



1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GEORGE W. BUSH, :

4 Petitioner, :

5 v. : No. 00-836

6 PALM BEACH COUNTY :

7 CANVASSING BOARD, :

8 Respondent. :

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Washington, D.C.

Friday, December 1, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of the Petitioner.

JOSEPH P. KLOCK, JR., ESQ., Miami, Florida; on behalf of Respondents Katherine Harris, et al., in support of Petitioner.

PAUL F. HANCOCK, ESQ., Tallahassee, Florida; on behalf of Respondent Robert A. Butterworth.

LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on behalf of Respondents Al Gore, Jr. and Florida Democratic Party.

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1 P R O C E E D I N G S

2 [10:00 a.m.]

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 this morning in number 00-836, George W. Bush vs. The Palm
5 Beach County Canvassing Board. Mr. Olson.

6 ORAL ARGUMENT OF THEODORE B. OLSON

7 ON BEHALF OF PETITIONER

8 MR. OLSON: And may it please the Court: Two
9 weeks after the November 7 presidential election, the
10 Florida Supreme Court overturned and materially rewrote
11 portions of the carefully formulated set of laws enacted
12 by Florida's legislature to govern the conduct of that
13 election and the determination of controversies with
14 respect to who prevailed on November 7th. These laws have
15 been formulated by the Florida legislature pursuant to an
16 express delegation of authority, to wit, by the United
17 States Constitution. The election code that the Florida
18 legislature developed conformed to Title 3, Section 5 of
19 the United States Code. That provision invites states to
20 devise rules in advance of an election, to govern the
21 counting of votes and the settling of election
22 controversy.

23 QUESTION: Well, Mr. Olson, isn't Section 5 sort
24 of a safe harbor provision for states, and do you think
25 that it gives some independent right of a candidate to

1 overturn a Florida decision based on that section?

2 MR. OLSON: We do, Justice O'Connor. It is a
3 safe harbor, but it's more than that. And Section 5 of
4 Title 3 needs to be construed in connection with the
5 history that brought it forth --

6 QUESTION: Yes. But I would have thought it was
7 a section designed in the case of, some election contest
8 ends up before the Congress, a factor that the Congress
9 can look at in resolving such a dispute. I just don't
10 quite understand how it would be independently
11 enforceable.

12 MR. OLSON: That's why I've mentioned the
13 context in which that section was adopted. In light of
14 the extreme controversy that was faced by this country as
15 a result of the 1876 election, and as this Court knows,
16 that election was very close and led to controversy,
17 contest, discord, Congress was very much concerned about
18 the possibility of that happening again, and one of the
19 reasons --

20 QUESTION: Yeah, but what they did was, and it's
21 typical of grant-in-aid programs, they said if you run a
22 clean shop down there, we'll give you a bonus, and if you
23 don't, well, you take your chances with everybody else.

24 MR. OLSON: Justice Kennedy, I submit that it is
25 much like a compact that Congress is offering in the form

1 of Section 5, yes. If you do these things, certain things
2 will happen. But among these things, what Congress wanted
3 to accomplish with Section 5 was not only to provide the
4 benefit to the states, but to provide the benefit to the
5 United States of the states accepting that implicit
6 proposal.

7 QUESTION: But what is there in the opinion of
8 the Supreme Court of Florida that indicates that it relied
9 on this Federal statute in the reasoning for its decision
10 and in its judgment?

11 MR. OLSON: Well, I think the fact is that it
12 did not. What it did was it disregarded the compact.
13 When the state adopted a code of ethics, or a code of
14 election procedures to govern the election and the
15 determination of disputes pursuant to the election, it
16 brought itself into that safe harbor and guaranteed to the
17 voters and the candidates in that state that the
18 controversy and turmoil that infected this country after
19 the 1876 --

20 QUESTION: Well, we are looking for a Federal
21 issue, and I thought that you might have argued that the
22 Secretary of State was instructed by the Supreme Court not
23 to jeopardize the state's chances and then cited 3 U.S.C.
24 Sections 1 through 10. And so if the, if the state
25 supreme court relied on a Federal issue or a Federal

1 background principle and got it wrong, then you can be
2 here.

3 MR. OLSON: Well, I certainly agree that it
4 mentioned those provisions. I'm simply saying that it
5 blew past the important provisions of Section 5 and the
6 benefits that Section 5 gives to the states to the voters
7 in that state and to the people running for office in that
8 state. That is to say that if the rules are complied
9 with, if disputes are resolved according to the rules that
10 are set forth, then not only will the electors chosen by
11 the voters in that state be given conclusive effect at the
12 time they are counted by Congress but we will not have the
13 controversy, dispute and chaos that's been taking place in
14 Florida.

15 QUESTION: Mr. Olson, suppose a less, a less
16 controversial Federal benefit scheme, let's say the scheme
17 that says states can get highway funds if, if they hold
18 their highway speeds to a certain level, all right? And
19 suppose you have a state supreme court that in your view
20 unreasonably interprets a state statute as not holding
21 highway speed to the level required in order to get the
22 benefit of that safe harbor. Would you think that that
23 raises a Federal question and that you could appeal the
24 state court decision here because it deprived the state of
25 the benefit of the highway funds?

1 MR. OLSON: No, I don't think so.

2 QUESTION: Why is this any different?

3 MR. OLSON: This is a great deal different
4 because this is -- first of all, Article II of the
5 Constitution which vests authority to establish the rules
6 exclusively in the legislatures of the state, tie in with
7 Section 5. Secondly, as this Court has stated --

8 QUESTION: Well, let's just talk about Section
9 5. I mean, the constitutional question's another one.
10 Why is Section 5 in that regard any different from the
11 highway funding?

12 MR. OLSON: I think it -- I think it can't be
13 divorced from Article II of the Constitution because it's
14 a part of a plan for the vesting in the legislatures of a
15 state, and Section 5 implements Article II in the sense
16 that it provides a benefit not just to the state but to
17 the voters.

18 QUESTION: But just talk about the statutory
19 issue. I assume that if we worked long enough with
20 Justice Scalia's hypothetical, we could find a case where
21 a court adjudicated with reference to the Federal
22 principle and got the Federal principle wrong. Did --
23 Indiana vs. Brand and that kind of thing. Did that happen
24 here?

25 MR. OLSON: Well, I think that the state did not

1 pay, the state supreme court did not pay much attention to
2 the Federal statute. It was obviously aware of it. It
3 did get the Federal principle --

4 QUESTION: Well, then there is no Federal
5 constitutional issue here.

6 MR. OLSON: Well, there is a Federal--

7 QUESTION: Pardon me, statutory issue.

8 MR. OLSON: Well, we believe that there is,
9 Justice Kennedy, because although the state recognized it,
10 it blew right past it. The state legislature adopted the
11 code that the Section 5 of Article 3 of Title 3 invited it
12 to do. The state supreme court, which had no right under
13 the Constitution, but I can't divorce the constitutional
14 provision from Section 5, then overturned the plan that
15 the state enacted through its legislature to make sure
16 that what happened down in Florida was not going to
17 happen. And so what the state supreme court did, knowing
18 full well that these provisions existed, overturned the
19 carefully enacted plan by Florida.

20 QUESTION: Mr. Olson, do you think that Congress
21 when it passed 3 U.S. Code, intended that there would be
22 any judicial involvement? I mean, it seems to me it can
23 just as easily be read as a direction to Congress, saying
24 what we are going to do when these electoral votes are
25 presented to us for counting.

1 MR. OLSON: I think that it was intend --
2 directed to Congress, but it seems to me that in the
3 context in which it was adopted and the promise that it
4 afforded, that the conclusive effect would be given to the
5 state selection of electors, that is a somewhat empty
6 remedy and it doesn't accomplish Congress' objectives if
7 it cannot be enforced when an agency of the state
8 government steps in as the Florida Supreme Court did here
9 and overturn the plan by which the Florida legislature
10 carefully set forth a program so that disputes could be
11 resolved, and we wouldn't have the controversy, conflict
12 and chaos that we submit exists today in Florida.

13 QUESTION: Mr. Olson, your -- your submission is
14 based on the premise that the Florida court overturned
15 something that the statute did not. Is it not arguable, at
16 least, that all they did was fill gaps that had not been
17 addressed before?

18 MR. OLSON: Justice Stevens, I don't think that
19 in this case that's even remotely arguable. What the state
20 supreme court did is take a set of timetables, a set of
21 provisions that --

22 QUESTION: Yes. And the first one was the
23 mandatory -- is it your view still that the shall date
24 controls in all respects?

25 MR. OLSON: No. Not necessarily. But the 102

1 -- there is the two provisions, Section 102.111 and
2 102.112. 111 contains the shall date, 102 contains the
3 may date.

4 QUESTION: Correct.

5 MR. OLSON: Both of those statutes, both of
6 those provisions say that the returns must be, or shall be
7 filed by a certain deadline. The shall and the may
8 provisions simply relate to the possible remedy. We
9 submit that under either interpretation the Secretary of
10 State of Florida either must or shall ignore those
11 returns, or may set those aside in her discretion.

12 QUESTION: Does that mean if there were an act
13 of God that prevented the returns from being filed that
14 she would have discretion either to accept or reject the
15 returns?

16 MR. OLSON: Yes, I believe --

17 QUESTION: She would have the discretion?

18 MR. OLSON: Yes.

19 QUESTION: Would she be compelled in that event
20 to accept the returns?

21 MR. OLSON: I don't think so. She took the
22 position --

23 QUESTION: She has the total discretion either
24 to accept or reject?

25 MR. OLSON: That's --

1 QUESTION: Is there any circumstance in which
2 she would be compelled to accept a late return?

3 MR. OLSON: I don't know of any. I haven't
4 thought of any, Justice Stevens.

5 QUESTION: Well, you are arguing in effect that
6 it's a mandatory deadline. I wonder if you really mean
7 it's mandatory.

8 MR. OLSON: Well, the problem is that it's --
9 what we are saying is that either it's mandatory, in which
10 case she could not accept them.

11 QUESTION: But you don't know whether it's
12 mandatory or not?

13 MR. OLSON: Well, the Florida Supreme Court and
14 what the circuit court did in that case, it said that it
15 wasn't -- and we'll accept this for purposes of this
16 argument that it wasn't --

17 QUESTION: Yes, but one of the things that's of
18 interest to me is the extent to which you say there was a
19 change in the law. It seems to me that in order to answer
20 that question you have to know what your view of the law
21 was before this all happened.

