

PERSPECTIVES

Teaching Legal Research and Writing

FROM THE ELECTORAL COLLEGE TO LAW SCHOOL: RESEARCH AND WRITING LESSONS FROM THE RECOUNT

BY ALEX GLASHAUSER

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Last semester, as commentators pondered the effect of the 2000 election on everything from the legitimacy of the presidency to the stability of our democracy, I cut through the haze to focus on the question of surpassing significance: How would the Florida recount and its aftermath affect my research and writing class? In that class, I face two constant hurdles: exciting students about what they think is a dry subject, and convincing students that my academic advice matters in the real world. The election imbroglio helped me on both counts because it inspired passion and showed students what happens when you ignore basic research and writing lessons:

1. Don't analyze a statutory phrase in a vacuum.

When interpreting statutes, students often rush to home in on superficially relevant discrete phrases, ignoring broader context. Likewise, in the first days after the election, when the Palm Beach County "butterfly ballot" dominated the news, many commentators focused on a statutory subsection stating that ballots must instruct voters to mark their choice "at the right of the name of the candidate."¹ That provision was accurately quoted² — but early analysts neglected to note that the beginning of the statute limited its application to "counties in which voting

¹ Fla. Stat. Ann. § 101.151(3)(a) (emphasis added); *see also id.* § 101.191 (using same language in template for general ballot).

² *E.g.*, Thomas C. Tobin, *State of Confusion*, St. Petersburg Times, Nov. 9, 2000, at A1.

machines are not used."³ Palm Beach County used punch-card ballots likely covered by a provision in a separate statute governing electro-mechanical voting systems: "Voting squares may be placed in front of or in back of the names of candidates . . ."⁴

³ Fla. Stat. Ann. § 101.151; *see Crossfire* (CNN television broadcast, Nov. 9, 2000), LexisNexis Library, CNN File (statement of Greta Van Susteren that "people are [not] really looking at" statute covering punch-card ballots).

⁴ Fla. Stat. Ann. § 101.5609(6) (emphasis added).

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2. Anticipate ambiguities.

Because some voting squares on the butterfly ballot were in front of the names and some in back, the “in front of or in back of” language raised its own issue: Must all voting squares on each ballot uniformly be either in front or in back of the names?⁵ The legislative drafters presumably found their own words clear, but that was no guarantee that others would. I stress in class that to root out potential ambiguities, students must learn to edit their writing from an outsider’s perspective.

3. Don’t use “which” for “that.”

One of my favorite ambiguities to teach — because students quickly grasp how to edit around it — is the comma-less “which.” I ask my class to edit the following: “Do not obey rules of grammar which serve no purpose.” After playful protests, everyone agrees that instead of adding a comma, we should switch the “which” to “that.” Florida law offers a more debatable example: “If [a] manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall [pursue one of three options].”⁶ Could all errors affect the outcome, or only some?

The choice for the precise writer in this situation is between a restrictive clause — “that could affect” — or a nonrestrictive clause — “[comma] which could affect.” In a “that” clause, only some errors “could affect the outcome” and thereby trigger the options. In a “[comma] which” clause, all errors “could affect the outcome”; the clause aims to describe rather than to delimit. The courts that interpreted the comma-less “which” to mean “that” could have been spared that work by careful legislative drafting.⁷ Just as some errors apparently do not affect the outcome of elections, some grammar rules do serve a purpose.

4. Rely on primary sources.

Students love citing encyclopedias, treatises, periodicals, annotations, and even headnotes —

⁵ Compare, e.g., David Tell & William Kristol, *Gore’s Spoiled Ballot*, Wkly. Standard, Nov. 20, 2000, at 9 (answering “no”), with Philip B. Heymann, *The Case for a Do-Over*, Wash. Post, Nov. 10, 2000, at A45 (answering “yes”).

⁶ Fla. Stat. Ann. § 102.166(5) (emphasis added).

⁷ Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1282 (Fla. 2000); Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1228 (Fla. 2000); see Siegel v. LePore, 234 F.3d 1163, 1186 (11th Cir. 2000) (Anderson, C.J., concurring).

which are useful finding tools but not final destinations — because they neatly sum up the law. I caution that often the law is messier than secondary sources let on, but students give me the same “how picky *is* this guy?” look as when I warn that session law trumps unenacted titles of the *U.S. Code*.

As luck would have it, the frenzy of recount litigation spawned ample misinformation about court opinions; journalists were dissecting decisions without reading them. For instance, many secondary authorities, most notably the *New York Times* on its front page, reported that the case filed in federal court by George Bush, Dick Cheney, and voters asking to enjoin county canvassing boards from continuing with manual recounts had been dismissed for lack of jurisdiction.⁸ In fact, the court held simply that the plaintiffs had not met the standard for preliminary injunctive relief.⁹ This example is now my poster child to remind students to trust their own reading of a case, not someone else’s.

5. Update all research.

Someone else’s take on primary law does matter, of course, if that someone else happens to be a court of appeals reversing a lower court’s decision or a legislature revising its code. Failure to check case history may be the legal researcher’s biggest sin, and likewise, being caught with the wrong version of a statute should embarrass even 1Ls, not to mention judges. When the Florida Supreme Court voted 4-3 to overturn a trial court’s decision to block Al Gore and Joe Lieberman’s contest of the certified state results, all seven justices agreed on one thing: the trial judge had relied on an outdated version of the contest statute and on case law interpreting that same old version.¹⁰ In articulating a standard based on “reasonable probability” that the election result turned on an irregularity, the judge had neglected a 1999 amendment providing that a contest plaintiff need show merely that the irregularity

⁸ Todd S. Purdum & David Firestone, *U.S. Judge Refuses to Block Hand Tallying of Votes*, N.Y. Times, Nov. 14, 2000, at A1.

