"From the Chair"

Column by Honey Kessler Amado

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I am saddened by United States Supreme Court's opinion in *Bush v. Gore*, rendered some weeks ago. While I expect justices to have judicial philosophies which reflect the presidents who appointed them, I also expect them and all judges to be above partisanship and politics in the execution of their duties. I cannot discern a legal ideology which justifies the majority or concurring opinions, leaving me to conclude, unhappily, that the goal of the majority was simply political: to stop the count of votes, to prevent the possible election of a Democrat as president.

The majority led the Court into a political fray where it does not belong. The election of a president is a wholly political act. Contests between electors, who are state officials – not federal officials – should be decided within their own states and finally resolved, if not at home, then by Congress, the *political* body of our country. Congress recognized this reality and created the mechanism for deciding between competing electoral slates. Congress created no role for the Supreme Court in the selection of the president because the election is an act of the will of the people, and that will is better reflected by the Congress than by the Court. (This is precisely why our rights and liberties are entrusted to the Supreme Court – courts are expected to act against the will of the majority when necessary to protect the minority.)

The foreshadowing of the troubling opinion and its tortuous reasoning appears immediately in the identification of the author as "per curiam." "Per curiam" – "by the court" – is used to distinguish an opinion of the whole court from an opinion written by any one judge. This opinion was far from written by the whole court. Indeed, the majority is a scant majority, and the four dissents do not simply mildly disagree with esoteric points in the majority or concurring opinions. (Humpty Dumpty said to Alice, "Words mean just what I choose them to mean." Like "per curiam" for a scant majority. Whatever did the justices mean?)

The majority couched its entry into the political arena as a concern for due process and the equal protection of voters, given the absence of standardized criteria for manually recounting ballots in Florida. Then, suggesting that the problems could be cured by

remanding the matter back to the Florida Supreme Court, the majority concluded that there was insufficient time for a recount and any review and refused to allow the remand!

But time is a false issue. The majority and concurring opinions speak of a "safe harbor" but do not explain the concept of safe harbor. In doing so, the justices obscured the issue. The "safe harbor" allowed by 3 USC §5 must be understood relative to 3 USC §15, which provides that if a slate of electors is selected on the day provided by section 5 (December 12, 2000), then that slate is safe from any challenge in Congress; that slate *must* be accepted by Congress. Indeed, section 15 sets out the pomp and circumstance of counting the electoral votes in Congress on the Sixth day of January and the method of resolving any conflicts in slates from any given state. Thus, while December 12 may be a preferred date, given its safety from later challenge, it is not an absolute deadline. December 12 was not a reason – it was an excuse – for terminating the counting of the votes in Florida.

On purely legal grounds, the majority justices again revealed their political goal when they abandoned their historic respect for federalism and its concomitant deference to the highest court in each state to interpret its own state's law. Though the Supreme Court on rare occasions has overruled state courts where a court has distorted its own laws to deprive citizens of due process or of civil rights and liberties, this is not such a case!

The majority and concurring opinions walk and talk political. When it entered the political imbroglio, the Court sadly compromised its role as the non-political protector of rights –protector against the abuses of power by the political institutions of the state. This is no small thing. It will take some time for the confidence in the High Court to be restored.

Your thoughts, ideas, and concerns regarding this magazine are welcome. You can reach me through the Los Angeles Lawyer magazine offices (213/896-6503) or at my e-mail HoneyAmado2@gmail.com.

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