22 MR. OLSON: I think that we can answer that this
23 way, is that whether it was shall ignore or may ignore.
24 It was not must accept.

25 QUESTION: Under any circumstance it was not

1 must?

2 MR. OLSON: No, under no circumstances was it
3 must accept. Now --

4 QUESTION: Even in an act of God or fraud?

5 MR. OLSON: I don't believe so, Justice Stevens.

6 QUESTION: Okay.

7 QUESTION: Mr. --

8 QUESTION: Isn't the law in Florida like as in
9 most states, and in the Federal government, that when an
10 official has discretion, may accept or may not accept,
11 that has to be exercised within the limits of reason?

12 MR. OLSON: Yes.

13 QUESTION: Well, then, isn't it possible that
14 when the court says she must accept under certain
15 circumstances, what they mean is outside those
16 circumstances, given the circumstances here it would be
17 unreasonable to refuse?

18 MR. OLSON: Well, what the court did was so
19 constrain those circumstances, virtually to make them
20 nonexistent.

21 QUESTION: All right. So then what you're
22 arguing about is a determination by the state court of
23 Florida as to what the circumstances are under state law
24 where the action of a state official would or would not be
25 reasonable.

1 MR. OLSON: I think that -- yes, but I think
2 that it has to be looked at in the context in which that
3 was done when the state supreme court so constrained and
4 says in its opinion shall accept these late returns until
5 5 p.m. on November 26th, and in the context there was no
6 discretion left for the Secretary of State at all.

7 QUESTION: Mr. Olson, may I ask you, because
8 you've been skipping over what I thought was a key piece
9 of the Florida legislation. The Florida Supreme Court
10 said, there's the deadline, and that conflicts with
11 another provision of this law, the provision that says
12 there shall be under certain circumstances recounts, and
13 then there's a rather detailed description of the process
14 that's necessary, the time line for when you can ask the
15 recount is on the 6th day.

16 MR. OLSON: Up to.

17 QUESTION: Yeah, up to. And it would be
18 impossible in a populous county to in one day do what the
19 statute instructs must be done when there's a recount.
20 The Florida Supreme Court said, it's right in its opinion,
21 there's two conflicts, and the first one they mention
22 straight out on page 21A of your appendix, is that there
23 has to be a reconciliation between this, yes, there can be
24 recounts and, yes, there's a deadline. So they are trying
25 to reconcile two provisions.

1 MR. OLSON: The first part of the recount
2 provision to which you're referring, Justice Ginsburg,
3 says may conduct a recount. Under certain circumstances
4 after the sampling part of that process is taken, if it's
5 taken in the county canvassing board's discretion, then
6 under certain circumstances it's supposed to go forward
7 with a more fulsome process, but the legislature being
8 fully aware of the recount provisions and the importance
9 of -- this ties in with the protest period for the
10 election, which overlaps the recount provisions, and the
11 contest provision for the election, and the fact that all
12 of this has to be done in the context of a presidential
13 election.

14 Under any other kind of election, these things
15 wouldn't be nearly as important, but we have very
16 important timetables, and as this Court has said a
17 presidential election is so important to the rest of the
18 nation, and there is such high Federal interest in
19 accomplishing these things in the right way, what the
20 Florida legislature did is balance the protest period, the
21 recount period with the contest period, and state that
22 there shall be certain deadlines before which certain
23 things need to be done and after which, so what those two
24 statutes say is that there may be a recount, but that
25 there shall be compliance with the time deadline. It also

1 says that --

2 QUESTION: But that's something that one can
3 certainly argue. My problem is, one could also argue what
4 the Florida Supreme Court said, and I do not know of any
5 case where we have impugned a state supreme court the way
6 you are doing in this case. I mean, in case after case we
7 have said we owe the highest respect to what the state
8 says, state supreme court says, is the state's law.

9 MR. OLSON: This is a very unusual situation,
10 Justice Ginsburg, because it is in the context of a
11 presidential election, and it is in the context of Federal
12 rights. This Court has, in the areas in which we've
13 described in our brief, undertaken to review the meaning
14 and the effect that the state supreme court or state court
15 decision under certain circumstances. We submit this is
16 one. What the Florida Supreme --

17 QUESTION: But I said, and even in the very
18 cases that you cite, because I checked them, that we owe
19 the highest respect to the state court when it says what
20 the state law is.

21 MR. OLSON: Yes, but then the Court has also
22 said, then we go on to see the extent to which what the
23 state court did, as we cited in the Lindsey case, for
24 example, in the ex post facto context, we go on to see
25 what the import of that is in connection with the Federal

1 right. I would emphasize that what the Florida Supreme
2 Court did is basically essentially say, we're rewriting
3 the statute, we're changing it.

4 QUESTION: Does the Secretary have any
5 flexibility to accommodate the statute to the exigencies
6 was presidential election? The Secretary of State.

7 MR. OLSON: The Secretary of State did. It
8 doesn't -- she doesn't much anymore because what has
9 happened -- and I would like to finish that one point,
10 that the Florida Supreme Court said we are not going to be
11 bound by technical statutory requirements or what the
12 supreme court called hyper-technical statutory
13 requirements. Instead, we are going to resort to the will
14 of the people, the will of the electorate, the will of the
15 voters, so to speak, and we are going to -- because we
16 can't rewrite the statute, but we are going to partially
17 rewrite the statute, we are going to resort to our
18 equitable powers. So what -- and among the things that
19 the court did, and there are a range of them, as I have
20 indicated, they took away the discretion of the Secretary
21 and instructed her to accept these manual recount returns.

22 QUESTION: Mr. Olson, on the equitable powers,
23 they were doing that in setting a new deadline, and I
24 don't think you would argue the case would have been more
25 acceptable if there had been no deadline?

1 MR. OLSON: No, it wouldn't have been, but --

2 QUESTION: And on the fight between may and
3 shall, they relied on four traditional canons of statutory
4 construction and not equity at all.

5 MR. OLSON: They recited four canons of
6 statutory construction, Justice Stevens, but when they
7 said they use those construction -- canons of statutory
8 construction to say that the words may and shall mean
9 shall not, that is not a reasonable exercise of statutory
10 construction. I think what the -- it's relatively obvious
11 that what the supreme court did is exactly what Article --
12 Section 5 of Article III intends not to happen. Change
13 the rules.

14 QUESTION: I don't read their opinion that way,
15 Mr. Olson. It seems to me that the portion of their
16 opinion dealing with statutory construction ends with a
17 conclusion that the Secretary has discretion. The portion
18 of the opinion employing the canons of construction does
19 not place any limits upon the Secretary's discretion.

20 MR. OLSON: Well, yes, I agree with that up to a
21 point, but then it says that she must accept these returns
22 that are after the deadline.

23 QUESTION: That was not on the basis of any
24 canons of statutory construction. That was on the basis
25 of the state's constitution.

1 MR. OLSON: That's right, but -- so there was
2 both going on, and what the court was bound and determined
3 to do was to get to a consequence that the court
4 determined was consistent with the will of the people,
5 irrespective of what the statute --

6 QUESTION: Mr. Olson, would you agree that when
7 we read a state court decision, we should read it in the
8 light most favorable to the integrity of the state supreme
9 court, that if there are two possible readings, one that
10 would impute to that court injudicial behavior, lack of
11 integrity, indeed dishonesty, and the other one that would
12 read the opinion to say we think this court is attempting
13 to construe the state law -- it may have been wrong, we
14 might have interpreted it differently, but we are not the
15 arbiters, they are.

16 MR. OLSON: I would like to answer that in two
17 ways. In the first place, I don't mean to suggest, and I
18 hope my words didn't, that there was a lack of integrity
19 or any dishonesty by the Florida Supreme Court. What
20 we're saying, that it was acting far outside the scope of
21 its authority in connection with an exercise of power that
22 is vested by the Constitution of the United States --

23 QUESTION: But if it tells us -- if it tells us,
24 we see these two provisions in conflict, they need to be
25 reconciled.

1 MR. OLSON: But -- under almost any other
2 circumstances, yes, Justice Ginsburg, but in this context,
3 in this context, we are talking about a Federal right, a
4 Federal constitutional right, and the rights of individual
5 citizens under the Constitution and so therefore, this
6 Court has a grave responsibility to look --

7 QUESTION: Mr. Olson, I'd like to get focused a
8 little more on this same area. If it were purely a matter
9 of state law, I suppose we normally would leave it alone
10 where the state supreme court found it, and so you
11 probably have to persuade us there is some issue of
12 Federal law here. Otherwise, why are we acting?

13 MR. OLSON: Yes.

14 QUESTION: And are you relying in that regard on
15 Title 2? I mean, would you like to -- Article II? Would
16 you like to characterize the Federal issue that you think
17 governs this?

18 MR. OLSON: Well, we are very definitely relying
19 on Article II of the Constitution. The framers of the
20 Constitution debated long and hard. It was one of the
21 longest debates that took place during the formation of
22 the Constitution. Where should this power be lodged, in
23 the Federal legislature, in the state legislature, at the
24 ballot booth or what. The one thing that was discussed
25 and rejected by virtually everyone is that the power to

1 select the manner in which electors would be appointed
2 would be in the state judiciary, and we quote -- in the
3 state judiciary. That was rejected.

4 The notion that it would be vested in the state
5 judiciary was something that was rejected, and what the
6 framers decided to do is to vest it in the state
7 legislature and vested that authority under Article II,
8 not just in the state, but the legislature.

9 QUESTION: And the state legislature could vest
10 it in the judiciary if it wanted, as I read the McPherson
11 case, and here they have done something less. The state
12 judiciary said, we are going to invoke the ordinary
13 election procedures, which you know, warts and all, it
14 involves some interpretation by the courts and contest
15 proceedings, et cetera.

16 MR. OLSON: Well, it is -- yes, it said that,
17 Justice Kennedy. But what it did was supplant a set of
18 rules elect -- enacted before the election to govern the
19 election, for a set of rules made up after the election.

20 QUESTION: All right. Mr. Olson, let's assume
21 that it did that, for the sake of argument. I want to go
22 back to the issue that the Chief Justice raised a little
23 while ago, and I'd like you to comment on this line of
24 reasoning. You've got Section 5. Congress in the statute
25 seems to have gone to great lengths to provide what to do

1 in the situation that you are describing, accepting your
2 view of the case.

