Fact Sheet: LaRouche On U.S. Supreme Court Election Ruling

by Edward Spannaus

The following Fact Sheet summarizes what the U.S. Supreme Court said in its ruling in *Bush v. Gore,* issued December 12, including what the dissenting Justices said; we interpolate Lyndon LaRouche's points of agreement, and disagreement, with the various points made in the opinions.

The Majority Opinion: In their argument to the U.S. Supreme Court, the Bush camp made two intertwined arguments, with the emphasis on the first. The first argument was that the Florida Supreme Court had made a wholesale revision of Florida state law as passed by the legislature, and that the Florida Supreme Court had usurped the legislature's authority and had no authority to get involved; and secondly, that the recount scheme ordered by the Florida Supreme Court violated the equal protection clause of the U.S. Constitution.

(Ironically, the equal-protection clause is part of the post-Civil War 14th Amendment, ratified in 1868, intended to ensure equal protection of the laws to blacks.)

Justice Antonin Scalia's concurring opinion, issued on Saturday, Dec. 9, when the stay was issued, argued that the Florida Supreme Court's interpretation of Florida law was wrong, and he made the mischievous argument that to count "legally cast votes" threatened irreparable harm to Bush, "casting a cloud upon what he claims to be the legitimacy of his election." Additionally, Scalia raised the issue of varying standards used in the recounts, i.e., the equal protection argument.

The majority opinion issued on December 12, representing an apparent agreement among five Justices (Rehnquist, Scalia, Thomas, Kennedy, and O'Connor), was only based on the second (equal protection) argument, not the first (usurpation) argument. But the hardliners:— Scalia, Rehnquist, and Thomas—went beyond the equal protection argument, to attack the Florida Supreme Court for "departing" from the Florida legislative scheme for Presidential elections. Moreover, they said that there is no way that the entire recounting process could be completed by December 12—which was undoubtably true, given that they had ordered a halt to the recounting process three days earlier.

Some court-watchers surmise that the Rehnquist concurring opinion was first drafted to be the majority opinion, but that during debate among the Justices, O'Conner and Kennedy dropped away from the more extreme position being taken by the three hard-liners.

The Courts, Electoral College, and Congress

The Dissents: (Stevens, Ginsburg, Breyer, and Souter)

All four dissenters agree: The U.S. Supreme Court should not have intervened, and should not have issued the stay on Saturday; if matters had been allowed to take their course in Florida, it is likely that the disputes could have been worked out by Congress, under the provisions for objections to Electors. Leave it to Congress. All four say that, now, the U.S. Supreme Court should vacate the stay, and remand the case to the Florida Supreme Court.

All four cite the federal statute enacted after 1876, which says that after states have tried to resolve disputes, through judicial or other means, then Congress is the body authorized to resolve any remaining disputes.

All four agree that the argument, about the Dec. 12 deadline, is not a serious argument, since the statute does not mandate states to be finished by that time.

LaRouche agrees that the federal courts, and the U.S. Supreme Court, should have stayed out of it, and he agrees that the proper place for ultimate resolution of the issue is the Congress. And LaRouche agrees that the only real deadline is January 6, when Congress meets to consider the Electoral votes.

LaRouche differs from the dissenters, in that they omit the crucial role of the Electoral College. In LaRouche's view, the Electoral College should function as intended by the Framers of the Constitution: Electors should vote their conscience, without fear or favor, and without partisanship. If the selection of a President is not resolved within the Electoral College, then it goes to Congress.

LaRouche notes that there are, under the Constitution, three levels in which an election dispute should be handled, and that there exists a separation-of-powers relationship between these three: (1) The states, including the state courts, which have a limited role, but which can intervene as state courts; (2) The Electoral College, which is a temporarily-constituted, independent body; and (3) The United States Congress.

Scalia's Method

Dissenter Breyer, joined by the others, explicitly goes after Scalia's method of resorting "to plain text" in saying that Article II of the U.S. Constitution grants the power to appoint Electors exclusively to the state legislatures; Breyer contends that nothing in the text or subsequent U.S. Supreme Court decisions leads to the conclusion that this power is unlimited and unfettered by any state constitutional limitations (i.e., judicial review).

Breyer says that no one will ever know if the recount could have been completed in time.

LaRouche agrees as to Scalia's "plain text" nominalism,

Carl Schmitt Paved The Way for the Nazis

Carl Schmitt (1888-1985) earned the title "Crown Jurist of the Third Reich" because he provided the legal rationales for each step in the devolution of the post-World War I, Weimar Republic into the Nazi state.

Schmitt, a law professor in Bonn and, then, Berlin, was a philosophical Romantic and follower of Mussolini. He published numerous popular polemical tracts and advised Weimar officials, advocating rule by decree under Article 48 of the Weimar Constitution in the face of the economic collapse in Germany under the Versailles reparation regime.

