday night, November 26, the Florida Elections Canvassing Commission certified the election results. Bush was determined to be the winner of Florida by 537 votes and thus the winner of Florida's 25 electoral votes.

On Monday, November 27, Gore filed suit in Florida under the Florida law on contesting election results. This provision, Section 102.168(3) (c), provides that "[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" shall be grounds for a contest. The statute authorizes a court finding successful grounds for a contest to "provide any relief appropriate under such circumstances."

On Saturday and Sunday, December 2 and 3, a Florida state trial court held a hearing on whether Gore had met the statutory requirements for a successful contest. On Monday, December 4, the Florida trial court ruled against Gore on the grounds that Gore failed to prove a "reasonable probability" that the election would have turned out differently if not for problems in counting ballots.

The Florida Supreme Court granted review and scheduled oral arguments for Thursday, December 6. On Friday afternoon, December 7, the Florida Supreme Court, by a 4 to 3 decision,



reversed the trial court. The Florida Supreme Court ruled that the trial court had used the wrong standard in insisting that Gore demonstrate a “reasonable probability” that the election would have been decided differently. The Florida Supreme Court said that the statute requires only a showing of “[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.” The Florida Supreme Court ordered a counting of all of the uncounted votes in Florida.

Just hours after the Florida Supreme Court’s decision, on Friday night, December 8, a Florida trial court judge ordered that the counting of the uncounted votes commence the next morning and that it be completed by Sunday afternoon, December 9, at 2 p.m. The judge said that he would resolve any disputes.

On Saturday morning, counting commenced as ordered. At the same time, Bush asked the U.S. Supreme Court to stay the counting and grant certiorari in the case. In the early afternoon on Saturday, the U.S. Supreme Court, in a 5 to 4 ruling, halted the counting of the votes in Florida pending its decision.

On Monday, December 11, the U.S. Supreme Court held oral arguments. Again, they were broadcast immediately after their completion. On Tuesday night, December 12, at approximately 10 p.m., Eastern time, the court released its opinion in *Bush v. Gore*.

The Decision

In a per curiam opinion, the Supreme Court ruled 5 to 4 that counting the uncounted ballots without standards denies equal protection and that counting could not continue because Florida wished to choose its electors by the December 12 “safe harbor” date set by federal law. The per curiam opinion was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas.

The court said that the central problem was that the Florida Supreme Court ordered counting the uncounted ballots, but failed to prescribe standards. The per curiam opinion stated: “The problem inheres in absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.” The court said that this results in similar ballots being treated differently.

The court thus concluded that counting the uncounted ballots as ordered by the Florida Supreme Court would deny equal protection: “The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer.” The court explicitly stated that it was deciding just the matter before it and was not setting a general precedent. The per curiam opinion declared: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”

The court then confronted the key question: Should the case be sent back to the Florida Supreme Court for it to set standards for the counting or should the court order an end to the counting process? The court, in its per curiam opinion, noted that federal law requires the selection of electors to be completed by December 12 and Florida indicated that it wished to observe the December 12 date. The court thus ordered an end to the counting.

Chief Justice Rehnquist wrote a separate opinion concurring in the judgment. Justices Scalia and Thomas joined this opinion. The Rehnquist opinion argued that the Florida Supreme Court had impermissibly changed Florida’s election law in a manner that violates federal law. The federal law in question was Section 5 of 3 U.S.C., which provides that the state’s selection of electors “shall be conclusive, and shall govern in the counting of the electoral votes” if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the Electoral College. Chief Justice Rehnquist said that this prevents a state from changing its electoral process after the election and that Florida’s Supreme Court had done this by usurping the authority Florida law had vested in the Florida secretary of state and the Florida circuit courts. Chief Justice Rehnquist concluded that the Florida Supreme Court “significantly departed from the statutory framework

in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.”

The Dissents

Each of the four dissenting justices wrote separate dissents. Justice Stevens, joined by Justices Ginsburg and Breyer, challenged the per curiam’s premise that there was a denial of equal protection. He argued that the procedure created by the Florida Supreme Court, with a trial judge resolving disputes, could prevent unequal treatment of like ballots. He explained: “Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process.” Justice Stevens said that if the lack of standard for counting is the problem the solution is to send the case back to Florida to create standards for the subsequent recount.

Justice Souter’s dissenting opinion, joined by the other three dissenting justices, objected to the court hearing the case at all. Justice Souter argued that no significant federal issues were raised and that the case should have been left to the Florida courts to resolve.

Justice Ginsburg’s dissent argued that there was no denial of equal protection and that in any event, the appropriate solution was to have the case sent back to Florida for the counting to continue.

Finally, Justice Breyer acknowledged that there were equal protection problems with counting votes without standards, but argued that the court was wrong in ending the counting rather than sending back the case for counting with standards. He stressed that the December 12 deadline was not some magic date. States could still choose their electors after that date and could be confident that Congress would recognize them.

Issues to Consider Concerning *Bush v. Gore*

The decision in *Bush v. Gore* raised many issues. One of the most important was whether the court was correct in finding a denial of equal protection. Seven justices expressed concern over a denial of equal protection from counting votes without uniform standards. Yet Justices Souter and Breyer, who shared this concern with the majority, did not file opinions “concurring in part and dissenting in part,” but rather just dissented. How, exactly, was equal protection denied?

Another major issue is whether the court has created a new principle of equality in voting. Will this principle be the basis for future successful challenges to variations within a state in election practices? The court stated that it was deciding only the issue before it and not setting a precedent. But its ruling has led to lawsuits across the country arguing that variations within a state in conducting elections violate equal protection.

Finally, another important issue is whether the court was justified in ending the counting in Florida. The court, in its per curiam opinion, said that the Florida Supreme Court had indicated that it wanted to follow the December 12 deadline set by the federal “safe harbor” statute. Since it was December 12, the Supreme Court ordered an end to the counting. But because it was an issue of Florida state law, should the Supreme Court have sent the case back for the Florida Supreme Court to decide the content of Florida law under the unprecedented circumstances?

On December 13, 2000, the day after *Bush v. Gore* was decided, Al Gore conceded the election to George W. Bush. For the first time in history, the Supreme Court had, in effect, decided a presidential election.

For Discussion

1. In the 2000 election, what did the first count of Florida’s votes show? On what basis did Al Gore demand a recount? What did the machine recount show?

2. What happened when Gore demanded a manual recount? Do you think a hand recount is more accurate than a machine recount? Explain.
3. A lawsuit was brought to demand an extension of time to report the results of the hand recount. This case ended in a decision by the U.S. Supreme Court on December 1. What decisions were made by the trial court, Florida Supreme Court, and U.S. Supreme Court? Which of these decisions do you think was correct? Why?
4. Gore brought another lawsuit on November 27. What were the grounds for this suit? How did the trial court rule? The Florida Supreme Court? The U.S. Supreme Court? A concurring and four dissenting opinions were also written in *Bush v. Gore*. Which of the opinions—court, concurring, or dissenting—seems most reasonable? Why?