

## Book Review

*Inside Bush v. Gore* - Charles T. Wells (U.of F. Press 2013)

Charley Wells's new book—*Inside Bush v. Gore*—offers readers a rare behind-the-scenes look at one of the most controversial legal disputes in this nation's history.

More than a dozen years have passed since the United States Supreme Court decided *Bush v. Gore*, effectively sealing President George W. Bush's election. But despite the passage of time and three subsequent presidential elections, the public's fascination with the 2000 election has not diminished. Earlier this year, retired Justice Sandra Day O'Connor reignited debate by suggesting the Supreme Court perhaps made a mistake in deciding the case. And during this year's legislative session, Florida Legislators debating new reforms to Florida's elections code again invoked the 2000 debacle, as they have with other post-2000 amendments.

Scores of books and articles have been written about that divisive decision and the closely contested election it decided. Indeed, it seems everyone has an opinion on the legal tussles from those thirty-six days. But finally there is the inside story, as told by one of the judges at the center of the case.

Charles Talley Wells became Chief Justice of the Florida Supreme Court on July 1, 2000, some six years after he joined the Court and just months before a presidential election thrust the Court into the national spotlight. He and his six colleagues faced the disputes head-on and, operating on a sometimes herculean schedule and issuing several controversial orders and opinions. Ultimately, they split four votes to three, with the majority authorizing a state-wide recount that would have prolonged uncertainty and threatened further harm. Chief Justice Wells authored a compelling dissent. Days later, the United States Supreme Court rejected the Florida Supreme Court's decision and effectively ended everything. Vice President Gore conceded the next day.

Most who have written about the dispute have focused on the United States Supreme Court's ultimate decision—whether its legal conclusions were right or wrong, whether it was politically motivated, and how it might affect people's confidence in the institution. Others have analyzed the parties' legal and political strategies that preceded the decision. Still others have studied the extensive flaws in Florida's election laws and machinery that birthed the dispute in the first place. But only now do we have the perspective of a judge inside the case: a judge who participated firsthand in the Court's struggles with unprecedented legal issues, immense time pressures, worldwide scrutiny, and immeasurable stakes.

Before turning to the book's main topic, Justice Wells sets the stage by describing the Court's background along with the histories and personalities of its Justices. Although careful to avoid disclosing particulars of the Court's deliberations—respectful of the confidentiality judicial deliberations demand—Justice Wells unreservedly shares his perception of the other Justices, describes tensions between the Court and the Florida

Legislature (some arising from recent death-penalty decisions), and provides other details framing the historical context of the 2000 decision. These details not only set the stage for the rest of the story but also provide fascinating insight to current lawyers and court-watchers, particularly since three of the seven Justices from *Bush v. Gore* remain on the Florida Supreme Court today.<sup>1</sup>

Justice Wells also shares some personal history, including his Central Florida roots, his family, his time at the University of Florida (his affection for this University is well known), his interests and experiences in politics, his decades-long law practice, and what he called his “route to the court.”

Turning to the contested election, he reveals his personal thoughts and fears from every step of the saga—beginning immediately after the election before there was any hint of what was to come. He reminds us of the many pieces of litigation in varied state and federal forums, as well as the actions of state and local elections officials, sharing his thoughts and insights on all of them. He then describes the Justices’ work before the cases arrived at the Court—after if first became apparent that the Court ultimately would have a role to play. And then, with meticulous detail, Justice Wells walks through his Court’s direct participation in the dispute.

The Florida Supreme Court issued two principal opinions in the *Bush v. Gore* matter. The first was a unanimous decision to allow additional time for local officials to provide election returns.<sup>2</sup> The second was a deeply divided decision to allow a statewide recount on a seemingly impossible timeline.<sup>3</sup> The United States Supreme Court reversed both; the second reversal ended everything.<sup>4</sup>

In straightforward and easily followed terms, the story analyzes the legal arguments presented to the Court in both cases, along with the complex and sometimes contradicting Election Code provisions underlying them. For example, Justice Wells explains that the pertinent laws were so contradictory that they were irreconcilable under standard rules of statutory interpretation: one law expressly authorized the Secretary of State (Florida’s chief elections officer) to do something, and a second provision expressly prohibited the same thing. Florida’s much maligned Secretary of State, Katherine Harris, exercised the authority the first law granted, and she was immediately challenged in court. The Florida Supreme Court faced a decision and, in its first opinion, overturned Secretary Harris’s choice. With Gore’s supporters accusing Secretary Harris of acting unlawfully to assist

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<sup>1</sup> Justices Lewis, Pariente, and Quince.