According to Schmitt, all politics consists of the relationship between friend and foe, and the state achieves legitimacy through its ability to identify and exterminate foes. True democracy consists of the complete identity between the ruler and the ruled, requires an ethnically homogeneous population, and can be better served by a dictator, ruling by decree and subject to periodic popular plebecites, than by parliamentary democracy. Under Schmitt's theory, the sovereign decides what the law is through a "primal act" of "decision" about revolutionary or exceptional moments. Schmitt identified "equality" and protection of "property" as primary values, simultaneously advocating total political control of the population and free enterprise. His dogma of law can be glimpsed from the titles of his books: *Political Romanticism,* 1919; *Political Theology,* 1922; *Constitutional Law,* 1928; *Legality and Legitimacy,* 1932.

Like Friedrich Nietzsche, Schmitt has been the subject of a recent popular academic revival, particularly among "conservative revolution" figures in U.S. politics.

but LaRouche insists on taking the argument much further: Scalia must be compared to Carl Schmitt, the professor of law in Germany in the 1920s and early 1930s, who paved the way for Hitler to come to power, with his romantic notion of law, that law is the dictate imposed by the state, and rejecting any concept of natural law. Scalia absolutely outlaws the fundamental principle of the Constitution: the promotion of the general welfare. Scalia's radical nominalism is, in fact, worse than Schmitt, for reasons LaRouche elaborated in his Tuesday webcast (see accompanying box on Carl Schmitt).

Lack of Uniform Standards

Dissenters Souter and Breyer agree with the majority that there is an equal protection or due process issue with respect to the differing standards used in the recounts, but they differ from the majority five, in contending that they should remand to the Florida Supreme Court with instructions to establish uniform standards, and they believe this could be done, and the recounts completed, by Dec. 18.

Ginsburg and Stevens think there is not a substantial equal protection issue; even if there were, there is time to resolve it. Dec. 12 is not a crucial deadline; most important date is January 6, when Congress determines the validity of Electoral votes.

All four dissenters agree that there is no justification for halting the recounts altogether. As to variations in the recount standards, there are already variations in the original certification, because of different types of voting equipment; e.g., there is a much higher rate of undervotes with punch cards than with other systems.

LaRouche agrees that there is an issue of uniformity of standards for counting, and he also agrees with those who note that different voting systems involve different standards, but LaRouche adds that Congress should examine this lack of uniform standards and ballot confusion. And, when it comes to the Voting Rights Act, LaRouche emphasizes the enormous degree of hypocrisy on all sides, especially on the part of Al Gore, who has supported the nullification of the Voting Rights Act. (See additional comment below.)

Furthermore, LaRouche includes the issue of the purging of the Florida voter rolls, with the aid of a private firm hired by state officials, which resulted in the disenfranchisement of many black voters—an issue on which Al Gore has said absolutely nothing.

Dred Scott Case Compared

Dissenter Breyer says "we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation." This is an unmistakable reference to the Dred Scott case—which has often been characterized as the Supreme Court's "self-inflicted wound."

LaRouche concurs with the comparison to the Dred Scott case, as also raised in the *Berlingske Tidende* column from its U.S. correspondent, but again, he argues that this does not go far enough.

The Winner and the Loser

Dissenter Stevens says that the majority's decision to terminate the recounts "in the interests of finality . . .orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent"—which were legal ballots under state law, but which were rejected by the tabulating machines.

And Stevens says that the majority are making an unwar-

Lyndon LaRouche and part of the Washington, D.C. audience for his Dec. 12 international webcast.

ranted attack on the judges of the Florida Supreme Court, which "can only lend credence to the most cynical appraisal of the work of judges throughout the land." He says confidence in judges is essential. "Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."

LaRouche sees this as a fair comment on what the majority did. And as to the disenfranchisement of voters, LaRouche says that it would be impossible to determine who actually won, because of the massive fraud and corruption on both sides. But the issue of disenfranchisement of voters, and other violations, should be taken up and examined, preferably by a Congressionally mandated commission, entirely separate from any issues of counting the votes.

Death Penalty and Civil Rights Jurisprudence

Dissenter Ginsburg (along with the three other dissenters) points out the irony, that in *habeas corpus* and death penalty cases, the U.S. Supreme Court usually declares that state court judges are as competent as federal judges. And she castigates Rehnquist for lumping together what the majority is doing today, with civil rights cases involving recalcitrance by state courts of the "Jim Crow South."

LaRouche agrees on this point.

Fundamental Issues

Beyond this, LaRouche continues to emphasize that the question is not "who" won, but "what" will the next President, whoever he is, become—and "what" will be the character of the next Presidency. He warns that the crisis is not over, but that what Scalia and the hard-core "text maniacs" have done, is tending towards transforming an election crisis into a constitutional crisis. And he stresses that the constitutional role of the Electoral College and the Congress is critical, to ensure that whoever ascends to the office of the President must be qualified to deal with the present crisis, and must be fundamentally committed to the principle of the General Welfare—as neither Bush nor Gore are.