3 Section 5, it says if you do certain things
4 within certain times, the conclusion that you draw is
5 going to be conclusive upon the Congress. In Section 15,
6 it sets out in fact an elaborate set of contingencies
7 about what the Congress is supposed to do and can do if
8 there is a dispute as to whether a given set of procedures
9 in the state have conformed to Section 5. Section 15
10 refers to regularity. It refers to legality and
11 illegality. It looks to me as though at least at this
12 stage of the proceedings, Congress has said if there is a
13 question about whether this if-then provision in Section
14 5, construing Article II, has been satisfied, then this is
15 the decisional tree for the Congress to follow in deciding
16 what to do about it and in resolving challenges.

17 It looks to me as though at this stage of the
18 game, the statute has committed the determination of the
19 issues that you raise and the consequences to follow from
20 them to the Congress. Why should the Court, why should
21 the Federal judiciary be interfering in what seems to be a
22 very carefully thought out scheme for determining what
23 happens if you are right?

24 MR. OLSON: Because I submit that that writes
25 Section 5 essentially out of existence if an agency of

1 state government, if a state legislature --

2 QUESTION: No. It doesn't write it out of
3 existence. It provides in Section 15 what happens if the
4 state agency does what you say it did.

5 MR. OLSON: If the state agency, if the state
6 legislature empowered by Article II of the Constitution,
7 does what it is invited to do by Section 5, and then
8 another agency of state government, in this case the state
9 supreme court, comes along and upsets that scheme, yes,
10 you have ultimate resort to the resolution of the dispute
11 under Sections 15 of Title 3, but that's precisely --

12 QUESTION: Well, you say you have ultimate
13 resort. But that begs the question, that seems to be
14 precisely the resort that Congress has provided.

15 MR. OLSON: Well, I'm not making myself clear, I
16 think, is that the importance of Section 5 was to invite
17 the state to do things that would avoid the chaos and the
18 conflict and the controversy and the unsettled situation
19 that this country faced in 1876, and --

20 QUESTION: Mr. Olson, did Section 15 exist when
21 McPherson was decided?

22 MR. OLSON: I don't know, Justice Scalia. I
23 don't know the answer to that, when it was adopted. I
24 can't recall whether it was a part of the 1887 electoral
25 count statute or not. I can probably answer that in

1 regard --

2 QUESTION: That would make a difference,
3 wouldn't it?

4 MR. OLSON: Well, it seems to me it wouldn't
5 make a difference, because of this. It might -- yes, it
6 certainly might make a difference one way, but it still
7 wouldn't make a difference because our concept here, and I
8 think it's quite a rational and actually the only
9 explanation for how you can put these provisions together,
10 Article II and Section 5, and Congress' desire to avoid
11 the very controversy, chaos, conflict, which even --

12 QUESTION: Well, but Section 15 assumes that
13 there is controversy and chaos.

14 MR. OLSON: Yes.

15 QUESTION: Section 15 isn't providing for
16 challenges except in situations perhaps exactly like this
17 one.

18 MR. OLSON: But that's what the country -- what
19 essentially Section 15, although it modifies it and
20 structures it somewhat, it was still a situation that
21 Congress was facing in 1876 when it was dealing with the
22 Hayes-Tilden election.

23 QUESTION: Right.

24 MR. OLSON: And by the time it got there, there
25 were dueling slates of electors that were buying -- there

1 were exchanges and a lot of things that everyone felt was
2 very destructive to the country.

3 QUESTION: But Congress had to face the
4 constitutional fact that under Article II, it could not,
5 or its understanding was certainly, that it could not
6 mandate certain state procedures. Article II did say the
7 legislature shall decide what they are.

8 MR. OLSON: Correct.

9 QUESTION: So the most that Congress could do in
10 providing for a more orderly resolution of what happened
11 in Hayes-Tilden was to do what it did in Section 5, and
12 that is to say if you do certain things, you can depend
13 upon the results, recognizing that the state might not do
14 those things. And it then provided, or at least at the
15 present time it is provided in Article, in Section 15,
16 that if you don't do those things, there is a sequence of
17 issues that can be raised to be decided by the Congress.

18 If Congress wanted this Court to get into the
19 issue at this stage, it seems passing strange to me that
20 despite all the elaborateness of Section 15 there wouldn't
21 have been some mention of Federal litigation proceeding in
22 the Section 15 proceeding.

23 MR. OLSON: I think that's a very important
24 point, and let me make it: That Congress did say if you
25 do these things, certain consequences will flow from it.

1 Florida did these things, and we submit that there is,
2 that the courts are here to protect the benefit of the
3 bargain that Florida made when it responded to that
4 invitation, because --

5 QUESTION: We have to separate your statutory
6 argument from your Constitutional argument. To the extent
7 that you are relying just on the Constitution, do you
8 think that Congress could by Section 15 exclude the courts
9 from adjudicating the constitutionality of what the state
10 has done?

11 MR. OLSON: No, I don't think so.

12 QUESTION: But it certainly could express its
13 preference for a scheme whereby the initial litigation, if
14 you will, at this level, would take place in the Congress.
15 To acknowledge that is not to say that the issue is
16 justiciable or that this Court has somehow been
17 necessarily excluded from the process for all time. It is
18 simply to say that the first line of litigation at the
19 Federal level seems under the statute to be Congress, and
20 not the Court.

21 QUESTION: Isn't that a fair reading of 15?

22 MR. OLSON: That's not a fair reading of Section
23 5, and let me answer this question, and I would like with
24 the Court's permission to reserve the time --

25 QUESTION: Well, I don't think Section 5 goes to

1 the issue. The question is whether it's a fair reading of
2 Section 15.

3 MR. OLSON: I don't think that they can be read
4 in isolation. I think that Section 5 was designed to
5 avoid the problem created by the controversy and the
6 having to resolve this in Congress, which is exactly what
7 did happen in 1876, and was a very unsatisfactory
8 situation.

9 QUESTION: And in 1876, Congress did not have --

10 QUESTION: 1877.

11 QUESTION: -- the rules with --

12 QUESTION: 1877.

13 QUESTION: Congress did not have the rules with
14 respect to conclusiveness that it now has under Section 5.

15 MR. OLSON: That's right. And it put those
16 rules with respect to conclusiveness into Section 5. The
17 Florida legislature bought into that scheme and now the
18 Florida Supreme Court, which doesn't have any
19 Constitutional authority pursuant to Section 2 to do so,
20 upset that scheme, deprived Florida of the benefit of
21 doing exactly what Congress wanted to have happen under
22 Section 5. I would, with the Court's permission, reserve
23 the balance of my time.

24 QUESTION: Very well, Mr. Olson. Mr. Klock,
25 we'll hear from you.

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ORAL ARGUMENT OF JOSEPH P. KLOCK, JR.
ON BEHALF OF THE RESPONDENTS KATHERINE HARRIS,
ET AL., IN SUPPORT OF PETITIONER

MR. KLOCK: Mr. Chief Justice, and may it please
the Court:

Our argument is simply addressed to issues
having to do with Florida law, and the point being raised
by the Secretary is this, that the law in the state of
Florida on November 7 was changed by the Supreme Court of
Florida's decision on November 21. The Secretary is not
contesting the right of the Florida Supreme Court to
change the law of Florida, is simply pointing, she is
simply pointing out, that the law did change.

QUESTION: Does the Secretary maintain that in
some instances she has a discretion that a court does not
or can a court do whatever she might do, under Florida
law?

MR. KLOCK: Under Florida law, she has certain
discretion that I think a court probably does not have in
the protest period, Justice Kennedy, and that would be
that she had the discretion to decide whether or not
returns could be permitted after that seventh day, and
indeed that's based on two things that we have in the
record. One is an opinion that was issued by the Division
of Elections that talks about the circumstances in which

1 the Secretary would exercise discretion, and the second is
2 the letter that the Secretary sent to the three or four
3 canvassing boards that requested an extension of time
4 after the 14th deadline had passed.

5 She sent the letter out, she said, please
6 indicate to me whether or not you intend to file returns
7 after the deadline, and if you do what the reasons are.

8 She collected a set of criteria, she applied the
9 criteria, and then sent a letter back, and what she did,
10 Justice Kennedy, in the case of the Division's letter, the
11 opinion which, of course, is binding under Florida law on
12 elections officials who receive them, she -- the Division
13 head said that there were certain circumstances such as
14 acts of God, hurricanes, and that kind of thing where the
15 discretion would be exercised. When she came up with her
16 additional reasons for considering whether or not she
17 would exercise her discretion, she indicated a number of
18 them which are also contained within the record. It's at
19 the Joint Appendix at 21, she indicated where there was a
20 result of voter fraud with a substantial --

21 QUESTION: She said she would exercise her
22 discretion. Did she say she would have to exercise her
23 discretion in those conditions?

24 MR. KLOCK: I think she would have to exercise
25 her discretion.

1 QUESTION: The court did compel her to?

2 MR. KLOCK: Yes, sir.

3 QUESTION: Do you think that was clear before
4 the opinion of the supreme court in this case?

5 MR. KLOCK: Yes, sir.

6 QUESTION: Let me just ask one general question
7 for your comment on whether it's a change in the law. To
8 what extent, in your view, was the -- did the Supreme
9 Court of Florida consider itself bound by either prior
10 precedent or the constitution of the state which
11 preexisted?

12 MR. KLOCK: In terms of handing down its
13 decision?

14 QUESTION: In terms of the particular result it
15 reached in this case.

16 MR. KLOCK: I believe the Supreme Court of
17 Florida was looking at its law in terms of articulating
18 the law that it wanted to have then and on a going-forward
19 basis. What it did -- and obviously since it's the chief
20 court of the state, it has the right to do whatever it
21 wishes to do with respect to Florida law only bound by
22 whatever separation of powers --

23 QUESTION: Do you think they thought their
24 decision was dictated either by prior precedent or by the
25 constitution of the state?

