

Supreme Court may hear Bush v. Gore once again

Linda Greenhouse
New York Times

WASHINGTON (U-WIRE) — Again?

Is it conceivable that not even two years after the U.S. Supreme Court brought the presidential election to a close with its 5-4 decision in Bush v. Gore, the justices would put themselves on the line again in a state election case that this time could determine control of the Senate?

That chance presented itself on Thursday in the form of an "application for emergency relief" filed at the court by the New Jersey Republican Party. The Republicans asked for a stay of the New Jersey Supreme Court's decision on Wednesday to permit former Sen. Frank R. Lautenberg to appear on the Nov. 5 ballot in place of Sen. Robert G. Torricelli, who withdrew his re-election bid on Monday, after the formal deadline for a ballot substitution had expired.

Psychoanalyzing the Supreme Court in the aftermath of Bush v. Gore was only the second challenge confronting the Republicans' lawyers as they scrambled to keep a potential Democratic winner from replacing an almost certain loser. The first challenge was a strictly legal one: persuading any justices who might be inclined to intervene in this state election-law dispute that there is a plausible basis for the Supreme Court to assert its jurisdiction. And on that score, given what they had to work with, the lawyers probably did as good a job as anyone could.

The Supreme Court has juris-

diction only over questions arising under the federal Constitution and federal statutes. The Republican petition offered the justices a bit of each, including a nod to constitutional due process and to a federal statute on absentee voting. Most creatively, the Republicans borrowed a concept from the three-justice plurality opinion in Bush v. Gore to the effect that a state legislature's word on the conduct of federal elections is final and cannot be supplanted or perhaps even supplemented by the state's courts.

"It's not an argument that, before Bush v. Gore, would have occurred to a lot of lawyers, but it's their best claim to make," Richard H. Pildes, an election law expert at New York University Law School, said on Thursday.

"It's amazing how close" the parallel arguments are, said Richard L. Hasen, an election law specialist at Loyola Law School in Los Angeles. "It shows that Bush v. Gore can rear its head in lots of ways that we can't anticipate. It's out there for everyone to use for their different purposes."

The New Jersey justices, ruling unanimously on Wednesday, said the expired deadline for ballot changes could be overlooked because the state's election laws should be "liberally construed" in favor of "a full and fair ballot choice for the voters of New Jersey."

The decision had distinct echoes of the Florida Supreme Court's unanimous decision on Nov. 21, 2000, which extended the deadline for counties that were

conducting recounts to transmit their election returns. As its "guiding principle," the Florida court said it wanted to honor the "will of the people" rather than fall back on "hyper-technical reliance upon statutory provisions" that would have made the late returns invalid.

One difference between the two cases is the point at which the Supreme Court's intervention is being sought. In Florida, the election had been held and the ultimate question was who would be declared the winner. The question in New Jersey is one of access to the ballot.

"The worst that can happen is that their guy has to run in a competitive election," Hasen said of the New Jersey Republicans.

Another difference, of course, is that the New Jersey case does not arrive at the court on a clean slate. Although to much of the public, Bush v. Gore may seem a bad dream now faded in the mists of time, to the justices it is a vivid reality.

This is where psychology, rather than actual law, enters the equation. The court has essentially complete control over its docket. The new court term, which begins Monday, could well include such major issues as campaign finance, affirmative action and constitutional limits of the war on terrorism.

To this volatile mix, does the court really want to start the year off by adding Bush v. Gore the sequel? On the other hand, can anyone who lived through Bush v. Gore the original really be confident of the answer?

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