

OFFICIAL BALLOT, GENERAL ELECTION  
PALM BEACH COUNTY, FLORIDA  
NOVEMBER 7, 2000

RICHARD A.

POSNER

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BREAKING

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THE DEADLOCK

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(REPUBLICAN)

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AL GORE • VICE PRESIDENT

(DEMOCRATIC)

AL GORE • PRESIDENT  
GEORGE W. BUSH • VICE PRESIDENT

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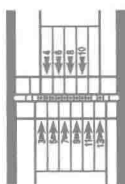
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THE 2000 ELECTION

THE CONSTITUTION, AND THE COURTS

OFFICIAL BALLOT, GENERAL ELECTION  
PALM BEACH COUNTY, FLORIDA  
NOVEMBER 7, 2000



# Breaking the Deadlock

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*The 2000 Election, the Constitution,  
and the Courts*

*Richard A. Posner*

Princeton University Press

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## *Preface*

THE MOST RECENT Presidential election was held on November 7, 2000, and by the morning of November 8 it was apparent that the election would be decided by the popular vote in Florida, with its 25 electoral votes. George W. Bush led in the popular vote in Florida by fewer than 2,000 votes out of almost 6 million cast. A machine recount was automatic under Florida law, given the closeness of the result, unless the loser refused it. Al Gore did not refuse it. By not refusing and—when the machine recount failed to overcome Bush's lead—by demanding hand recounts in four counties, he precipitated an extraordinary legal and political struggle over who would become the 43d President of the United States. The struggle ended (realistically, not technically; technically it did not end until January 6, 2001, when Congress counted the electoral votes) on December 13, when, following his decisive defeat in the U.S. Supreme Court the night before, Gore conceded the election.

The 36-day drama was dense with legal and political maneuvering; clouded with statistical uncertainty; saturated with state and federal law, both statutory and constitutional, with trials and

appeals, stays and opinions; rich in issues of constitutional and democratic theory and in practical issues of election administration; revealing in exposing the limitations of appellate judges and professors of constitutional law and the extent of penetration of law by politics; exacerbated by racial politics; and resounding with cries for reform on many levels. Its multifaceted character, its narrative and analytic complexity, its peripeteias, the fierce passions it aroused in the political class, the naked partisanship of intellectuals that it evoked, the sense of crisis, the sense of law stretched to the breaking point, the spectacle of obscure people thrust unwillingly into the limelight—all this was reminiscent of the Clinton-Lewinsky scandal and its aftermath, about which I had written a book that could, I decided, serve as a model for a study of the election deadlock and its aftermath.<sup>1</sup> Of course there were many differences, of which the most important was overlooked: the election crisis involved, so far as appears, no scandal, no crimes—just the rash of mistakes that occur whenever human beings are confronted with something difficult, emotional, and unexpected; mistakes, moreover, susceptible of correction for the future.<sup>2</sup> But one great point in common was that both crises demonstrated the indispensability of pragmatism to the resolution of tumultuous, law-saturated public issues.

The election deadlock alone was one of the great political events of recent times. It and the ensuing litigation—of which the Supreme Court's decision in *Bush v. Gore* that ended the deadlock was just one phase—are as fascinating as they are momentous. Multidisciplinary treatment is needed to do justice to the complicated series of legal and political maneuvers that unfolded in a setting of profound statistical uncertainty and against a complex

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1. Richard A. Posner, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (1999).

2. The big corrigible mistake of the Clinton impeachment—the independent-counsel law—has been corrected. The law has been allowed to expire, without mourners who might seek to reenact it.

background of constitutional and statutory law and racial and party politics. Such a treatment must cover statistics (was it a real deadlock?); law, constitutional and otherwise, and the legal process; political theory and political science, especially democratic and constitutional theory; racial politics; the role and character of the Supreme Court; and issues of technology and cost in election administration.

My essential purpose is to make the various facets of the election deadlock and its litigation aftermath intelligible. But I also make and defend a number of claims, among them that Gore was not the “real winner” in Florida, although he might have won had a more “user-friendly” voting technology been used throughout the state; that Gore’s lawyers did not blunder (nor did Bush’s) and therefore should not be blamed for Gore’s failure to overturn the result of the election; that the contemporaneous response of the legal professoriat exposed serious deficiencies in the academic practice of constitutional law; that the U.S. Supreme Court’s interventions in the postelection struggle were not the outrages that its liberal critics have claimed them to be but, rather, a pragmatically defensible series of responses to a looming political and constitutional crisis; and that radical reforms in the electoral process (such as a national ballot for Presidential elections or the abolition of the Electoral College) are not justifiable, although more limited reforms in election administration may well be. In the last chapter I offer a modest blueprint for feasible reform.

