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EXPLAINER

COULD THE SUPREME COURT DECIDE THE 2020 ELECTION?

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The Government Law Center's explainers concisely map out the law that applies to important questions of public policy.
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Introduction

In 2000, after all the votes in the presidential election had been tallied, it was clear that whoever won in Florida was going to have the majority of the electoral college votes and become the next president. The problem was that the Florida vote was exceptionally close and there were a sufficient number of disputed ballots to question the outcome in that state. The result was all-out efforts by both the Democratic and Republican parties to influence the ongoing vote count. After weeks of effort and a great deal of litigation, the United States Supreme Court eventually issued a decision that effectively made George Bush the winner over Al Gore. With that decision, Bush went on to serve two terms as president.

We now know that the courts are going to be heavily involved in the 2020 elections, determining many different issues in various states. The headline in a lengthy story in the *New York Times* of July 8 read: "An Avalanche of Litigation Catapults the Ballot Box Into the Courtroom."[1] These cases are far too numerous and complex to detail in this piece. However, the various cases will be critical in determining the election procedures used in many of the states.

An important question that arises is when is the United States Supreme Court likely to be involved, as that Court can make final determinations in cases brought both before and after the elections. As we saw in 2000, a ruling of that Court can finally determine the outcome. In pre-election cases, its rulings can determine such important issues as who has the right to vote.

The first question in any case brought before the Supreme Court is whether it has the authority to hear the case. In legal terminology, the Court, to render a decision, must find that there is a basis for its *jurisdiction*. In any case involving the presidential election, there are significant constitutional and statutory limitations.

Section 2 of Article II of the federal Constitution provides that "Each State shall appoint, in such Manner as the Legislature

thereof may direct" the state's electors. This makes clear that the states have the sole power to determine how to choose their representatives to the Electoral College, which is the body that has the legal authority to determine the next president. With electors in all states now being chosen by a vote of their citizens, this provision gives states the power to determine all election procedures.

Based on this constitutional limitation, Congress, in 1948, enacted a statute that provides that as long as a state has provisions to determine "any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures" its determination "shall be conclusive."[2] This finality provision applies as long as the state's determination is made no later than six days before the Electoral College meets. On its face, this would appear to preclude any federal involvement, including judicial involvement, in any state election for the presidency unless a state does not meet the statute's timetable. However, despite this statute, the Supreme Court has found a constitutional basis for acting in two different areas.

The Voting Rights Act

In 1965, Congress enacted the Voting Rights Act.[3] It prohibited any voting practice or procedure that would "deny or abridge the right of any citizen of the United States to vote on account of race or color." That Act, which imposed significant federal regulation and authority over state elections, was upheld by the Supreme Court in *South Carolina v. Katzenbach*[4] based on the Fifteenth Amendment to the federal Constitution. This was one of the post-Civil War amendments, providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of race, color, or previous conditions of servitude." It specifically authorized Congress to enforce its prohibitions by appropriate legislation.

The 2013 case of *Shelby County, Alabama v. Holder*[5] limited some of the remedial provisions contained in the Voting Rights Act. However, the right of any party to bring an action under the Act was not affected by this decision, as there was no challenge to that provision. The Act also contained specific provisions affecting only certain states and counties based on historical practices in those locations. These so-called covered jurisdictions were required to obtain the prior approval of a federal court or the Department of Justice before implementing any change in their election procedures. Three counties in New York were covered—Brooklyn, Bronx and Queens.

The Court found that these covered jurisdictions were included in the statute because of past, rather than current, practices. It held that Congress would need to revise this list by looking at current, rather than historical, practices in order for there to be a constitutional basis for this provision. However, what is critical is that the Court in the *Shelby* case did not invalidate either of the two provisions contained in the Act giving federal courts jurisdiction.

This means that the federal courts, including the Supreme Court, are authorized to determine actions where the allegations are a denial of the right to vote on account of race or color. There are expected to be many

such cases in 2020, all of which can be heard by federal courts. Final appeals from these courts lie with the Supreme Court. Consequently, the Supreme Court has the authority to determine any case brought under the Voting Rights Act.

Bush v. Gore

Beyond the Voting Rights Act, the only other support for federal jurisdiction is found in *Bush v. Gore*.[6] However, the jurisdictional basis authorizing the Court to hear that case was tenuous, and there is a serious question as to the value of the decision as a precedent for future cases.

In the Bush-Gore race in 2000, it was clear that whichever candidate would win the state of Florida would have a majority of the votes in the electoral college, thereby making him the next president. After a machine count of the ballots, there were many that could not be determined. The largest issue was the so-called "hanging chads." Florida used punchcard ballots, where voters showed their selection by punching a tab in the ballot. A good number of ballots were punched but not cleanly. In many cases, the tab remained attached to the ballot; thus, the hanging chad. This was not the only difficulty, but it became the centerpiece of the dispute.

