

5. As noted earlier, the Secretary acknowledges that Section 102.112, Florida Statutes, uses the discretionary term "may", instead of the mandatory term "shall" as to whether late returns are to be ignored by the Secretary in certifying the results of the election. That the Secretary may ignore late filed returns necessarily means that the Secretary does not have to ignore such returns. It is, as the Secretary acknowledges, within her discretion.

To determine ahead of time that such returns will be ignored, however, unless caused by some Act of God, is not the exercise of discretion. It is the abdication of that discretion. An Act of God has long been considered to excuse even the most mandatory of requirements. Rather, the exercise of discretion, by its nature, contemplates a decision based upon a weighing and consideration of all attendant facts and circumstances.

The Florida Supreme Court has stated that "substantial compliance" is sufficient to comply with such mandatory filing deadlines. See Chappel v. Martinez, 536 So. 2d 1007 (Fla. 1988). If the returns are received from a County at 5:05 p.m. on November 14, 2000, should the results be ignored? What about fifteen minutes? An hour? What if there was an electrical power outage? Some other malfunction of the transmitting equipment? More particularly related to this case, when was the request for recount made? What were the reasons given? When did the Canvassing Board decide to do a manual recount? What was the basis for determination that such a recount was the appropriate action? How late were the results?

Obviously, the list of scenarios is almost endless and the questions that would need to be asked in properly exercising discretion as to whether to ignore or not ignore late filed returns are numerous. The Secretary may, and should, consider all of the facts and circumstances.

The County Canvassing Boards are, indeed, mandated to certify and file their returns with the Secretary of State by 5:00 p.m. today, November 14, 2000. There is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of State, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored. Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results and declaring the winner.

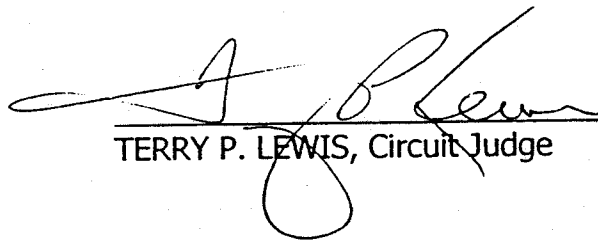
Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly exercise her discretion in making a decision on the returns, but I cannot enjoin the Secretary to make a particular decision, nor can I rewrite the Statute which, by its plain meaning, mandates the filing of returns by the Canvassing Boards by 5:00 p.m. on November 14, 2000.

I also note that although the Canvassing Boards cannot properly contest an election, an unsuccessful Candidate, or any qualified Elector, may file, pursuant to Section 102.168, Florida Statutes, a complaint in Circuit Court contesting the election results. One of the specific itemized grounds for such a challenge is the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election".

Accordingly, it is

ORDERED AND ADJUDGED that the Secretary of State is directed to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion. In all other respects, the Motion for Temporary Injunction is denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 14th day of November, 2000.



TERRY P. LEWIS, Circuit Judge

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IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY

FLORIDA DEMOCRATIC PARTY,
Plaintiff,
v.
PALM BEACH COUNTY
CANVASSING BOARD,
Defendant.

Case No. CL00-11078AH

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MOTION FOR EXPEDITED HEARING ON THE FIRST AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT AND PETITION FOR WRIT OF MANDAMUS

Plaintiff, the Florida Democratic Party, respectfully asks this Court to schedule an accelerated emergency hearing on the First Amended Complaint for Declaratory Judgment and Petition for Writ of Mandamus. This case involves a request for a declaratory judgment, and a mandamus involving the tabulating of the November 7, 2000 ballots for President of the United States, in Palm Beach County, Florida.

An emergency hearing is needed to ensure that the sanctity and integrity of the votes of the citizens of Palm Beach County are protected and counted against unlawful and arbitrary decisions of the Canvassing Board to invalidate and ignore legally cast votes and properly marked ballots.

EXHIBIT
C

Because the statutory deadline for certification of the votes is imminent, a prompt and expeditious hearing will protect fundamental rights, promote the historic principle of "one person, one vote," and defend citizens against irreparable interference with their Constitutional rights to votes.

In further support of this Motion, Plaintiff states the following:

1. The Complaint for declaratory relief was filed on November 13, 2000, in anticipation of a manual recount that the Canvassing Board had scheduled to commence on November 13, 2000.
2. The Amended Complaint for declaratory relief and mandamus were filed today, November 14, 2000, and have been simultaneously served on the Canvassing Board.
3. The Canvassing Board had ordered and scheduled a manual recount of all ballots, pursuant to Fl. St. § 102.166(5), but the Board has temporarily suspended the recount pending, inter alia, receiving judicial instruction on the issues raised by the Petition for Writ of Mandamus.
4. In order to conduct a complete and accurate count of all votes that were cast for Presidential candidates, the Canvassing Board needs prompt and correct advice regarding the statutory requirements for a hand count and