

SCRATCHING AND CLAWING

Courts stepping lightly in major political minefield

by Charles Lane
The Washington Post

WASHINGTON — The Florida state Supreme Court's ruling Thursday adds the imprimatur of the state's highest judicial body to the view already taken by a federal court and three Florida state trial judges: that manual recounts of the ballots from Nov. 7's presidential election may go forward.

At the same time, however, the courts so far have stepped carefully in the political minefield of the election dispute, issuing cautious rulings and declining to say that the results of the recounts must be included in Florida's final certification.

The upshot is that the legal action so far allows both sides to continue pursuing their chosen political strategies and to claim that the status quo favors its side.

The Gore campaign's game plan is to make sure that the manual recounts continue in heavily Democratic counties of the state, and Thursday's action by the state high court action broke the logjam that had prevented Palm Beach from even starting that enormous task. Meanwhile, the Bush campaign is banking on getting to Saturday and state officials' expected certification of Bush as the winner after the final absentee ballots are counted.

Acutely aware of the institutional and personal risks inherent in the polarized partisan battle raging around them, judges seem to be taking shelter in the judiciary's instinctive aversion to unnecessarily broad edicts, particularly when the matter involves intervening directly in electoral politics.

Courts are saying that they will sort out the issues before them—but only the issues before them.

Indeed, the Florida Supreme Court's cautious 89-word "interim order," issued solely in response to a request for guidance from Palm Beach County about the legality of manual recounts under state law, was notable for what it did not say.

It did not, as Republicans were quick to

point out, rule directly on whether the recounts were legal. Rather, the court's statement simply noted that lower state courts had indicated they could proceed. "At present," the court said, "this is binding legal authority on this issue."

Perhaps more important, the order contained nothing about what may be the most critical issue of all: the legality of Secretary of State Katherine Harris' decision to exclude all recount results that were not certified to her by 5 p.m. Tuesday.

That matter could start making its way toward the Florida Supreme Court today. This morning, Leon County Circuit Judge Terry P. Lewis is to rule on the Gore forces' contention that Harris' decision to enforce the deadline violated his previous directive that she not act "arbitrarily."

One possibility, given Lewis' cautious approach in his initial ruling, is that he might hold off until the recounts are actually finished, since the question of whether Harris was right in refusing to accept new results would not matter if the final tally that would not change the outcome.

Whatever Lewis decides, his ruling will be appealed. Then, and only then, Florida lawyers said, would the state Supreme Court tackle the issue for the first time.

"What's going to go up on appeal is Terry Lewis' order," said Tallahassee lawyer Bill Bryant. "That way there's a disposition on factual issues and all they have to do is talk about the law. That's what appellate courts like to do."

A 12-year-old Florida Supreme Court precedent may provide at least a faint hint of how the court would ultimately decide the issue. Ruling on a disputed congressional race in 1988, the justices unanimously refused to throw out an entire county's ballots because the recounted results were submitted in writing eight days after the election, instead of a week as the law required.

However, in that case, the county had already phoned in its results before the deadline.

Meanwhile, the Bush campaign prepared to press its federal lawsuit against the manual recounts in an Atlanta appeals court.

The case is an uphill battle for Republicans as they seek to convince the 12 members of the 11th Circuit Court of Appeals that the Florida law on recounts is so arbitrary that it violates the constitution's guarantee of due process.

In pressing this claim, the Republicans must deal with fairly well-established legal doctrine that the administration of elections for members of the electoral college is under the control of state government. On Monday, District Judge Donald Middlebrooks of Miami cited this body of law when he declined to assert federal jurisdiction after a hearing last Monday.

The Bush lawyers' task is also complicated by the fact that they are asking the court to invalidate the statute permitting recounts even before the recounts have fully taken place.