<sup>2</sup> *Palm Beach Cnty. Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1240 (Fla. 2000), *vacated sub nom. Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000).

<sup>3</sup> *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000), *rev’d sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

<sup>4</sup> *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 78 (2000); *Bush v. Gore*, 531 U.S. 98, 111 (2000). The Florida Supreme Court issued opinions on remand from both decisions. *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000); *Palm Beach Cnty. Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000).

Governor Bush, Bush's supporters accused the Florida Supreme Court of disregarding Florida law. As the book notes, one prominent critic attacked the Court's decision as "[s]even radical Democratic lawyers [choosing] to ignore the clear intent of Florida's legislative and executive branches." Understanding of the criticism, Justice Wells explains the Court's legal determination and ultimately its practical one too: when people turn to the Courts for decisions, the Courts have to act.

Some of the inside story is unsurprising, like the fact that the Justices' split decision followed tense and divisive deliberations. Other parts are perhaps less expected—for example, that the Justices' unanimous first decision, which set a uniform deadline for the certification of local results, followed wide disagreement on the appropriate deadline but resulted from the Justices' steadfast desire for a unanimous decision. (That the Justices sat around a table to jointly write every word of that opinion—a first for the Justices—further highlighted the uniqueness of the situation.)

The story and the history are not limited to the legal arguments and decisions; they include the practical challenges associated with the sudden and unprecedented interest in the Court's every move. Fortunately, Justice Wells does not omit the more mundane obstacles the Court addressed: arranging courtroom video feeds with hungry news outlets, managing staff schedules over a Thanksgiving holiday, directing the Marshall in accommodating Reverend Jesse Jackson's protest without disrupting the Court, and surviving a broken copying machine as press eagerly awaited decisions. Nor does Justice Wells forget some more lighthearted moments; he includes several amusing anecdotes along the way, as well as several references to what he once called the "real dispute"—how Steve Spurrier's Gators would perform against the Seminoles over Thanksgiving weekend.

But the story turns serious as it approaches its final chapters. Justice Wells describes in detail the Court's preparations for its final arguments as the tension heightened and the end drew near. He details his fears that the Court's narrow majority was leading the state into potential crisis. He explains the building tension between the Justices. And he gives a moment-by-moment account of the final oral argument and the decision that followed it. He walks through his thought process as he saw the majority's direction, authored his final dissent, and waited and watched as the United States Supreme Court stepped in and ended the contested election.

Although many lawyers and historians have suggested that the United States Supreme Court was wrong to intervene in what was essentially a state-law dispute, Justice Wells reminds the readers of the potential consequences of leaving the dispute in Florida's hands. Even as the Court acted, the Florida Legislature stood ready to intervene and appoint presidential electors favoring Governor Bush regardless of any additional vote counting—a step Justice Wells feared could lead to a constitutional crisis. Indeed, Justice Wells's ultimate conclusion was that regardless of the election officials' additional maneuvering, the margin of error would always exceed the margin of victory. The most important thing, he believed, was finding an end to the matter. As he wrote in his measured dissent:

I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution.<sup>5</sup>

Justice Wells's dissent further expressed concern that his colleagues in the majority did not understand the magnitude of their decision, and it accurately predicted that the majority's decision could not survive scrutiny at the United States Supreme Court. But the book includes no gloating or I-told-you-sos. Instead, he praises his colleagues, none of whom he believed let their political preferences affect their decision, and all of whom he believed operated honorably. Nor does he harbor any resentment for the relentless criticism his Court faced. Instead, he closes with his encouraging take on the entire process: that it proved that the citizenry still trusts the courts to settle their political disputes rather than turning to violence. That despite passionate disagreement, the United States still transfers power peacefully. And that in America, the rule of law still prevails.

This thorough, charming, and sometimes folksy work gathers parts of the story otherwise unavailable but critical to its full understanding. At the end, Justice Wells writes that "Courts are human," and his spellbinding book shows the remarkable human side of the *Bush v. Gore* saga. But more importantly, it captures an essential chapter of Florida history and presents a new and different look at one of the most well-known legal disputes of all time.

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<sup>5</sup> *Gore v. Harris*, 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).