The Equal Protection Paradox

Additionally, LaRouche notes with interest and a sense of irony, the majority's reliance on the equal-protection clause, for example their statement: "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over another." A number of commentators have noted that this potentially has implications for opening up many state election procedures to constitutional challenges.

If the majority is right about the application of the equal-protection clause in this case, LaRouche asks, then should not this also apply to LaRouche's previous challenges under the Voting Rights Act, where state authorities allowed the Democratic Party to ignore votes cast for LaRouche in Democratic primaries and caucuses, and to refuse to grant LaRouche delegates which were lawfully won under state election laws and Democratic Party rules? Does this not provide a basis for asking the U.S. Supreme Court to reconsider their refusal to review Judge David Sentelle's nullification of the Voting Rights Act of 1965 in the case *LaRouche v. Fowler?* Does this not also imply that the courts were

wrong to permit the Democratic Party to throw out over 53,000 lawfully-cast votes for LaRouche in the May 2000 Democratic Primary, and to refuse to award LaRouche the convention delegates which LaRouche won in that state-run primary election?

Power Politics and The Supreme Court

by F.A. Freiherr von der Heydte

The following excerpts are taken from "The Thornburgh Doctrine: The End of International Law," published in the May 25, 1990 issue of EIR. *The late Professor von der Heydte was a noted expert on civil and international law, and is the author of the book* Modern Irregular Warfare, *published in English in 1986. In 1962, he was named Brigadier General of the Reserves for the West German army; during 1966-70, he was a member of the State Parliament of Bavaria for the Christian Social Union (CSU). We reprint these excerpts here, because of their extreme relevance to the doctrines of Chief Justice William Rehnquist and Associate Justice Antonin Scalia, which are even more evident ten years later.*

The so-called Thornburgh Doctrine, according to which all traditional international and constitutional law is strictly subordinated to considerations of power politics and opportunism, a doctrine pushed aggressively by the Bush administration and already used on a grand scale in the invasion of Panama, received the blessing of the Supreme Court, the highest court of the United States, in a ruling of Feb. 28, 1990. . . .

With the aforesaid decision in the case *United States v. Verdugo-Urquidez,* the Supreme Court decided that American officials abroad can undertake searches and can seize materials without restriction and in circumvention of orderly legal proceedings. The court quashed an earlier decision of the Ninth Circuit Court of Appeals which decided that, without a court-ordered search warrant and without observing the limitations of the Fourth Amendment in a search of a Mexican residence, the evidence found by the appellant could not be used against that Mexican citizen. The Supreme Court, by a majority of 6-3, found that the Fourth Amendment, which prohibits unlawful government search and seizures, cannot be claimed by foreigners in foreign countries, since the relevant activities of American officials are not subject to the provisions of the U.S. Constitution and the Bill of Rights.

The decision follows a line of development of U.S. legal opinions and justice policy that has been recognizable for some time. . . .

With equal clarity, the justification written by Chief Justice William Rehnquist shows a conscious rejection of any legal principles that are superior to positive law; indeed, they show a total absence of principled legal-ethical considerations. . . .

Justice Rehnquist's legal argument, which derives a whole structure of argumentation from two words, is the expression of an extreme legal positivism that must necessarily come continually into conflict with constitutional principles founded on natural law. . . .

The U.S. legal positivism criticized here, does not attempt to appeal to this sort of superior principles of law. The principle unmistakenly applied—"might makes right"—is subject to only one restriction, that of utilitarianism. What is justified, is what "serves the national interest."

Thus, we find repeated reference to pragmatic considerations in recent legal opinions of the U.S. Department of Justice and the Supreme Court decision under discussion here. Abraham Sofaer, then legal adviser to the State Department, to shore up his legal position, used a quote from former Secretary of State Henry Kissinger in which Kissinger speaks of "moral and practical imperatives" and the parallel goals of "law and pragmatism."

Purely pragmatic grounds are also drawn upon for the selective application of U.S. penal law without simultaneous consideration of all constitutional provisions: Justice Rehnquist thinks that any other decision would too sharply impair U.S. activities abroad. . . .

Justice Kennedy goes even further in his pragmatic evaluation of the case. In general, he does not want to contest the validity of constitutional provisions in foreign countries, but believes that the specific form of the case makes an application of the Fourth Amendment appear to be "not practical and anomalous."

Quite in the spirit of the Thornburgh Doctrine, Justice Rehnquist comes to the conclusion that the highest necessity is the ability of the government to act in "the national interest." Germans who read this cannot help recalling the time of the National Socialists and their leading legal ideologist, Carl Schmitt, who considered any action in "the national interest" to be justified.

However this so often belabored "national interest" may be defined, it has nothing to do with the law, even if there are many historic examples for such pragmatism being the determining factor of government actions or even legal opinions. . . . Complying with the Constitution may in individual cases appear to be "impractical" and complicated; but violating it—even if in the supposed "national interest"—is always illegal. Law is the counterpole to power, and the mixing of the two can never establish law.