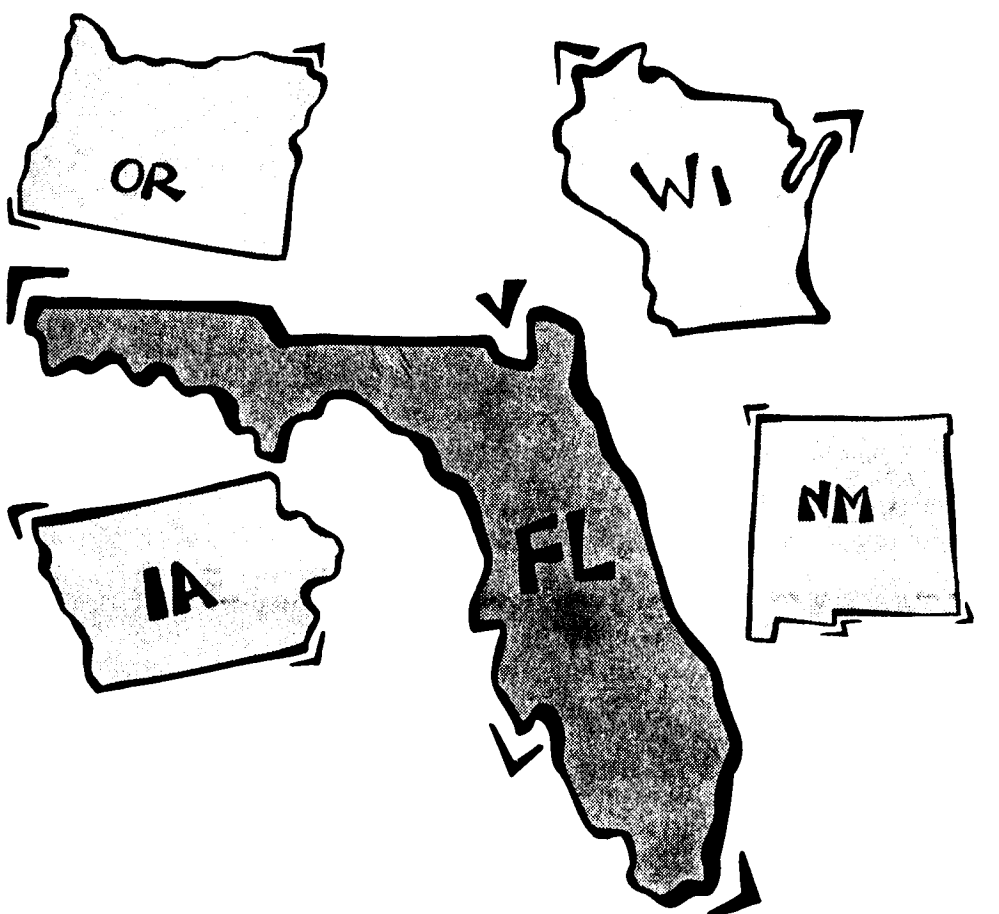
Their brief said the federal courts had to step in because of the extraordinary circumstances.

"Eight days after Florida's Presidential vote, the entire nation is witnessing the disintegration of a process that was designed to elect America's president," the brief said. "The Florida manual recount process is being used to eliminate any possibility of an orderly, rational, and final end to the election, and to deny the protections of the Constitution not only to the parties who brought this case, but to all Americans."

But, in their brief, the Democrats warned the appellate court that interfering with the "reasonable and trustworthy" state election procedures would create more, not less, confusion and interfere with a matter expressly committed to the states. The Republican argument, they said, "reflects an intense distrust of the law and courts of the state of Florida and a desire for the federal courts to dictate the details of Florida's electoral process."



The Road to the White House



Lawyers argue over Harris' role in recounts

by Peter Slevin
The Washington Post

TALLAHASSEE, Fla. — Lawyers for both sides in the disputed presidential election argued Thursday about whether Florida Secretary of State Katherine Harris was right to enforce a strict deadline for counties to submit their final vote counts, and the judge said he would rule on the important issue Friday morning.

Harris' lawyers described her as careful, studious and respectful of state law when she decided not to include further hand-counted ballots in the state's presidential vote totals. Harris Wednesday night announced that she would not accept any new tallies submitted after the statutory deadline of 5 p.m. Tuesday.

Attorneys for her office and the campaign of Texas Gov. George W. Bush blamed officials in Palm Beach, Broward and Miami-Dade counties for counting too slowly and missing the deadline.

As a crucial fight over the deadline played out before Leon County Circuit Judge Terry P. Lewis, lawyers for Vice President Al Gore countered that Harris "decided long in advance" to reject the ballots from predominantly Democratic counties. They said the Republican official acted arbitrarily and abused her discretion.

"Rather than considering all relevant facts and circumstances in taking these actions, the secretary has directed an unwavering effort to stop the manual counting of ballots," the Gore lawyers argued. They called part of Harris' decision process "a charade."

The Democrats rushed to court to persuade Lewis to nullify the vote totals certified Wednesday night by Harris and the 3-member state canvassing board. They also asked the judge to authorize the continued recount and to require Harris to give "due and proper consideration" to counties that submit hand-

counted totals in coming days or weeks.

