# Activist Judges Should Not Overrule Elections

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The U.S. Supreme Court has taken a bold step towards returning Florida's election process to sanity. By halting the 11th hour partial hand recount, it stopped a reckless judicial attempt to elect Al Gore and potentially disenfranchise six million Florida voters.
People all over the world are wondering why Florida cannot decide an election in a timely and decisive manner. There is one main reason -- the Florida supreme court threw the election process into chaos.

It is now clear that Florida Secretary of State Katherine Harris was acting correctly when she tried to certify the votes after seven days, as required by Florida law. If that had happened, then Gore could have contested the election in an orderly and fair way, as Florida law allows.

But Gore's lawyers asked the Florida supreme court to use its equitable powers to create a new ballot recounting schedule and to order Harris to adjust her totals based on the new partial recount. The seven Democratic court appointees happily obliged.

That activist and partisan court decision threw the election, Florida, and the nation into legal turmoil. All of sudden, all laws, rules, and precedents went out the window, and Gore became free to litigate all aspects of the election.

Fortunately, the U.S. Supreme Court stepped in and tried to stop this madness. It unanimously nullified the Florida supreme court decision, pointing out that federal law requires the election to be decided based on pre-election law.

This decision completely vindicated Florida law as well as Secretary Harris's scrupulous adherence to it. But the Florida supreme court didn't get the message and wrote yet another new set of rules ordering a massive statewide recount of selected so-called under-votes four days before the deadline, with no time allowed to contest the validity of those votes.

Never before has a court so brazenly tried to fix a major American election. In doing this, the Florida supreme court went directly in opposition to its three dissenting justices, the U.S. Supreme Court, the trial court, the Florida Secretary of State, the county election canvassing boards, and the Florida legislature.

The Gore mantras have been that every vote should be counted and that hand-counts are more accurate, but both arguments are fallacious. Those Miami-Dade County under-vote ballots were counted twice by machines, and no presidential votes were detected.

Nationwide, 2 to 3 percent of voters did not choose a presidential candidate. Gore's only hope to overturn Bush's certified Florida victory was to get a Florida court to order Miami-Dade County to recount ballots in order to "discern" (in David Boies's word) what was going on in the mind of those who did not properly cast a vote for President, a mystical reading of chad (like tea leaves) using constantly shifting standards.

Hand counts can be accurate if done promptly and according to well-defined, pre-election rules. But delayed and politicized hand counts of ballots that have been handled many times are bound to be inaccurate because they are subject to fraud and debate over hanging and dimpled chad.

This election has made several facts painfully clear: that vote counting is not perfect; that there are always minor irregularities that could be litigated; and that, if we permit the courts to broadly review election outcomes, a judge could reverse just about any close and hotly contested election.

Stable and democratic self-government requires fairness, accuracy, and finality in its elections. There are no substantial allegations of election fraud or other misbehavior in Florida requiring litigation, and Florida's election rules and procedures were agreed to by everyone before the election.

There was a lot of discussion during the U.S. Supreme Court oral argument in Bush v. Gore about what standards to apply in ballot recounts. Justice Sandra Day O'Connor asked the best question: "Why isn't the standard the one that voters are instructed to follow, for goodness sakes? It couldn't be clearer."

The Florida supreme court is a textbook example of the folly of judicial activism and it gave the world the impression that our electoral system is crooked. Bush won Florida fair and square under the operative rules, and he was right to resist Gore's effort to get the courts to change the rules after the election.

We commend the conservatives on the U.S. Supreme Court for acting promptly to stop the runaway judicial activism of the Florida supreme court. Nothing could be more judicially activist than for a state court to intervene in an election, change the pre-election rules, declare new vote counting standards, toss out the certified results, and decide the winner.