1 MR. KLOCK: Your Honor, I don't know whether
2 they thought that or not, but that's not what the opinion
3 says. As a matter of fact, the opinion is pretty clear,
4 they start out by talking about statutory construction,
5 and they hinge everything on the use of the word
6 interpret, and then they sort of turn the word interpret
7 to a use that it's not intended to be, but then when they
8 get to the point of designing the rule of law they're
9 going to go forward on, they don't talk about interpreting
10 the statute. They then go and base it on principles of
11 equity in the Florida Constitution, and indeed what they
12 end up with, Your Honor, is this statement with respect to
13 the discretion that the Secretary is left with, and that
14 is this -- and it's on 35 of the Joint Appendix. "We
15 conclude that consistent with Florida's election scheme,
16 the Secretary may reject a Board's," that's the canvassing
17 board's, "amended returns only if the returns are
18 submitted so late that their inclusion will preclude a
19 candidate from contesting certification or preclude
20 Florida voters from participating fully in the Federal
21 electoral process."

22 Now, Your Honor, there's --

23 QUESTION: I understand your position is that
24 was entirely new?

25 MR. KLOCK: Yes, sir.

1 QUESTION: I'm just wondering, therefore your
2 submission is that it was not dictated by the constitution
3 or by prior precedent?

4 MR. KLOCK: No, Your Honor.

5 QUESTION: I thought you said a moment ago that
6 the court, the Florida court did rely on the Florida
7 Constitution. There's a section of their opinion that's
8 devoted to that.

9 MR. KLOCK: Your Honor, in devising the remedy,
10 they refer to the Florida Constitution, but the issue that
11 we're here on, as I understand it, sir, is whether or not
12 the law changed. There's no question that they have a
13 right to do what they did. The only --

14 QUESTION: I think perhaps another statement of
15 the issue is to what extent did the Florida Supreme Court,
16 in construing this statute, rely on more general
17 provisions of the Florida Constitution which they cited in
18 their opinion?

19 MR. KLOCK: I think they did rely, in creating
20 the remedy on the Florida Constitution, I believe they
21 created a right that had not previously been seen there,
22 which they have a right to do, but, Mr. Chief Justice, the
23 issue again is whether or not the law that they
24 articulated on November 21 is different than the law that
25 existed on November 7, and how the Secretary of State, in

1 exercising her discretion, was to divine the standard that
2 would be established on November 21.

3 QUESTION: Your position is so long as it's
4 different, it violates Section 5 and therefore we have a
5 right to step in?

6 MR. KLOCK: Well, Justice Scalia, we have not
7 addressed the Federal issues because, I mean, we're in a
8 situation where you have --

9 QUESTION: Well, this is a Federal court what
10 are you here for, if you're not addressing --

11 MR. KLOCK: I understand that, sir. I
12 apologize. But we have the Secretary of State here, we
13 have the Attorney General here, and the legislature has
14 filed by amicus, and of course the state has not appeared,
15 so it's a little unusual. We haven't addressed those
16 issues, but to answer your question, yes, sir.

17 QUESTION: Can you tell me when this petition
18 was filed here, the Secretary had not certified anybody
19 the winner, and now the Secretary has certified a winner,
20 and therefore, I guess, whether we win, whether your side,
21 the side you're supporting wins or loses, it doesn't
22 change that, and I guess that's moot, but my question is,
23 is there any respect in which this really makes a
24 difference, this case? How? I'm thinking, if it does
25 make a difference, numbers of vote, is that kind of thing

1 right for us to decide now? How could it make a
2 difference? What's the consequence of our going one way
3 or the other now in this case?

4 MR. KLOCK: Your Honor, it makes an enormous
5 difference because the relief that has been requested
6 would be for the Court to determine that the law in effect
7 at the time of the election was that manual recounting of
8 ballots would not be permitted to address voter error,
9 which I think has been extensively --

10 QUESTION: We don't have -- all -- suppose they
11 won and the relief was, suppose your side won, and the
12 relief was, fine, it should have been certified on
13 November 14th or 18th instead of November 26th. Now,
14 what's the consequence of that? Just that? Forgetting
15 what the reasoning is. Is there a consequence that flows
16 from that, that is real, adverse, you know, significant,
17 concrete that we can predict now as opposed to speculate?

18 MR. KLOCK: The only immediate result would be
19 that you would have a margin that instead of being 536
20 votes would be 900-some-odd votes, and it would only be
21 added to as a result of whatever was added by the overseas
22 ballots.

23 QUESTION: Fine. Then this case has said, we've
24 said a claim is not ripe if it rests upon contingent
25 future events that may not occur as anticipated or indeed

1 may not occur at all. And so what I wonder, is this in
2 this realm of speculation as to whether or not it will or
3 will not make a difference, a difference to the outcome of
4 the election.

5 MR. KLOCK: It will make a difference to the
6 outcome of the election because there is an ongoing
7 contest which is interrelated and is involved with the
8 Supreme Court's opinion, and of course because the Supreme
9 Court of Florida, in coming up with the remedy that they
10 came up with, completely changed the period of time from a
11 relatively short period of time, seven days for a protest
12 and much longer period for a contest, we now have a
13 situation where there is 19 days for the protest and 16
14 days for a contest.

15 QUESTION: Well, it's too late -- it's too late
16 to lengthen the time for the contest. I mean, to the
17 extent that they have shortened the contest time, you
18 know, that's water over the dam right now, isn't it?

19 MR. KLOCK: Yes, Justice Scalia, but the issue
20 here -- I'm sorry.

21 QUESTION: Is it not the case that if the votes
22 are, are as, as they have been shown to be under the
23 Florida Supreme Court's opinion, the race is much closer,
24 and therefore some counties under Florida law would
25 conduct recounts that otherwise would not conduct

1 recounts. Doesn't whether a recount is conducted depend
2 upon how likely it is that the recount is going to change
3 the outcome?

4 MR. KLOCK: Your Honor, if the law is returned
5 to the point it was on November 7, there is no right to a
6 manual recount to correct voter error, and that will end
7 the litigation that currently exists in the State of
8 Florida, which were the opinions of the Secretary of
9 State's Division of Elections that were issued and also
10 the state of the law as it existed at that point in time.
11 The record shows very clearly that there was no dispute
12 that there were any problems with voting machines or any
13 other tabulation problems with voting machines. It was
14 simply when they went through the process of what is,
15 Justice Ginsburg, a discretionary right to a manual
16 recount, not a mandatory one, when they went into that and
17 did the test, each of those canvassing boards did not find
18 any problem with a mechanical problem. It was simply a
19 problem in terms of voter error.

20 QUESTION: The secretary took the -- never mind.
21 Thank you.

22 QUESTION: Thank you, Mr. Klock. Mr. Hancock,
23 we'll hear from you.

24 ORAL ARGUMENT OF PAUL F. HANCOCK
25 ON BEHALF OF RESPONDENT ROBERT A. BUTTERWORTH

1 MR. HANCOCK: Mr. Chief Justice, and may it
2 please the Court: In accordance with Article II of the
3 United States Constitution, the Florida legislature has
4 directed the manner of selecting presidential electors in
5 Florida. That manner is pursuant to a popular vote that's
6 implemented pursuant to the general election laws of the
7 State of Florida.

8 QUESTION: I guess Article II permits the
9 legislature in general to make a choice that it could
10 itself select the electors?

11 MR. HANCOCK: Yes, Justice O'Connor. We agree
12 with that. In implementing the election law, each branch
13 of the Florida government plays a role. For example, the
14 judiciary, or the executive branch of our government has
15 not found itself bound by the technical, hypertechnical
16 requirements of the election law. An example of that is
17 that the, the executive branch has implemented a rule, not
18 a law, but a rule that allows absentee ballots from
19 overseas military voters to be received after the 10 days
20 after the close of the polls. Under the law of the State
21 of Florida, all absentee ballots have to be received by
22 the time the polls close on election day.

23 QUESTION: In your brief you say, you conclude
24 that the Florida Supreme Court like, I think it's page 12,
25 like any state court, exercised its inherent equitable

1 powers to remedy a threat to fundamental constitutional
2 rights, and it rewrote the certification deadlines
3 according to that power, did it not?

4 MR. HANCOCK: The only -- yes, Justice Kennedy.
5 The only equitable power exercised by the court was
6 setting the deadline.

7 QUESTION: Isn't that such an amorphous general
8 abstract standing that it can't possibly be said to be a
9 law that was enacted and in place at the time of the
10 election?

11 MR. HANCOCK: No. The laws were enacted well
12 before the election. What happened was that in the court
13 --

14 QUESTION: Of course, the Constitution was there
15 before the election, the Due Process Clause is before the
16 election, but what we are talking about is having laws of
17 sufficient specificity and stability that people can rely
18 on them in advance and not have them changed after the
19 fact. And your brief makes it very clear that they
20 exercised their inequitable powers to remedy a threat to
21 fundamental constitutional rights and changed the deadline
22 accordingly. It seems to me that's no standard -- it's an
23 enviable standard, something we might all agree with in
24 the end, but as far as the requisite specificity to
25 satisfy 3 U.S.C. Section 5, I just don't see it as there.

1 MR. HANCOCK: The court had to do something,
2 Justice Kennedy. It was faced with conflicts in Florida
3 law. They had conflicting opinions from the Florida
4 Attorney General as to the meaning of the law and the
5 Secretary of State as to the meaning of the law. As a
6 result of --

7 QUESTION: Maybe it had to do something, but did
8 it comply with 3 U.S.C. Section 5?

9 MR. HANCOCK: I submit, Justice Kennedy, that 3
10 U.S.C. Section 5 doesn't require the state to do anything,
11 it merely says --

12 QUESTION: But did it comply with that part of 3
13 U.S.C. Section 5 that requires that laws be enacted and in
14 place prior to the election in order to get the safe
15 harbor?

16 MR. HANCOCK: Yes, it did. The laws were in
17 place before the election. And those laws granted to the
18 judiciary --

19 QUESTION: Well, but certainly the date changed.
20 That is a dramatic change. The date for certification,
21 right?

22 MR. HANCOCK: Yes.

23 QUESTION: And it was done by the court.

24 MR. HANCOCK: Yes, it was done pursuant --

25 QUESTION: And the legislature had very clearly

1 said, you know, seven days after, that's the date, and it
2 just does look like a very dramatic change made by the
3 Florida court, and I'm wondering if that is consistent in
4 fact with the notion, expressed at least in Section 5, so
5 that the result would be if it did go to Congress, it
6 would be a change.