The stakes are so high for each campaign that, no matter which way Lewis rules, the Florida Supreme Court seems certain to be asked to decide whether Harris properly certified the vote, although she will add overseas absentee ballots on Saturday. In earlier cases, the court has ruled that the right of voters to be heard may trump strict legal requirements.

A 1975 dispute over absentee ballots, for example, prompted the court to warn that voters must not be disenfranchised lightly: "A fair election and honest return should be considered as paramount in importance to minor requirements which prescribe the formal steps to reach that end."

The Bush camp and the Florida secretary of state are portraying the deadline as anything but minor. Without setting rules and following them, Harris and her supporters have argued, there can be no finality to the election and no winner of Florida's 25 electoral votes and the White House. They contend Harris has discretion to decide whether to include totals that arrive late.

Lewis agreed earlier this week that Harris has the authority to make that decision, but he strongly cautioned her to make it with "due consideration of all relevant facts and circumstances." He noted the amount of time it could take to hand-count more than 1.5 million ballots in the three South Florida counties. When Harris certified the statewide total and rejected any further additions on Wednesday night, the Gore campaign soon filed papers complaining that Harris had done exactly what Lewis had forbidden. Gore attorney W. Dexter Douglass told the judge that Harris "did not consider any facts and circumstances."

As evidence, Douglass and his colleagues pointed to a sequence of events that followed Lewis' initial Tuesday afternoon ruling. That night, Harris requested that the three counties describe their reasons for seeking extensions. On Wednesday afternoon, the counties said

the recounts required time-consuming work and had been delayed by Harris' advisory that the recounts were themselves illegal.

Eight hours after Harris received the counties' explanations, she rejected them and certified results of previous counts that put Bush ahead of Gore by 300 votes out of roughly 6 million cast. She said she had acted carefully in concluding that the counties offered no good grounds for missing the deadline.

Douglass noted in court that Palm Beach County, after receiving conflicting rulings from Harris and Democratic Attorney General Robert Butterworth, had delayed its manual recount and asked the Supreme Court to decide which state official was right. The high court said Thursday that the counts may continue.

In his folksy North Florida drawl, Douglass likened the counties to a hapless motorist pulled over by a policeman. While the driver is waiting, a line of traffic builds up behind his car, and then the policeman writes him a ticket for blocking traffic.

Lawyers for Harris and Bush countered that the secretary of state was bound by law to enforce the deadline when the counties offered no good reason to delay. Washington D.C. lawyer Michael Carvin said the deadline provision is more important than another portion of Florida law that the Democrats say grants them a right to a manual recount.

"This conflict is fictitious," Carvin said, arguing that the counties should have worked faster if they wanted to conduct recounts. "What you do is get the personnel and get it done. That's not optional."

Carvin pointed to the actions of Palm Beach County's canvassers before Harris issued her opinion that the hand counts were unwarranted: "They took Thursday off. They took Friday off. They worked hard on Saturday. They took Sunday off. It would be an abuse of her discretion to tolerate this type of extraordinary delay."

The possibilities...

With five states under scrutiny, many scenarios could take place if hand recounts continue in Florida. Oregon, Iowa, Wisconsin and Iowa could all have recounts that could put this election in even more turmoil...

Gore - Wisconsin, Oregon, New Mexico, Iowa = 267
Bush - Florida = 271

Gore - Florida = 262
Bush - Wisconsin, Oregon, New Mexico, Iowa = 276

Gore - Florida, New Mexico = 269
Bush - Wisconsin, Oregon, Iowa = 271

Gore - Florida, Wisconsin = 273
Bush - Oregon, New Mexico, Iowa = 265

Gore - Florida, Iowa = 269 *
Bush - Wisconsin, Oregon, New Mexico - 269 *

* If states are tied and all electors pledged to the candidates vote for their candidate in the Electoral College this December, the House of Representatives would choose the President, and the Senate would choose the Vice President. It doesn't end there. The Republicans still hold the majority in the House of Representatives, which would likely see them voting for George W. Bush. If Maria Cantwell of Washington can hold on to her slim lead in her Senate race, she would pull the Democrats into a tie with the Republicans in the Senate, 50-50. The Vice President would then break the tie, ultimately choosing the next Vice President. Al Gore would be the man to break the tie and would likely choose the Democrat, Joe Lieberman. The result?

President George W. Bush
Vice President Joe Lieberman