Although it has proved impossible to avoid all technical issues of law and of statistics, the book is written to be accessible to a general audience. For it is intended not only for specialists in election law and constitutional law but also for anyone who is interested in the role that voting plays in a democracy and in the role of courts, particularly the U.S. Supreme Court, in our constitutional system, and for anyone who was captivated by the drama of the 2000 election and its aftermath. I do not apologize for the technical aspects

of the book. In the wake of the deadlock the view rapidly took hold in influential quarters that the election had been “stolen” from Gore by an act of judicial usurpation. That is a drastic and misleading oversimplification, in part because it overlooks or misunderstands the legal, statistical, and political complexity of the deadlock.

At first I thought that everything I might be able to say about the subject could be said in an article, and so I wrote “Florida 2000: The Election Deadlock and the Litigation That Ensued.”<sup>3</sup> Even before publication, the article attracted an unusual amount of attention.<sup>4</sup> It became apparent that there was a demand for a fuller treatment and that issues essential to an evaluation of the deadlock and its resolution could not be adequately analyzed in an article.

The article was the indispensable beginning, however, and I thank all those who gave me comments on early drafts of it, as well as those who commented on it later and contributed to the refinement of my thinking that is reflected in this book: Jack Balkin, Gary Becker, Christopher DeMuth, John Donohue, Frank Easterbrook, Eldon Eisenach, Einer Elhauge, John Ely, Richard Friedman, Elizabeth Garrett, Howard Gillman, Richard Hasen, Dennis Hutchinson, Pamela Karlan, Michael Klarman, Andrew Koppelman, William Landes, Lash LaRue, Lawrence Lessig, Michael McConnell, Frank Michelman, Edward Morrison, Charlene Posner, Eric Posner, Eric Rasmusen, Stephen Stigler, David Strauss, Cass Sunstein, and Benjamin Wittes. I also thank Benson Dastrup, Boris Kasten, and especially Bryan Dayton, for their very valuable

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3. 2000 *Supreme Court Review* 1 (2001). A second, shorter article, entitled “*Bush v. Gore*: Prolegomenon to an Assessment,” largely a knockoff of the first but with a few additional points, has been published as a chapter in an electronic book, *The Vote: Bush, Gore & the Supreme Court* (Cass R. Sunstein and Richard A. Epstein eds. 2001), <http://www.thevotebook.com>, and will also appear, in slightly different form, in the summer issue of volume 68 of the *University of Chicago Law Review* (2001). I cite other essays from *The Vote* in this book, but will spare the reader further reference to the *Review* version.

4. See, for example, Benjamin Wittes, “Maybe the Court Got It Right: A Judge’s Defense of the Florida Election Decision,” *Washington Post*, Feb. 21, 2001, p. A23.

research assistance; state and local election officers in Florida, voting system vendors, and Jeanne Heffernan, for helpful information; William Landes, Edward Morrison, and Stephen Stigler for helpful suggestions with regard to the statistical analysis in Chapter 2; Richard Friedman and Michael Klarman for very fruitful e-mail exchanges; Ward Farnsworth for his helpful suggestions; Bruce Ackerman for helpful comments on a draft of Chapter 5; participants in a symposium on the election aftermath held at Northwestern University School of Law on January 12, 2001, for their stimulating comments; and Michael Boudin, Eldon Eisenach, Larry Kramer, Thomas LeBien, Eric Posner, and two anonymous readers for Princeton University Press, all of whom commented helpfully on the manuscript; Professor Kramer's generosity in offering extensive expert comments on the legal and historical aspects of the manuscript deserves a special acknowledgment.



## *Chronology of the Deadlock*

November 7, 2000	Presidential election
November 9	Gore protests outcome, demands hand recounts in four counties
November 14	Deadline for counties to submit vote totals to secretary of state
November 18	Deadline for adding overseas votes to totals
November 21	Florida supreme court, ruling in Gore's protest suit, extends November 14 deadline to November 26
November 26	Florida secretary of state certifies Bush as winner of popular election in state
November 27	Gore brings suit to contest certification of Bush as winner
December 4	U.S. Supreme Court vacates and remands Florida supreme court's November 21 decision
December 4	Judge Sauls, confirming his oral ruling of the previous day, throws out Gore's contest suit after two-day trial
December 8	Florida supreme court reverses Judge Sauls, orders statewide hand recount of undervotes

December 9	U.S. Supreme Court stays recount
December 11	Florida supreme court responds to December 4 remand by U.S. Supreme Court
December 12	Safe harbor deadline for appointment of state's Presidential electors
December 12	U.S. Supreme Court reverses Florida supreme court's December 8 decision
December 13	Gore concedes election to Bush
December 18	Electoral College casts its votes
January 6, 2001	Congress meets to count electoral votes; declares Bush winner and next President

## *Glossary of Election Terms*

**Chad** — A perforated area, usually rectangular, next to a candidate's name in a punchcard ballot, which the voter punches to record a vote.