7 MR. HANCOCK: The -- I agree that the date was
8 implemented pursuant to the court's equitable powers.
9 Other than that, it was a routine exercise in statutory
10 construction. The court was faced with a situation first
11 of all where because of conflicting advice the counties
12 had started and then stopped conducting manual recounts
13 because of advice from the secretary of the state which
14 the supreme court ultimately concluded to be erroneous.

15 QUESTION: Yes. And that advice was -- and this
16 was really the beginning of all of the problem, her advice
17 was that the provision providing for recounts, manual
18 recounts, not requiring them but giving them as one of the
19 options, only came into play when there was some defect in
20 the, in the machinery, and it was not available for voter
21 error, that is for voters who didn't punch the cards the
22 way they were supposed to. And the attorney, your office
23 came out with the opposite conclusion.

24 The secretary's brief contends that that had
25 always been the rule in Florida. Is that the case? Do

1 you know of any other elections in Florida in which
2 recounts were conducted, manual recounts, because of an
3 allegation that some voters did not punch the cards the
4 way they should have through their fault? No problem with
5 the machinery -- it's working fine. You know, there were
6 what, pregnant chads, hanging chads, so forth?

7 MR. HANCOCK: No, Justice --

8 QUESTION: Did that ever happen --

9 MR. HANCOCK: No, I'm not aware of it ever
10 happening before. But, I can say that the Supreme Court
11 of Florida for 100 years has put a duty on election
12 officials to discern the intent of the voter, and while
13 the secretary of the state refers to it as voter error,
14 when the ballot is punched, that's, under the laws of the
15 State of Florida as interpreted by the supreme court, that
16 voter has cast the ballot, even if the chad did not --

17 QUESTION: Is it your position that any
18 interpretation the Supreme Court of Florida makes to
19 implement the will of the people is never a new law?

20 MR. HANCOCK: The supreme -- yes. I can't say
21 ever, but I'd say that on the case before the court, all
22 that was before the court was ordinary statutory
23 construction, which must be, the result of it whether this
24 Court would agree with it or disagree with it, must be
25 respected by this Court. That's the very foundation of

1 federalism.

2 QUESTION: Mr. Hancock, are you relying on the
3 Florida Supreme Court statement at least twice in its
4 opinion -- now I looked at the page to which Mr. Klock
5 referred, page 37-A, it says for the second time that
6 Section, the section governing manual recounts appears to
7 conflict with the sections that set a deadline, and it's
8 reconciling that conflict.

9 MR. HANCOCK: Yes.

10 QUESTION: Whether it was wrong or right, that's
11 what it said its mission was and that's what it did.

12 MR. HANCOCK: Yes. Both in words and in
13 operation, the statutes could not work together because of
14 the time for requesting manual recounts, the extent of the
15 job manual recounts --

16 QUESTION: What is the section that requires
17 manual recounts?

18 MR. HANCOCK: It's 102. -- well, 102.166
19 authorizes manual recounts.

20 QUESTION: That's different from requires.

21 MR. HANCOCK: Yes, but once it starts, Justice
22 Scalia, once it's authorized, if the initial sample
23 recount shows an error that might effect the outcome of
24 the election --

25 QUESTION: Then --

1 MR. HANCOCK: The board is then required to,
2 among other things, conduct a full manual recount.

3 QUESTION: No, no. It's required to do one of
4 three things, one of which could be a manual recount. It
5 could decide to do one of the other two instead.

6 MR. HANCOCK: Yes. The problem faced by the
7 counties --

8 QUESTION: So there is really -- there is -- I
9 mean, the Court says that there is a requirement for a
10 manual recount but I don't see anything in the text of the
11 statute that requires a manual recount.

12 MR. HANCOCK: The statute requires that the
13 election officials attempt to discern the cause of the
14 error. Here the cause of the error was that, in these
15 counties, was that the machines were not able to read
16 ballots, 10,000 ballots in Palm Beach County, the machine
17 did not read as including a vote for president. That was
18 the issue so that the solution to that was not the
19 machines, even when they're operating properly would not
20 read these ballots, so what was left of the county
21 canvassing boards then was to do the full manual recount,
22 and the language of that statute again says they shall do
23 a full manual recount in those circumstances.

24 QUESTION: It says that the board may authorize
25 the manual recount, it doesn't require it. If it does

1 authorize it, then it tells it how to do it and says they
2 shall appoint as many counting teams as necessary,
3 presumably as necessary to do it within the time limit.

4 MR. HANCOCK: Yes, Justice O'Connor, but, again
5 these -- under the law these requests can be made up to
6 the time of canvassing -- that means up to six or seven
7 days -- and also the number of ballots at issue here are
8 between 650,000 in Palm Beach County and also 900,000, up
9 to 900,000 in Broward County.

10 QUESTION: If that is a statutory problem, the
11 court's resolution didn't really solve it, did it?
12 Because even with her extended time period the same
13 statutory problem exists. There still isn't enough time
14 under the extended deadlines for some of these counties
15 that have an enormous number of votes to conduct a manual
16 recount, isn't that right?

17 MR. HANCOCK: Well, let me --

18 QUESTION: I mean to resolve a supposed conflict
19 in the statute in a manner that leaves in place the same
20 problem that existed before seems to me not a real
21 resolution of the statutory problem.

22 MR. HANCOCK: The supreme court tried to blend
23 it all together to make it work, Justice Scalia, and again
24 it came up with a solution. The Secretary of State's
25 argument here is based on -- the Secretary of State

1 herself recognized that she had the discretion under
2 Florida law to accept returns filed outside of that
3 seven-day deadline. A breakdown of the machines, in her
4 view, would justify late returns. A failure of the
5 machines to read ballots would not justify late-filed
6 returns.

7 The supreme court said that the legal standard
8 she was using was wrong. That -- we submit that that
9 decision of the supreme court is the law in the state of
10 Florida.

11 QUESTION: I'm going to extend your time two
12 minutes, Mr. Hancock, because you haven't had a chance to
13 say a lot yet.

14 MR. HANCOCK: Well, I don't need the extension
15 time, Your Honor. If there's no other questions, I will
16 stop. Thank you.

17 QUESTION: Thank you. Mr. Tribe, we will hear
18 from you.

19 ORAL ARGUMENT OF LAURENCE H. TRIBE
20 ON BEHALF OF THE RESPONDENTS AL GORE, JR.
21 AND FLORIDA DEMOCRATIC PARTY

22 MR. TRIBE: Mr. Chief Justice, and may it please
23 the Court:

24 I think I would want to note at the outset that
25 the alleged due process violation which keeps puffing up

1 and then disappearing and has as far as I can tell not
2 appeared at the state supreme court, did make one
3 appearance in the reply brief here, is really not before
4 the Court, and for understandable reasons, because
5 although it is part of the popular culture to talk about
6 how unfair it is to change the rules of the game, I think
7 that misses the point when the game is over, and when it's
8 over in a kind of photo finish that leaves people unsure
9 who won, and then the question is, how do you develop
10 great, sort of greater certainty, and a rather common
11 technique is a recount, sometimes a manual recount,
12 sometimes taking more time would be rather like looking
13 more closely at the film of a photo finish. It's nothing
14 extraordinary. It's not like suddenly moving Heartbreak
15 Hill or adding a mile or subtracting a mile --

16 QUESTION: You're seeing no important policy in
17 3 U.S.C. Section 5.

18 MR. TRIBE: No, no.

19 QUESTION: In fact, we can change the rules
20 after -- not important -- the popular culture --

21 MR. TRIBE: Certainly not, Justice Kennedy, but
22 I read U.S.C. Section 5 -- that is 3 U.S.C. Section 5 not
23 as a requirement that, for example, one never add
24 resources to checking how a particular ballot was cast.
25 If you look at the language, I think it's really much too

1 casual to say of it that all of the laws must stay fixed
2 in order to have the safe harbor apply. As I'll try to
3 argue in a few minutes, that's not really a question for
4 this Court, but for the Congress, but the language of
5 Section 5 is that -- and I'll just read what I think are
6 the key words, "if a state --"

7 QUESTION: Can you tell us where you're reading
8 from?

9 MR. TRIBE: Actually, I'm just reading from a
10 copy of the U.S. Code, 3 U.S.C. Section 5, not from any --
11 the page I can identify --

12 QUESTION: It's in the appendix to the
13 petitioner's brief, I'm sure, isn't it?

14 MR. TRIBE: Yes, although I'm afraid I don't
15 have it in front of me.

16 QUESTION: Page 3A of the blue brief.

17 MR. TRIBE: Thank you, Justice Souter. Page 3A
18 of the blue brief, I am reliably informed.

19 So if any state --

20 QUESTION: That won't get you an extra two
21 minutes.

22 MR. TRIBE: Well, I tried. I tried. If any
23 state shall have provided, and then it says by laws
24 enacted prior to the day fixed for the appointment of the
25 electors, a fancy way of saying election day, for the

1 final determination of any controversy or contest about
2 the appointment of electors -- and here's the key phrase,
3 I think -- by judicial or other methods or procedures at
4 least six days before the time fixed for the meeting of
5 the electors, that means in our situation, December 12,
6 then the final determination shall be conclusive and
7 govern the counting in Congress.

8 Now, the question for Congress, I suppose, would
9 be, although I don't see how this Court could get into
10 that question at this stage, but the question would be, is
11 a particular change extending a deadline for exigent
12 circumstances because a recount has been authorized, a
13 change in the judicial or methods of procedures for
14 resolving the contest.

15 QUESTION: Let me just ask you a moment, you say
16 you don't think the statute permits this Court to get into
17 the matter at this time. Are you suggesting there could
18 be any judicial review of a decision by the Congress to
19 count one set of electoral votes?

20 MR. TRIBE: No, I don't think so, Mr. Chief
21 Justice, it's just that I don't trust my own imagination
22 to have exhausted all possibilities. For example, in the
23 case in, I think it was 1890, in *Fitzgerald v. Green* when
24 this Court held that only states can punish fraudulent
25 voting for presidential electors, it got into the act sort

1 of obliquely and at an angle, and that had a bearing on
2 the question of how the presidential electoral slate might
3 be composed, but it certainly didn't get into this.

4 QUESTION: No, it certainly was quite different
5 from --

6 MR. TRIBE: Very.

7 QUESTION: -- this hypothetical.

8 MR. TRIBE: That's certainly right.

9 QUESTION: You suggest in your reply brief that
10 it is not -- I think you said it's not self-evident that
11 the Florida legislature at this time has the right to
12 appoint any slate of delegates because the Congress has
13 set the date, and the date is the general election day.

