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How Clinton, Bush and Gore could save America's embarrassment

by Chibli Mallat

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How is it possible to see through 'the political thicket' as Justice Felix Frankfurter described the electoral contest in America more than 50 years ago?

Uncertainties are far more numerous than certainties. The greatest uncertainty, of course, is the outcome in Florida, the decisive state in the presidential election. With a difference of just 327 votes in favor of George Bush, legal and political arguments are bound to continue and intensify.

Should the Palm Beach county 'cancelled' votes lead to a recount, to a new vote in the county, or should they remain discounted? Are legal challenges to be entertained, locally at the level of the state, or federally, considering the nature of the election? And since the contest appears to be also close in other states, with Oregon not officially called three days after election day and razor margin majorities apparent elsewhere, legal challenges in Florida are bound to lead to legal challenges elsewhere, hugely adding to the uncertainty and the mess.

What about the certainties?

First, unless one of the two candidates is struck by a saintly lightning which makes him concede, there is no president-elect before a week. There can be no 'final' result in Florida before the last absentee ballots arrive on November 17. But even then, the difference is bound to remain tiny. The absentee votes are expected to number around 3000. They are said to lean overall towards Governor Bush, but some 1000 Floridians who live in Israel are generally expected to be in the Democratic camp.

So the certainty is that the Florida count will be final on November 17, but that the result, however it goes, will not go unchallenged: by the Gore people in Florida if he loses, by the Bush people in other states if Bush loses.

A week is a long time in feverish America, and legal challenges are bound to have mounted inside Florida and elsewhere. People are already on the street vindicating their vote and their candidate. Tension is high, and the spiral of recriminations will not end on November 17.

Secondly, the situation is constitutionally so novel that there are no decisive legal precedents to go by. The discrepancy between the votes is so small in Florida and elsewhere, and the gap between the popular vote and the electoral college vote such as to fuel understandable recriminations if it appears that Bush led in Florida and Gore led nationally. America may be none the wiser on the evening of November 17.

The irony of fate is the ultimate certainty. Scholars have occasionally decried the electoral college system, but the US Supreme Court has long admitted that "mathematical exactness or precision is hardly a workable constitutional requirement." From an arithmetical point of view, there is bound to be some margin of human and machine errors in counting and recounting when 100 million votes are cast.

When the result hinges on a few hundred votes, the flurry of lawsuits, all inconclusive though all legitimate under the sacredness of one's vote in a democracy, is an equally mathematical inference. The electoral system operates on common sense, and Alexander Hamilton expressed it best 200 years ago, as the "mode of appointment of the Chief Magistrate of the United States" was being discussed in the Federalist Papers: "I venture somewhat further, and hesitate not to affirm that if the matter of it be not perfect, it is at least excellent."

Would the risk of the battle of the ballots spill onto Floridian or American streets? God forbid, but the options presently tabled will certainly lead to deep, continued frustration with half of the American

electorate estranged from the eventual president-elect. Neither a recount in Florida, nor the final results when the absentee ballots are in, nor legal challenges at state or federal level can remove the sour taste fate leaves in the greatest electoral contest in history.

Lawsuits conducted at state or federal level are drawn out processes. They will be bound to overtake the deadlines of the electoral college meeting (December 18) and the end of Clinton's presidential term (January 20 2001). Judicial awards cannot be conclusive in such a close matter as the irony of fate has dictated on November 7, 2000. The pandemonium of lawsuits in a matter which had never been adjudicated will lead to contradictory decisions which take years before they reach the Supreme Court. Frustration among one half of the American electorate is bound to continue, and to remain bitter after the lower and federal courts have their say.

But there are no alternatives to courts in the American system, and the Federal Electoral Commission, established in 1975, does not seem to have within its mandate any power beyond the regulation of financial contributions during the campaign. So if the courts are the better referee, how can their role be articulated effectively to dispose of the present situation ?

One way is to expedite the power of the courts to decide as ultimate, neutral referee in the American system. This means the immediate consolidation of all suits under one case lodged directly before the Supreme Court. While seizing the Court under Art.III of the US Constitution would not normally allow its "original jurisdiction" to apply, thus bypassing the pandemonium of dozens of lawsuits at lower state and federal levels slowly finding their way to the top, it may be useful for a State, any State, to bring the case to the Court. The rationale is naturally understood by way of Florida's exceptionalism, either as Plaintiff or Defendant State under the "original jurisdiction" clause "in all cases in which a State shall be a party".

The other option is to conduct a new presidential election. An answer at the level of some Florida county, or even at state level, is simply not adequate considering the national stakes in the election. But who can call for new elections, and under which authority?

The initiative, one would think, should come from the person in charge, William J. Clinton, and arrangements could be made for a new ballot within days.

Under which authority could the president act to request new elections? This is harder to pin down in constitutional terms, but the decision would require agreement by the two chief candidates, and the president can find enough leeway in his solemn constitutional oath "to preserve, protect and defend the Constitution of the United States" should Bush and Gore rise to the occasion.

It would also be more appropriate to consider this option before the 'final' results are announced in Florida. A new election would also be the more civilized course to take than the referral to the Supreme Court under the first option, for it would provoke less frustration than a decision of the Supreme Court on the side of either candidate, if indeed the court could decide in such dramatic circumstances.

But such a historical understanding would require unprecedented statesmanship from both candidates.

Of course, a new election could provide another cliffhanger with similar or other dramatic uncertainties. But even the irony of fate has divine limits in the political thicket.

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