**Hanging chad** — A chad attached to the ballot by only one corner.

**Swinging chad** — A chad attached to the ballot by two corners.

**Dangling chad** — A hanging or a swinging chad.

**Tri-chad** — A chad attached to the ballot by three corners.

**Dimpled (also known as pregnant) chad** — A chad that, while bulging, indented, or marked, remains attached to the ballot by all four corners.

**Pierced chad**—A dimpled chad that is pierced. (The term “dimpled chad” is sometimes reserved for an unpierced dimpled chad, and when that is done “pregnant chad” becomes the only designation for all chads, pierced or unpierced, that are attached to the ballot by all four corners.)

**Overvote (or overvoted ballot)** — A ballot that contains more than one vote for the same office.

**Undervote (or undervoted ballot)** — A ballot that contains no vote for one or more offices.

## Breaking the Deadlock

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## Introduction

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THE TUMULTUOUS political and legal events (in a word, the “deadlock”) that are the subject of this book ran their course in only five weeks—from November 8, 2000, the day after the 2000 Presidential election, to December 13, 2000, the day that Al Gore conceded the election to George Bush. This short period was dense with incident, and the book will be more intelligible if I supplement the chronology at the front of the book with a brief narrative. That is one task of this Introduction; the other, with which I begin, is to outline the book itself.

To understand and appraise the deadlock, and trace out its origins and likely consequences, we need to place it within a broader framework than a blow-by-blow account of the five weeks can provide. (Such accounts are in any event available from journalists.)<sup>1</sup>

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1. See, for example, Correspondents of the *New York Times*, *36 Days: The Complete Chronicle of the 2000 Presidential Election Crisis* (2001); Political Staff of the *Washington Post*, *Deadlock: The Inside Story of America's Closest Election* (2001). The first of these books, however, is merely a compendium of *New York Times* articles that were published during the deadlock; the second is a lively and balanced narrative written after the deadlock was resolved.

The building of that broader framework, partly historical and partly theoretical, is the project of Chapter 1. I survey the early history of voting, its place in democratic theory, the relevant provisions of the U.S. Constitution (with particular emphasis on the provisions dealing with the election of the President, and hence on the Electoral College), and the evolution of voting from the adoption of the Constitution to the eve of the 2000 election. The last deadlocked Presidential election before 2000—the Hayes-Tilden election of 1876—figures here, along with the other close calls in Presidential election history and the emergence of modern voting law. A number of issues presented by, and responses to, the deadlock, including the racial aspect, cannot be fully understood without reference to history and democratic theory.

Chapter 2 looks at the Florida popular vote and the recount results and asks whether it is possible, through the use of statistical analysis, to determine who the “real” winner was. The answer is no. The election in Florida was an unbreakable statistical tie. And in any case determining the “real” winner of an election is a legal rather than a factual matter. One of the most persistent fallacies in the public, especially political, commentary on the deadlock has been the notion that the winner of an election can be determined without reference to election rules.

The chapter also tries, by means of statistical analysis, to discover why there were so many “spoiled ballots” (that is, ballots that the tabulating machinery did not record as votes, whether because of voter error, machine defects, or other factors) in some Florida counties. The nature of the voting technology, and whether votes are counted at the county or the precinct level, turn out to be important factors, and likewise the correlated factors of literacy, income, and race. The Democrats’ belief that Gore would probably have won the popular vote in Florida had more counties used a more user-friendly voting technology is not groundless, but it does not follow that he was the “real”—that is, the legal—winner.



In Chapter 3, I turn to the litigation over the election. The chapter is partly descriptive, an effort both to explain an exceedingly complex series of cases interpreting and applying complicated federal and state statutes and difficult constitutional concepts and to map the likely consequences had the Supreme Court not intervened and stopped the recount on December 12. But the chapter is critical as well. I emphasize the discrepancies between the text, structure, and other clues to the meaning of the Florida election statute, on the one hand, and the interpretation placed on the statute by the Florida supreme court, on the other, and on the possible constitutional significance of such discrepancies. These discrepancies enable me to offer a tentative answer to the question, left open at the end of Chapter 2, of who the *legal* winner of the Florida popular vote for President was, and to offer a preliminary assessment of the soundness of the U.S. Supreme Court's decision of December 12, in *Bush v. Gore*, that ended the deadlock. I argue that the Florida supreme court's abrogation of the discretionary authority that the state legislature had unmistakably vested in state and local election officials furnished a plausible ground for concluding that the state supreme court had violated the requirement of Article II of the U.S. Constitution that each state's Presidential electors be appointed in the manner directed by the state's legislature.

Chapter 4 is a critique of the participants in the litigation—the judges and the lawyers, but also the professors of constitutional law who commented on the litigation either while it was going on or afterwards. There has been a great deal of criticism of the judges, mainly the five-Justice majority of the U.S. Supreme Court. That criticism is largely unjust. The Court was operating under great time pressure—and it shows. But there was no injustice. There has also been much criticism of Gore's legal team for tactical decisions that it made over the course of the litigation. I argue that these criticisms are also unfounded. The critics fail to appreciate that in