14 If that is so, doesn't this mean that when we
15 talk -- think about justiciability, we must be very
16 careful to preserve the role of the Court. You have said
17 or suggested here in your reply brief that the Florida
18 legislature now has no role. You are now suggesting that
19 this Court has no role. That means the Supreme Court of
20 Florida is it, so far as a judicial interpretation of the
21 consequences of 3 U.S.C. Section 5.

22 MR. TRIBE: Well, Justice Kennedy, first of all
23 I do want to be clear that in our view the question of
24 whether and when and how the Florida legislature can enter
25 the picture is in no way presented here. That paragraph

1 was intended to suggest that it's not obvious that the
2 views of some that there's no problem is right.

3 Secondly, if it were the case that the Florida
4 legislature could not simply decide, well, we're tired of
5 all this counting, we're moving in, and that this Court
6 cannot decide whether the conditions of 3 U.S.C. Section 5
7 are met, it would then remain only for Congress to make a
8 determination and adding the Florida legislature would
9 not, after all, have added an adjudication.

10 QUESTION: And my point is that puts hydraulic
11 pressure on your nonjusticiability argument and makes it a
12 very, very important argument and a critical argument in
13 this case.

14 MR. TRIBE: Well, perhaps, Justice Kennedy, but
15 I frankly can't see how it would affect the decision in
16 this case. After all, you have before you a judgment of
17 the highest court of the state. As Justice Ginsburg and
18 others have suggested, it would ordinarily be the case,
19 surely, that one would not go out of one's way to read the
20 judgment as a breach of faith with the duties of trying to
21 reconcile provisions that are --

22 QUESTION: Well, I guess in the area, though, of
23 presidential electors it could be that that court, as all
24 courts would be, have to be informed, at least, by the
25 provisions of Section 5 in reviewing the laws enacted by

1 the legislature of the state. I mean, it had to register
2 somehow with the Florida courts that that statute was
3 there and that it might be in the state's best interest
4 not to go around changing the law after the election.

5 MR. TRIBE: Well, Justice O'Connor, I certainly
6 agree that if the Florida Supreme Court adverted to 3
7 U.S.C. Section 5, and as Justice Kennedy asked earlier,
8 got it wrong, then there would be a Federal issue for this
9 Court. Would it be, I wonder, a Federal issue --

10 QUESTION: Well, is there a Federal issue if the
11 Court doesn't --

12 MR. TRIBE: No. The answer is no.

13 QUESTION: -- advert to that?

14 MR. TRIBE: It would be nice. But remember it
15 is --

16 QUESTION: Because of Article II, which, after
17 all, does give the legislature plenary power and must have
18 wanted -- it must have wanted to have the laws in place so
19 that it wasn't -- so that Florida wouldn't risk losing its
20 electoral votes. I mean, the legislature had to want that
21 by enacting laws, and perhaps the Florida court has to be
22 aware of the consequences to the state of changing the
23 rules.

24 MR. TRIBE: But, Justice O'Connor, under Article
25 II, Section 1, Clause 2, the authority to regulate the

1 manner of the choice of electors is vested in the state
2 legislature. If the state legislature decides from the
3 beginning to exercise that authority by instructing the
4 various institutions, certainly not just the courts, the
5 attorney general, the secretary of state, in very
6 particular ways to exercise their roles in the process,
7 with a specific view of --

8 QUESTION: Well, it certainly did by enacting
9 that date. Here is the certification date. How could it
10 have been clearer?

11 MR. TRIBE: Well, I suppose it could be a
12 violation of Florida law if the enactment of that date is
13 construed as a direction to a particular authority like
14 the secretary of state or the state's highest court to
15 take certain actions in order to get the benefit of this
16 bonus, but only a violation of Federal law. I don't see
17 how you got a --

18 QUESTION: What Florida law would that be?

19 MR. TRIBE: Of state law. I'm sorry.

20 QUESTION: Are you talking about the Florida
21 Constitution?

22 MR. TRIBE: Well, it might have been a violation
23 --

24 QUESTION: But then you run into the Blacker
25 case.

1 MR. TRIBE: But it seems to me that the Federal
2 question, which is really what brings us here, can only
3 arise if 3 U.S.C. Section 5 is something other than what
4 Mr. Olson called the indemnification of the state.

5 QUESTION: It can also arise under the section
6 of the Constitution that was construed in Blacker. That's
7 quite independent of 3 U.S. 5.

8 MR. TRIBE: That's right, if one concluded that
9 Florida had violated its duty to empower the legislature
10 to take these regulatory steps.

11 QUESTION: If one concluded that the Florida
12 legislature had relied on the state constitution in a way
13 that the Blacker case says it may not in construing the
14 statute.

15 MR. TRIBE: I think that's possible, Mr. Chief
16 Justice, but the judgment before you doesn't provide even
17 an inkling, I think of proof about those matters. All we
18 have --

19 QUESTION: That's what we have been arguing --

20 QUESTION: As to whether it does or whether it
21 doesn't.

22 MR. TRIBE: Well, I think we have been arguing
23 several interrelated things. One of the things we have
24 been arguing is whether one could in good faith reach the
25 conclusion, novel as it was in some respects, as Justice

1 O'Connor points out, that the Florida Supreme Court
2 reached. Now, if the answer to that question was no,
3 perhaps if there were a due process issue in this case,
4 and if someone had a protectable interest that was
5 injured, that would be relevant. But the Federal question
6 that makes that relevant here would arise only if one
7 forgot that 3 U.S.C. Section 5 is all carrot and no stick.

8 QUESTION: No. I don't agree with you on that,
9 Mr. Tribe. It seems to me a Federal question arises if
10 the Florida Supreme Court in its opinion rather clearly
11 says that we are using the Florida Constitution to reach
12 the result we reach in construing the statute. I think
13 Blacker is a strong argument they can't do that.

14 MR. TRIBE: Well, that they can never avert to
15 their own constitution?

16 QUESTION: Well, certainly it stands for the
17 proposition you couldn't do it then, in those
18 circumstances.

19 MR. TRIBE: Well, what would it be, I wonder,
20 about the circumstances here that would say that in
21 reconciling these provisions which at first we were told
22 were mandatory, then we were told they are not mandatory,
23 they give discretion, and now we are told that the real
24 issue is simply did the court in putting a boundary on
25 that discretion, do something federally impermissible.

1 What would it be about that sequence that would implicate
2 --

3 QUESTION: Well, you know, if the Supreme Court
4 of Florida simply said in its opinion, look, these
5 sections of the statute conflict, we've got to under our
6 judicial principles resolve it one way or the other, but
7 -- but it doesn't say that. It goes on to say, look, in
8 the light of the Florida Constitution and the general
9 rights conferred there, we are construing it this way.

10 MR. TRIBE: It seems to me that as a tiebreaker,
11 as a way of shedding light on the provisions that are in
12 conflict, so long as it's not done in a way that conflicts
13 with a Federal mandate, they are not violating any --

14 QUESTION: Mr. Tribe, I don't -- I don't agree
15 with that. I don't -- I don't think that the Florida
16 Supreme Court used the Florida Constitution as a tool of
17 interpretation of this statute. If you look at its
18 opinion, it's separated into, into various sections,
19 issues; IV, legal opinion of Division of Elections; V, the
20 applicable law; VI, statutory ambiguity; and that's -- and
21 VII, legislative intent. That's the section where they
22 construe the statute in view of these ambiguities and so
23 forth.

24 That section concludes, under this statutory
25 scheme, the county canvassing boards are required to

1 submit their returns to the department by 5 p.m. of the
2 seventh day following the election. The statutes make no
3 provision for exceptions following a manual recount. If a
4 board fails to meet the deadline, the secretary is not
5 required to ignore the county's returns, but rather is
6 permitted to ignore the returns within the parameters of
7 this statutory scheme.

8 So what the statutory interpretation gives you
9 is a firm termination date of December 7th and discretion
10 in the secretary. The opinion continues, VIII, the right
11 to vote. The text of our Florida Constitution begins with
12 a declaration of rights. And it goes on to say that to the
13 extent the legislature may enact laws regulating the
14 electoral process, those laws are valid only if they
15 impose no "unreasonable or unnecessary" restraints on the
16 right of suffrage contained in the Constitution. In other
17 words, I read the Florida court's opinion as quite clearly
18 saying, having determined what the legislative intent was,
19 we find that our state constitution trumps that
20 legislative intent. I don't think there is any other way
21 to read it, and that is, that is a real problem, it seems
22 to me, under Article II, because in fact there is no right
23 of suffrage under, under Article II. There is a right of
24 suffrage in voting for the legislature but Article II
25 makes it very clear that the legislature can itself

1 appoint the electors.

2 MR. TRIBE: It seems to me that it's already
3 been conceded that the legislature can delegate that
4 function to the judiciary. And when Justice Kennedy asked
5 if it can delegate the function to the judiciary, and that
6 is what McPherson seems to suggest, then can it not
7 delegate something less, that is, can it not give the
8 judiciary a role of the sort that it's exercising here?
9 After all, the legislature, and this is important -- it's
10 not true in every state -- the legislature itself
11 repromulgates the Constitution every several years and
12 then it's ratified by the people.

13 QUESTION: Isn't there another -- go on.

14 QUESTION: No. That's all right.

15 QUESTION: Isn't there another way of looking at
16 what the Florida court did, and that was in effect to
17 apply the statute, the interpretative criterion, that
18 where there is any discretion for interpretation, an
19 unconstitutional result should be avoided, and because you
20 have here a statute as I understand it that regulates both
21 Federal and state recounts, that much is, I think is
22 clear.

23 MR. TRIBE: Right.

24 QUESTION: The only way to avoid an
25 unconstitutional meaning of the statute so far as Florida

1 law was concerned was to get into this constitutional
2 concern about preserving the franchise, and that because
3 the legislature intended one standard to cover both
4 Federal and state recounts, it therefore is valid to
5 consider the state constitution in order to derive a
6 general meaning that will apply to a Federal, as well as a
7 state election. Can you look at it that way?

