

A Tough Call Made Openly And Honestly

By Eric M. Freedman

THE IMPORTANCE OF the Florida Supreme Court's order of Friday that ambiguous presidential ballots from around the state be hand-counted is not so much in affecting the outcome of the election — which will be determined by national, not state, judicial decisions and political forces — but in allowing the public a rare opportunity for the thoughtful evaluation of a judicial decision.

Public commentary on court rulings too frequently begins and ends with whether the commentator likes the outcome. If the commentator does not, then he or she is quick to blame the event on gross political bias on the part of the court and a propensity to rewrite rather than follow the law.

Thus, politicians commonly demand that judicial nominees promise to refrain from "legislating from the bench," even though those same politicians are quick to praise judicial rulings whose results they favor ideologically, regardless of whether the decisions find support in the history, text or structure of the text that the court was supposed to be construing.

The Florida Supreme Court's opinion shows the shallowness of this sort of reaction. The result of a court case will necessarily favor one side or the other and disappoint the loser. That tells us nothing. What we must ask in evaluating our judges is whether they wrestled honestly with the relevant issues and rendered a judgment based on their openly expressed assessments of which factors deserved the most weight in the case at hand.

On this occasion, the justices of the Florida Supreme Court did their jobs well. At oral argument (which, in a practice that should be followed in all courtrooms, was televised for public edification), they were plainly grappling conscientiously with the tangle of issues presented and in their opinions they laid out clearly the varying considerations that led them to their differing conclusions.

All the justices recognized that reaching a decision, any decision, would require charting a path through a wilderness of both state and federal legal authority — constitutional, legislative and judicial — containing elements that were at best obscure and at worst outright inconsistent. Thus, as is commonly the case, there was not one determinate answer that "the law" required.

The majority attacked that problem this way: "[A] common-sense approach is required, so that the purpose of the statute . . . to give effect to . . . the right to vote will not be frustrated." Reading the various legislative enactments in light of this purpose, the majority concluded that the statutes required there to be a counting process that gave effect to every ballot on which there is "clear indication of the intent of the voter."

Chief Justice Charles Wells dissented, even while observing that he did "not question the good faith or honorable intentions of my col-

leagues in the majority." For him, "[J]udicial restraint in respect to elections is absolutely necessary" — even where a court finds unfairness in the procedures — because of the potential of "a crisis with the other branches of government." Thus, he read the statutes to grant a heavy measure of discretion to the counting authorities and concluded that they had not abused their discretion in this case.

In a separate dissent, Justice Major Harding, joined by Justice Leander Shaw, wrote that "the majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos."

Since the partisan composition of the court was overwhelmingly Democratic, there is no reason to

doubt the considerations that the judges expressed were in fact the ones that moved them.

And all of those considerations were proper ones. A court in reaching a determination on the meaning of statutes should take into account not only their texts, but also their purposes and history, the effect of a particular ruling on the overall structure of government, and practical concerns.

Thus, even though the seven justices filed three disparate opinions, all of them were following "the law." This should teach us that, when embodied in the rulings of judges, "the law" is in the process by which the results are reached rather than in the results themselves.

That is the test which all citizens, regardless of their political views, should apply in evaluating the actions of the federal courts in the days ahead.



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