
The 2000 Presidential election ended in a collision of history, law, and the courts. It produced a deadlock that dragged out the result for over a month, and consequences--real and imagined--that promise to drag on for years. In the first in-depth study of the election and its litigious aftermath, Judge Posner surveys the history and theory of American electoral law and practice, analyzes which Presidential candidate really won the popular vote in Florida, surveys the litigation that ensued, evaluates the courts, the lawyers, and the commentators, and ends with a blueprint for reforming our Presidential electoral practices. The book starts with an overview of the electoral process, including its history and guiding theories. It looks next at the Florida election itself, exploring which candidate really won and whether this is even a meaningful question. The focus then shifts to the complex litigation, both state and federal, provoked by the photo finish. On
the basis of the pragmatic jurisprudence that Judge Posner has articulated and defended in his previous writings, this book offers an alternative justification for the Supreme Courts decision in Bush v. Gore while praising the Court for averting the chaotic consequences of an unresolved deadlock. Posner also evaluates the performance of the lawyers who conducted the post-election litigation and of the academics who commented on the unfolding drama. He argues that neither Gores nor Bushs lawyers blundered seriously, but that the reaction of the legal professoriat to the litigation exposed serious flaws in the academic practice of constitutional law. While rejecting such radical moves as abolishing the Electoral College or creating a national ballot, Posner concludes with a detailed plan of feasible reforms designed to avoid a repetition of the 2000 election fiasco. Lawyers, political scientists, pundits, and politicians are waiting to hear what Judge Posner has to say. But this book is written for and will be welcomed by all who were riveted by the recent crisis of presidential succession.


Judge Richard Posner performs an invaluable service by cutting through the Cherminsky and Sunstein left-wing legal clutter surrounding Florida Election 2000. Judge Posner delivers clear legal analysis that is still accessible to the educated layperson. His overall conclusions: the Florida vote was fair, the Florida supreme court was partisan, and the U.S. Supreme Court was as well, although it had practical reasons for being so. Specific points include:

* First and foremost, Posner correctly places most of the blame for the fiasco where it"s most deserving, on the Florida supreme court. To those who complain of judicial politicization of the U.S. Supreme Court, just remember where it began: with seven Democratic Party hacks in robes in Tallahassee. Posner slams the Palm Beach County Canvassing Board v. Harris decision (both the original and on remand) several times. Highlights include:

>>> The Florida court used inexcusably poor reasoning and logic in saying that a voter"s error in completing a punch card ballot is a form of "error in vote tabulation" (pp 95, 116, 122). This reasoning is a violation not just of the plain meaning of F.S. 102.166(5) (2000), but also a violation of common sense. As Posner notes, no allegation was ever made of an error in a punch card reader (pp 62, 86).

>>> The court also created a false dilemma by saying that the statute allowing a protest for seven days after the election conflicted with the overall seven-day deadline to certify returns (p 105). Posner correctly points out that (a) if a candidate were so stupid as to wait for seven days before protesting that "the losing candidate has himself to blame for not acting faster," (b) in any event, such a delay in protest did not in fact occur with Gore so the court never should have addressed the issue in the first
place and (c) a recount to review an error in the vote tabulation machines
(as opposed to a review of the vote itself) could be completed within the
time frame set forth in F.S. 102.166 (2000), so the court only found this
dilemma by misinterpreting what an "error in the vote tabulation" was in the

>>> The court used a vague state constitutional declaration of "power is
inherent to the people" (pp 100, 104-107) to ignore specific statutory
language directing the Secretary of State to make determinations
regarding election matters as set forth in F.S. 97.012 (2000), in order to
give Gore more time than he was authorized under the Florida statute. By
doing so, the court was not only usurping legislative power by changing the
plain words of the statute, it was also probably violating Art. II Sec. 2 cl. 2
of the Constitution (pp 127, 153, 155).