8 MR. TRIBE: I fully accept that, Justice Souter.
9 I'd supplement it with one important point. We are not
10 dealing here with a decision in which within the gray area
11 where a court could reasonably go either way, this court
12 simply said we don't care about these Federal
13 considerations. It in particular exercised its equitable
14 powers in favor of the Petitioner in order to facilitate
15 meeting the December 12 deadline while still being able to
16 have electoral contests. That December 12 deadline comes
17 purely from Federal law.

18 QUESTION: Can you -- can you just go back to
19 your characterization of the opinion. I think we would
20 all agree that given that the legislature has to select
21 the manner, a state can't say, our Constitution selects
22 the electors. I suppose that's --

23 MR. TRIBE: That's right.

24 QUESTION: All right, but thinking of this
25 opinion, suppose the court had said, look, we reach our

1 result based on the canons we found in Blackstone. Now,
2 nobody is going to say they said Blackstone is selecting
3 the electors, right?

4 MR. TRIBE: I think that makes sense.

5 QUESTION: All right. Now, I suppose they said,
6 we reached this decision based on the values found in the
7 Constitution. That would be like Blackstone. But suppose
8 they say, well, the legislature wants us to do X, but our
9 Constitution requires us to do not X. That might be
10 different.

11 MR. TRIBE: It might be different.

12 QUESTION: Now, what is it that they have done
13 here?

14 MR. TRIBE: I certainly don't think they have
15 done the third. They did not say -- I think when they
16 underscored the presence of language that Justice Scalia
17 read about what's mandatory, they were simply being candid
18 about the fact that they were acting in conflict with one
19 part of the statute, but the adjacent --

20 QUESTION: It's in a separate section of the
21 opinion, Professor Tribe, that is entitled the right to
22 vote. It is after the legislative intent section and it
23 says categorically, to the extent the legislature may
24 enact laws, they are invalid. And I suggest perhaps the
25 reason that the court did it is that however expansive the

1 doctrine of constitutional doubt is, there is no way that
2 it can make December 7 mean anything except December 7. I
3 mean, they were almost constrained to use the constitution
4 to override the, the firm deadline --

5 MR. TRIBE: Justice Scalia --

6 QUESTION: -- that was explicitly set forth in
7 the constitution.

8 MR. TRIBE: Justice Scalia, both you and I think
9 at one point Justice O'Connor, in pointing to the
10 particular dates that came out differently under the
11 approach that this Court used from what would have emerged
12 if they had looked only at 102.111 are making a mistake,
13 with all respect. It's not as though this Court
14 promulgated a rule for the future about December 7th in
15 commemoration of Pearl Harbor, we say December 7 is the
16 day. No. What they did was say we have to find a date
17 which will accommodate these conflicting statutory
18 provisions and policies in light of what our constitution
19 tells us, and we surely -- it would amaze, I would think
20 amaze this Court to see anyone saying that because an
21 opinion was organized under Roman numeral headings --

22 QUESTION: Professor Tribe --

23 MR. TRIBE: -- in such a way that --

24 QUESTION: Isn't it also true, Professor Tribe,
25 that part 8 of the opinion relies on four things -- the

1 Florida Constitution, earlier Florida decisions construing
2 statutes, an Illinois case, and a Federal case.

3 MR. TRIBE: Absolutely.

4 QUESTION: Not just their constitution.

5 MR. TRIBE: That's right, and surely --

6 QUESTION: Is it also true that the inability to
7 use Section 7 depended in the Florida Supreme Court's
8 reasoning not on the existence of the constitution as the
9 sole reason, but on the inability to make the December 7
10 date final and provide for the recounts within the times
11 in which recounts can be called for. What I'm saying is,
12 didn't they say that the date of the 7th cannot stand, not
13 because of the constitution alone but because there are
14 other provisions in the statute that cannot be
15 accommodated with sections -- with the 7 date?

16 MR. TRIBE: Exactly. And I guess to take a
17 broad --

18 QUESTION: They said that twice, and I think
19 that's critical if you add to that that we read a decision
20 of a state court in the light most favorable to that court
21 and not in the light least favorable. I suppose there
22 would be a possibility for this Court to remand for
23 clarification, but if there's two readings, one that's
24 questionable, one that isn't, all of our decisions suggest
25 that we read the one --

1 MR. TRIBE: Especially, I think, Justice
2 Ginsburg, when the odds that these conceivable Federal
3 problems are indispensable to this result, are
4 overwhelmingly negative. It's not as though one cannot
5 explain the result this Court reached in the most
6 conventional standard ways, and the fact that --

7 QUESTION: Professor Tribe, I would feel much
8 better about the resolution if you could give me one
9 sentence in the opinion that supports the second of these
10 supposed alternative readings, that supports the
11 proposition that the Florida Supreme Court was using the
12 constitutional right to vote provisions as an interpretive
13 tool to determine what the statute meant. I can't find a
14 single sentence for that.

15 MR. TRIBE: Justice Scalia, I can do a little
16 better than find a sentence. The entire structure of that
17 part of the opinion, as Justice Stevens points out, would
18 be incoherent if the constitution was decisive. That is
19 the highest law in Florida. Why bother with all the rest
20 if that is anything more than an interpretive guide.

21 QUESTION: You would bother with it because
22 having decided very clearly what the statute requires and
23 finding no way to get around the firm dates set, you say
24 the reason it's bad is because of the state constitution.
25 That's how it's written.

1 MR. TRIBE: But, Justice Scalia --

2 QUESTION: They might have tried it another way,
3 but it seems to me they didn't --

4 MR. TRIBE: They also say that the provision
5 that reaches the result that conflicts with the authorized
6 recounts was written in 1951, that in 1989 they wrote a
7 provision that unmistakably created discretion, and we
8 haven't yet discussed this provision, also created the
9 provision that when the returns are filed late, it doesn't
10 say throw them away, it doesn't say give them back, it
11 says fine every member of the canvassing board \$200 a day.
12 That would be a totally crazy provision. As this opinion
13 understands, if you were not to reach a reconciliation of
14 this sort, this result was overdetermined under Florida
15 law. It might be true that they said the constitution
16 also points this way, but there isn't a sentence in the
17 opinion that suggests that without that constitutional
18 argument the result would have to be different.

19 QUESTION: What is the November 26th date? Is
20 that the seven day date moved or is that some kind of a
21 date that tries to reconcile the ultimate point after
22 which the Secretary in exercising her discretion no longer
23 has to accept the late returns? Did it move the date from
24 the statute? Has it created a new date about this
25 discretion? What is it?

1 MR. TRIBE: Well, it looks to me like an
2 exercise of the chancellor's foot, as it were, in this
3 particular case. When I saw the date, November 26th, I
4 couldn't come up with an algorithm or a formula that would
5 generate it, but the court was confronted with the task of
6 drawing, as this Court has recognized, what are sometimes
7 inevitably arbitrary lines; that is, it said it was not
8 consistent with the overall scheme of the statute to
9 require these recounts, which had just begun, to
10 terminate. That truly would be a promise to the ear to be
11 broken to the hope, like a munificent bequest, Justice
12 Jackson said --

13 QUESTION: If the legislature --

14 MR. TRIBE: -- in the pauper's will. Why tell
15 people the count if you won't count it?

16 QUESTION: And if the legislature had jumped
17 into the breach and said this same thing, would that be a
18 new statute or new enactment under 5 U.S.C.?

19 MR. TRIBE: I -- honestly, Justice Kennedy, I'm
20 not sure because the language that I quoted from 3 U.S.C.
21 Section 5 focuses on the institutional dispute resolution
22 arrangement that is in place, and if you look at the
23 legislative history in the decade of hearings in the
24 period after the Hayes-Tilden debacle, that history
25 focused on the importance of having a fixed tribunal which

1 you could look to rather than one cooked up at the last
2 moment, and indeed what they seem to be most afraid of was
3 the political entry of legislators and executives at the
4 11th hour. There was no focus at all.

5 QUESTION: But are you saying you can't tell us
6 whether they, in the hypothetical, supposed that it would
7 be a new enactment?

8 MR. TRIBE: Well, there are certainly no cases
9 on the subject. The language gives me very little
10 guidance. Since the section is addressed to Congress,
11 neither my opinion about it nor the Court's opinion is
12 necessarily --

13 QUESTION: You don't think you could tell us
14 what you might advise the Congress if you were the counsel
15 for the Judiciary Committee.

16 MR. TRIBE: I think I would advise the Congress
17 that it is not a new enactment, that it is an entirely
18 reasonable construction of an existing enactment as to
19 which the only alternative construction is to make it
20 self-destruct, and to make it internally contradictory,
21 and I honestly don't think if I were advising Congress
22 that I would say it's a new construction.

23 I do think, also, that some people reasonably
24 could argue the contrary, and I guess I think that this
25 language should be interpreted whether by a court or by

1 Congress in a way that gives some deference to the state
2 government and its organs, and I think any degree of
3 deference here is inconsistent with saying that there's
4 been a Federal violation, especially when -- I want to
5 remind us all about the context. Are we going to say that
6 this paragraph in this opinion says that Florida is in
7 breach of Article II of the Constitution in general? Hard
8 to say. I don't think so.

9 QUESTION: There should perhaps be some
10 deference, though, to the concept expressed in Article II,
11 that it is the authority of the legislature and some
12 special concern about what the legislature may have said.

13 MR. TRIBE: Yes, but if the legislature is
14 entirely happy not to completely delegate this power to
15 the courts, which Article II would permit, but rather to
16 allow the courts to exercise a somewhat more flexible role
17 than the one that the critic of this opinion would be
18 embracing. That's within the power of the legislature of
19 Florida.

20 QUESTION: Yeah, but who would have thought that
21 the legislature was leaving open the date for change by
22 the court? Who would have thought that?

23 MR. TRIBE: Anyone. If you just read the
24 statute in 1989 and it says may. It says she may reject
25 the late returns.

1 QUESTION: That doesn't change -- that's not the
2 date.

3 MR. TRIBE: No, the date is the one from which
4 the may is measured. That is, you're supposed to get it
5 in by seven days later. What if you don't? Well, if you
6 don't, she may or she may not reject them. Now, anybody
7 reading that would realize that's a deadline only in a
8 kind of Pickwickian sense. It's not a real deadline.
9 She's got discretion. Certainly if there's an act of God
10 of the sort Justice -- was it Justice Stevens? -- asked
11 about --

12 QUESTION: Yes, well, then the Secretary came in
13 and argued and said, yes, her discretion was if it were an
14 act of God or a machine breakdown she would exercise her
15 discretion.