The Florida Supreme Court, which undoubtedly had jurisdiction, ordered a hand recount of the ballots in dispute, directing that those conducting the recount determine the intent of each voter from an examination of the ballot. Other problems were also to be determined.

The United States Supreme Court, hearing an appeal from the Florida Supreme Court, noted that different counties, and even those overseeing the recount in a single county, could have different standards in making their determinations. It found that in this case, "a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards." It noted that when a court orders a remedy "there must be some assurance that rudimentary requirements of equal treatment and fundamental fairness are satisfied."

The Court then concluded that what was ordered by the Florida Supreme Court "cannot be conducted in compliance with the requirements of equal protection and due process." These are two of the protections conferred by the Fourteenth Amendment to the federal Constitution. By finding these deficiencies, the Court was able to conclude that there was the basis for federal jurisdiction, as the recount presented questions arising under the Constitution. It stopped the recount, leaving George Bush, who was leading at the moment the Court stopped the recount, as the winner and next president.

Apparently recognizing the tenuous basis of its finding giving it jurisdiction, the Court said that "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." Thus, while equal protection and due process can serve as a basis for Supreme Court jurisdiction, it is very unclear as to when and under what circumstances they can be applied. The question is what, if any, voting procedures are sufficiently significant so that a violation rises to the level of a denial of equal protection and/or due process.

This leaves open a very large question should a case arise after the 2020 election. While we know that the Supreme Court could hear the case if it is based on a denial of the right to vote based on race or color, it is far from clear as to whether it can again use the equal protection and due process clauses.

If the Court hears a post-election case, will the country accept the outcome?

Finally, there is a large question unrelated to the provisions of any law should the Supreme Court determine the outcome of the 2020 election much as it did in 2000. As previously noted, there was enormous effort on the part of the two major parties in trying to achieve victory in Florida for their candidate. The news headlines were filled with reports of those activities and there was overwhelming public interest as well as intensive public debate. Yet, after the Supreme Court reached its decision, everyone walked away and accepted the outcome.

In a Gallup poll conducted shortly after Gore's concession, 83% of respondents said they would accept Bush as the legitimate president, and 66% said they had not lost confidence in the Supreme Court.[7] There was recognition that the highest judicial authority in the country had issued its ruling, and all political efforts came to a halt. George Bush was immediately recognized as the next president.

This demonstrated the respect the country had for the Court. Even though the Court handed down a 5-4 decision, there was little outcry or resistance. There was debate about whether the decision was legally correct, but this was a debate that took place mainly between lawyers and scholars. The general public moved on.

The question today is whether there is the same respect for the Court. Polling on approval of the Supreme Court over the last 20 years shows fluctuation, but no clear trends, with approval generally above 50%.[8] More than two-thirds of Americans (68%) have "a great deal" or "a fair amount of trust in the Supreme Court to operate in the best interests of the American people."[9] But it is difficult to predict how the public might interpret future events, or whether the perception of any institution's legitimacy will withstand new challenges.

The country is badly divided, and the last two confirmation hearings for justices nominated by the president have been brutal. Are the citizens of this country capable of showing the same respect for the Court as was shown in 2000? No one knows the answer, but it will be a critical question if there is another close and disputed election. The consequences for our nation would be enormous.

Endnotes

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[1] Online, the headline was "As November Looms, So Does the Most Litigious Election Ever."

[2] 3 U.S.C. § 5.

[3] 79 Stat. 438.

[4] 383 U.S. 301 (1966).

[5] 570 U.S. 529 (2013).

[6] 531 U.S. 98 (2000).

[7] *See* Gallup, "The Florida Recount Controversy From the Public's Perspective: 25 Insights" (Dec. 22, 2000), *available at* https://news.gallup.com/poll/2176/florida-recount-controversy-from-publics-perspective-insights.aspx. *See also* Gibson, Caldeira, and Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?* (2002) ("Evidence from our survey, conducted in early 2001, suggests little if any diminution of the Court's legitimacy in the aftermath of *Bush v. Gore*, even among African Americans.")

[8] *See* Gallup, *Supreme Court* (visited Aug. 4, 2020) (showing polling over time).

[9] *See* Annenberg Public Policy Center, *Most Americans Trust the Supreme Court, But Think It Is 'Too Mixed Up in Politics* (Oct. 16, 2019); see also Marquette University Law School Poll, *New Nationwide Marquette Law School Poll Finds Confidence In U.S. Supreme Court Overall, Though More Pronounced Among Conservatives* (Oct. 21, 2019).