>>> The court ignored elemental principles of statutory construction when
examining F.S. 102.112 (2000) (the Department of State *may* ignore
untimely returns) and F.S. 102.111 (2000) (the DOS *shall* ignore untimely
returns). It is a common understanding in the legal field that when two
statutes have only a potential conflict, a court is to interpret them so that
they do not. In this case, the Secretary of State acted in a way that
created no conflict (she ignored late returns) therefore there was no need
to claim a contradiction, then leverage that supposed contradiction into
giving Gore 12 more days.

>>> Recapping, Posner points out the obvious: "The U.S. Supreme Court
was criticized for intervening when it knew what effect its intervention
would have on the outcome of the election. But it would not have
intervened had the same principle discouraged the Florida supreme court
from intervening when it knew that the effect of its intervention could only
be to increase the likelihood that Gore would become president" (p 160).

Other points Posner brings out include:

* The hypocrisy of Democrats proclaiming "every vote must count" while
  simultaneously (a) trying to disenfranchise Seminole and Martin County
  voters who did not have voter ID numbers due to a computer glitch (pp 98-
  99), (b) requesting a recount only in four counties (why not all? Shouldn''t
every vote count?) and (c) requesting a recount of only undervotes, not
  overvotes (does every vote count or not?).

* The standard to review voters'' intent on punch cards that was employed
  by the Democrat-run Broward Canvassing Board was indefensible as a
  matter of law and common sense (pp 58-59, 124). The standard, which
  consisted of a dimpled chad, a mark or even an indentation next to the
  chad, supposedly was good enough to determine voter intent. Posner
  points out that indentations could arise from the card being passed through
  the machine or by being bent during handling, and that a dimpled chad
could arise from voters starting to vote but changing their minds after
realizing that they were voting for the wrong person. The statutory standard, even after the Florida supreme court butchered the statute, is whether there is "a clear indication of the intent of the voter." F.S. 101.5614(5) (2000). How can anyone with a straight face say a mark or indentation alongside a chad, or even a dimpled chad, is a "clear indication"? Let's not be silly. The sheer outrageousness of such a biased, subjective and manipulable standard is, in Posner"s opinion, why David Boies never suggested it as a standard in his legal maneuvering (p 195).

On this point Posner alludes to something (p 131) but is too diplomatic to say it explicitly: the Broward Canvassing Board could very well have altered punch cards under its standard to make a card look like a Gore vote. For example, a Democrat operative handling the punch card could press his fingernail on the chad or alongside it to make it look like a stylus had marked it. This could be done very subtly and even someone nearby would not be able to observe the fraud. Would you put it past the Democratic operatives to do something like that? I wouldn"t.

* Bush v. Gore should have been decided on Art. II Sec. 1 cl. 2 grounds (i.e., the specific grant of authority in the Constitution that directs state legislatures to appoint its electors), and not equal protection grounds that ultimately decided the case.

* The U.S. Supreme Court voted 7-2, not 5-4, that the Florida supreme court"s mandate for a standardless recount was unconstitutional (pp 127, 216). The Supreme Court only split 5-4 on whether enough time existed to have the Florida supreme court order a recount conforming to a constitutional standard (p 136).

* The U.S. Supreme Court did not command Congress to count Florida"s electoral votes. Congress, had it wished, could have refused to count them (p 185). The Florida state legislature could have determined not to seat them. The U.S. Supreme Court did not select a president. Electors did and Congress let them.

* Posner calls out liberal law professors and constitutional scholars on their inconsistency on judicial activism. "There are respectable schools of jurisprudence according to which Bush v. Gore could be shown to be unprincipled, even usurpative. But can liberals enroll in any of these schools without repudiating much of the constitutional law forged by the Supreme Court in the Warren and Burger eras? I don"t think so" (p 189).

Side note 1. To a certain extent this book, and the Bush v. Gore decision, have been buttressed and confirmed by later events. First, a consortium of mainstream media newspapers, hardly a group favorable to Bush, concluded after tabulating Florida ballots over a period of months that had Gore gotten his way legally in Palm Beach v. Harris, Bush would still have won (NYT, Study of Disputed Florida Ballots Finds Justices Did Not Cast
the Deciding Vote, Nov. 12, 2001). Second, the disenfranchisement of Michigan and Florida voters by

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