⁹ Siegel v. LePore, 120 F. Supp. 2d 1041, 1047-54 (S.D. Fla. 2000).

¹⁰ Gore v. Harris, 772 So. 2d 1243, 1255-56 (Fla. 2000); *id.* at 1266 (Wells, C.J., dissenting); *id.* at 1271 (Harding, J., dissenting, joined by Shaw, J.).

was “sufficient to change *or place in doubt* the result of the election.”¹¹ Thanks to this high-stakes blunder, my students are on heightened notice that until updated, the result of all their research is in doubt.

6. Leave no doubt about the reason for the result you urge.

As potentially damaging as doubt about the validity of authority is doubt on a reader’s part as to how a writer has reached a certain result. Students often jump from facts and law to conclusions, with little analysis. On occasion, courts can skip that step: if a court says something is so, then it is so. But even for judges, fuzzy writing can backfire.

When the Florida Supreme Court held that the secretary of state had abused her discretion in rejecting returns filed after the statutory deadline, it wrote at length about both the right to vote in Florida’s constitution and internal inconsistencies in the state’s election statutes.¹² What it did not do was explain which point—and how—led to its conclusion. It turned out that someone wanted to know: the United States Supreme Court.

All nine Justices agreed to vacate the Florida opinion while awaiting clarification of whether its conclusion was based on the state constitution or on statutory interpretation.¹³ After suffering that slap like a student ordered to rewrite a paper, the Florida court had to not only draft a new opinion,¹⁴ but also endure Justice O’Connor’s thinly veiled annoyance during oral argument in Washington at what was taking the court so long to hand it in.¹⁵

7. Mean what you say.

Unintentional obfuscation and delay sometimes cannot be avoided; lies can. I stress to students that although holdings are somewhat elastic, precedents are not empty vessels into which advocates may pour their positions. One case I have used to illustrate that point involved a representation by counsel to a federal court in Texas that a certain precedent “expressly limit[ed another precedent] to its facts.”¹⁶ The court begged to differ, noting that even a “dim-witted or overly hasty lawyer” could not have arrived at such “blatant mischaracterizations.”¹⁷ Like the chastised Texas lawyer, Gore attorney David Boies overreached in representing to the Florida Supreme Court at oral argument that an Illinois Supreme Court decision had “expressly held” that “any mark” on a ballot should be considered evidence of the voter’s intent.¹⁸

The Illinois decision did hold that chads that “did not completely dislodge from the ballot” should be counted; it expressed nothing, however, about whether “any mark” was enough.¹⁹ In an effort to fill that void, Boies scrambled to support his statement. Hours after the Florida court’s decision ordering the secretary of state to accept amended certifications reflecting manual recounts, Boies called an attorney from the Illinois case. The next morning, that attorney signed an affidavit stating that on remand after the Illinois Supreme Court’s decision, the trial court had counted chads that were merely “dimpled.” That day, Boies relied in part on the affidavit in convincing the Broward County Canvassing Board to count dimpled chads.

The next day, though, the Illinois attorney recanted, signing a new affidavit stating that after reviewing the transcript, he realized that the trial court had counted ballots only if light

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¹¹ *Id.* at 1255 (quoting Fla. Stat. § 102.168(3)(c) (emphasis added by court)).

¹² *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1231–38 (Fla. 2000).

¹³ *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

¹⁴ *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000).

¹⁵ Tr. of Oral Argument, Dec. 11, 2000, at *44, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), at <news.findlaw.com/cnn/docs/election2000/uscbushgoretms1211.pdf> (“I did not find really a response by the Florida Supreme Court to this Court’s remand in the case a week ago. It just seemed to kind of bypass it and assume that all those changes and deadlines were just fine and they would go ahead and adhere to them, and I found that troublesome.”).

¹⁶ *Safeway Transport., Inc. v. West Chambers Transport, Inc.*, 100 F. Supp. 2d 442 (S.D. Tex. 2000).

¹⁷ *Id.* at 447.

¹⁸ Tr. of Oral Argument, Nov. 20, 2000, *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000) (Nos. 00-2346, 00-2348, and 00-2349), at <www.cnn.com/2000/LAW/11/21/court.transcript.pol/#boies>.

¹⁹ *Pullen v. Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990).

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could pass through them.²⁰ So the upshot was that both Boies' statement at oral argument and the affidavit he submitted to the canvassing board were false. His misrepresentations may not have been intentional, but he should have taken more care to stay on the right side of the truth. And, like the Texas brief, his excessively zealous advocacy brought a threat of sanctions. Although an ethics complaint was eventually dismissed,²¹ no spin could undo the damage to his reputation.²²

* * *

My students last semester, of course, had their own spin on the election. When I warned them a week before their appellate briefs were due that emergency all-nighters did not conduce to effective writing, they reminded me that almost all the briefs for Bush and Gore had been produced during caffeine binges. On my heels, I improvised: "Sure, but those briefs would have gotten Cs!" And the message got through: one lesson my students had long since mastered was that much like a state high court's interpretation of state law, my decisions on grades—absent constitutional or decanal intervention—are final.

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²⁰ Rowan Scarborough, *Republicans Say Gore Team Continues to Misstate Facts*, Wash. Times, Dec. 1, 2000, at A1; *No Controlling Dimple Authority*, Wash. Times, Nov. 30, 2000, at A22; Lee Anderson, *For the Record: An Underreported Affidavit*, Chattanooga Times, Dec. 17, 2000, at G5.

²¹ Nicole Sterghos Brochu, *2 Gore Lawyers Cleared by Bar*, Sun-Sentinel, Feb. 18, 2001, at 1B.

²² See Michael Barone, *Lies and Statistics*, 129 U.S. News & World Rep., Dec. 11, 2000, at 42.