16 MR. TRIBE: And it's an entirely normal exercise
17 of judicial interpretation to say that this statute is not
18 limited to God and machines.

19 QUESTION: Professor Tribe, can I ask you why
20 you think the Florida legislature delegated to the Florida
21 Supreme Court the authority to interpose the Florida
22 Constitution? I mean, I -- maybe your experience with the
23 legislative branch is different from mine, but in my
24 experience they are resigned to the intervention of the
25 courts, but have certainly never invited it.

1 MR. TRIBE: Well, I have to say my experience
2 parallels that --

3 QUESTION: What makes you think the Florida
4 legislature affirmatively invited the Florida Supreme
5 Court?

6 MR. TRIBE: The odd thing is that the system in
7 Florida involves their own repromulgation of the
8 constitution, and their scheme with respect to the
9 resolution of disputes over elections draws a sharp
10 distinction between elections to their own House and
11 Senate, which they won't trust the courts with as far as
12 they can throw them. Those are to be resolved exclusively
13 in the House and Senate, and all others are to be resolved
14 in the courts under a standard that they understandably
15 preferred.

16 QUESTION: They are resigned, that they are
17 resigned to, but they need not be resigned to the Florida
18 Supreme Court interposing itself with respect to Federal
19 elections, they need not be because the Florida
20 Constitution cannot affect it. And I -- I just find it
21 implausible that they really invited the Florida Supreme
22 Court to interpose the Florida Constitution between what
23 they enacted by statute and the ultimate result of the
24 election.

25 MR. TRIBE: Well, I suppose if they were at all

1 far-sighted, if they looked at their own work and saw how
2 self-contradictory it was, they might say we would want
3 someone with the authority to reconcile these provisions
4 to do so in the light not only of the literal language but
5 of the fact that they are dealing with something very
6 important, the franchise, that disenfranchising people,
7 which is what this is all about, disenfranchising people
8 isn't very nice.

9 QUESTION: Wouldn't justice --

10 MR. TRIBE: And it violates the Federal as well
11 as the state Constitution.

12 QUESTION: But wouldn't Justice Scalia's
13 suggestion be a stronger suggestion if they had dealt by
14 the statute only with Federal elections or only with a
15 presidential election as opposed to dealing with both
16 state and Federal in the same statute?

17 MR. TRIBE: Well, it's not uncommon, given the
18 convenience of having similar regulations apply on
19 election day not to bifurcate. Oregon v. Mitchell, after
20 all, confronted the nation with a problem --

21 QUESTION: Right. But when they -- when they
22 don't bifurcate, it's reasonable to suppose that they
23 expect their statute to be construed, number one, as one
24 statute, not as having different dates for different, for
25 state and Federal; and, number two, to be construed so far

1 as the state concern arises in accordance with the state
2 Constitution, and if that is so, then the result is they
3 would expect a state constitutional concern to inform
4 their interpretation of a statute which ultimately governs
5 Federal as well as state.

6 MR. TRIBE: And they would recognize that when
7 the Federal election involved the presidency of the United
8 States with the special problems of the Electoral College
9 deadline, they might emerge with rather different
10 deadlines and to some extent a different approach for the
11 -- to elections.

12 QUESTION: But there are already different
13 deadlines for Federal elections, aren't there, because of
14 the Federal statute concerning overseas ballots?

15 MR. TRIBE: Yes. That's -- that's entirely
16 true.

17 QUESTION: So that's, that's going to be
18 different anyway.

19 MR. TRIBE: And there is an administrative order
20 --

21 QUESTION: But it's as a result of Federal law,
22 isn't it?

23 MR. TRIBE: Well, there is a consent decree
24 arising out of Federal law. There was the Federal general
25 statute --

1 QUESTION: But it wasn't the legislature's
2 choice, it was Congress' choice that required that.

3 MR. TRIBE: That's right. In 1986, there was a
4 congressional statute that already created that
5 difference.

6 QUESTION: Mr. Tribe, before you finish, I would
7 like to know whether you are conceding some of the things
8 you said. Sounds like maybe you are. But the Florida
9 legislature under Article II, Section 1, could say we
10 don't want any judicial review of anything about the
11 manner in which we say electors should be appointed. Does
12 the Florida legislature have the authority to cut out
13 judicial review?

14 MR. TRIBE: No. No, I certainly don't think so.
15 They cut out judicial review -- even this may not be
16 entirely consistent with the Florida Constitution. They
17 cut out judicial review for the election of their own
18 members in the House and Senate. I certainly don't think
19 they would have the authority to expel the Federal
20 judiciary from the election of senators and
21 representatives.

22 QUESTION: No. I mean the state judiciary. The
23 state judiciary. When it says each state shall appoint
24 electors in such manner as the legislature thereof may
25 direct.

1 May the legislature direct as to the Florida
2 Supreme Court, and Florida Supreme Court we don't want you
3 to review whatever we do?

4 MR. TRIBE: I'm not actually clear about that,
5 Justice Ginsburg. I have thought about it a lot. It
6 seems to me that under *Smiley v. Holm* and similar cases,
7 the general principle is that the Constitution takes the
8 state government and its arrangement as it finds it, and
9 that when the legislature is identified, that really does
10 not mean the legislature in some specialized capacity, as
11 with Article V.

12 Now, if that's the case and if it's therefore
13 assumed that the legislature is surrounded with both
14 executive and judicial authority, then a decision by the
15 legislature to completely exclude the judiciary from any
16 possible role, the state judiciary, might be inconsistent
17 with the underlying meaning of Article II itself.

18 QUESTION: Well, could the state legislature at
19 least now say in light of all this confusion, we enact a
20 law today saying this is the way electors will be
21 selected? Is that open to the legislature now?

22 MR. TRIBE: I'm not sure. That's very much like
23 my inability to answer because I honestly have not reached
24 a conclusion that it's not presented by this case. I
25 don't know whether the legislature could do the further

1 thing of naming electors, and if it doesn't do that --

2 QUESTION: Thank you, Mr. Tribe.

3 MR. TRIBE: Thank you, Mr. Chief Justice.

4 QUESTION: Mr. Olson, you have four minutes
5 remaining.

6 REBUTTAL ARGUMENT OF THEODORE B. OLSON

7 ON BEHALF OF THE PETITIONER

8 MR. OLSON: Thank you, Mr. Chief Justice. May it
9 please the Court: It seems to me that it's very difficult
10 to read the Florida Supreme Court decision as saying
11 anything else other than the Florida Constitution in their
12 view, in that court's view, is trumping everything else.
13 The second paragraph of the conclusion says because the
14 right to vote is the preeminent right in the declaration
15 of rights of the Florida Constitution and so forth, this
16 opinion is full of language --

17 QUESTION: But suppose they refer to the
18 declaration of the rights of man, to 1789, the French
19 revolution, I mean, the right to vote is a value in the
20 constitution. Are they actually saying -- I didn't see
21 it?

22 MR. OLSON: They are sayihng --

23 QUESTION: Or are they are saying the statute
24 means one thing, but the statute is unconstitutional
25 because the Constitution of Florida says the opposite. I

1 didn't see that.

2 MR. OLSON: I think that the only reasonable
3 fair reading of the decision is that the Florida Supreme
4 Court felt that, and it says it over and over again, that
5 we are going to be -- attempt to discern the will of the
6 people, the will of the electorate and discern, and
7 enhance in whatever way we possibly can the right to vote.
8 And because of that, these provisions of the statute which
9 are very much quintessentially legislative, the timetables
10 that are involved in this statute, particularly the
11 November 14th deadline, is a part of a composite package.
12 There is one week for a protest and certain recounts to
13 the extent that they can be done and there are four weeks
14 for contests.

15 When the Florida Supreme Court truncated, when
16 the Florida Supreme Court expanded the protest period from
17 7 days to 19 days, it necessarily limited the contest
18 period to a shorter period of time. It changed the
19 discretion. It allowed certain things to occur that
20 couldn't have occurred and it justifies all of those
21 things on the grounds that the Florida Supreme Court, the
22 Florida Constitution trumps those legislative concerns,
23 and that's why it said we are not going to be dissuaded by
24 hypertechnical statutory considerations. So the court was
25 doing what this Court said in the McPherson vs. Blacker

1 case that it cannot do, allow itself to insert itself or
2 the Florida Constitution over what is required by Article
3 II, Section 1 of the Constitution.

4 It also seems to me quite evident in response to
5 what Justice Kennedy was asking earlier, that there was
6 concern about the Federal statutory provision, the
7 language to which I think Justice Kennedy was referring is
8 on page 32-A of the appendix to the petition from the
9 court's decision, and there is a footnote there that does
10 refer to reference to 3 U.S.C. 1 through 10, which of
11 course includes Section 5, and it says so in conjunction
12 with the statement that the exercise of the discretion by
13 the secretary of state could not be done in such a way
14 that would preclude Florida voters from participating
15 fully in the Federal electoral process. The court was
16 assuming, it seems to me, that it did not, was not
17 conflict -- the decision that it was rendering was not
18 going to cause a conflict with the Federal statutory
19 scheme, and it was, we submit, in error in that regard.

20 So the -- the -- to sum up with respect to this,
21 the Florida Supreme Court radically changed the
22 legislative scheme because it thought it could do so under
23 the Florida Constitution. By doing so, it acted
24 inconsistently with Article II of the Constitution, and
25 inconsistently with Section 5 of Title III, and it has

1 brought about precisely the circumstances that Section 5
2 of Section 3, Title III, was designed to avoid.

3 QUESTION: As I look in the conclusion, the
4 paragraph on page 37-A, where they summarize what they
5 said, there is nothing there about the Florida
6 Constitution. It's only about the Florida election code.
7 They say they must construe the Florida election code as a
8 whole, and they point out the provisions in conflict.
9 There is not one word in that paragraph that says anything
10 about the Florida Constitution.

11 MR. OLSON: The very second paragraph refers to
12 the Florida Constitution and the rights to vote. Page
13 36-A of the appendix to the petition.

14 CHIEF JUSTICE RHENQUIST: Thank you, Mr. Olson.
15 The case is submitted.

16 (Whereupon, at 11:30 a.m., the case in the
17 above-entitled matter was submitted.)

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