



Bush v. Gore

INSTRUCTIONS FOR TEACHER

This moot court is based on the Supreme Court case of Bush v. Gore. This case demonstrates the kinds of questions that arise after a very close Presidential election and offers an example of how those questions might be resolved if they were to come to the Supreme Court again. One major problem with counting (and recounting) ballots in elections is ensuring the accuracy of the vote count. But ensuring accuracy involves multiple considerations. We want every ballot to be counted such that each and every vote goes to the candidate the voter intended it to. We also want each and every ballot to be reviewed in the same way using the same set of criteria; otherwise, some votes might go to the wrong candidate or not be counted at all. In Bush v. Gore, those approaches to accuracy came into conflict, and the Supreme Court had to decide whether Florida's method of ensuring accuracy was constitutional.

The lesson should begin with an overview of the federal and state court system and a brief explanation of appellate advocacy and the difference between a trial and an appellate argument. This background information is provided below.

Read the Summary of the Facts together as a class. Then, divide students into three groups: Appellant/Petitioner (Bush), Appellee/Respondent (Gore), and Supreme Court Justices. The groups can then on their own discuss the fact pattern, brainstorm ideas on the BRAINSTORMING SHEET, review and evaluate significant arguments on the ARGUMENT SHEET, and prepare their arguments to the Supreme Court for the mini moot court. The student Justices should work together to evaluate potential arguments using the BRAINSTORMING SHEET and ARGUMENT SHEET and to draft questions for oral argument using the JUSTICE SHEET.

During the discussion period, students from each side will need to select representatives (2-4) who will act as the Advocates during the moot court, and students from the Supreme Court will need to select a Chief Justice. Advocates from each side will have 15 minutes to present their side's strongest arguments to the Supreme Court and answer questions from the Justices. The

Advocates should decide how they want to divide their oral argument time. Afterwards, the mock Supreme Court will decide the outcome of the case, and the Chief Justice will announce the Court's decision. The oral argument should proceed as follows:

- The Chief Justice will open the argument by announcing, “We will hear argument today in Bush v. Gore. Petitioner, you have 15 minutes.”
- Advocates will only have 15 minutes to present their strongest arguments to the Supreme Court and to answer any questions posed by the Justices. Advocates representing Bush will go first, followed by Advocates representing Gore.
 - After the Advocates representing Gore have made their arguments, the Advocates representing Bush have five (5) minutes for “rebuttal.” The rebuttal should focus on responding to issues that Gore raised during the oral argument.
 - NOTE: The Advocates for Bush must reserve time for rebuttal at the start of their oral argument. (Kindly remind Bush to reserve time if he or she forgets as a rebuttal is a powerful tool during oral arguments).
- Each side should begin its argument by saying, “Thank you, Chief Justice, and may it please the Court.” Then, the Advocates may proceed with their arguments.
- During each side's oral argument, the Justices will interject with 3 questions. All students on each side can raise their hands to answer questions posed by the Justices of the Supreme Court if their Advocates need assistance.
- Once the oral arguments have been completed, the Chief Justice will close the arguments by saying, “The case is submitted.”
- Then, the Justices will confer and write a brief opinion (no more than three (3) paragraphs) with their decision. The Justices should decide how they want to divide the work of writing the opinion themselves. The Chief Justice will then summarize the Court's decision for the class.

Court System and Appellate Advocacy

Technically, there are 51 court systems in the United States. Each State has its own state court system, and the Federal government has a Federal court system. For our purposes, the general rule is that issues of state law are resolved in state court, while issues of Federal law are resolved in Federal court. In both the state and Federal systems, there are three levels of courts—the trial courts, the appeals courts, and the Supreme Court. Most of the action happens in the trial courts, and this is where the facts of the case are first decided. Ultimately, a trial court judge (with or without a jury) decides which side is the winner and which side is the loser.

The loser will likely be unhappy with this outcome, so she might ask that another court review the trial court's decision. This is called an appeal, and appeals are heard by, you guessed it, the appeals courts. The side who asks for the appeal is called the Appellant or Petitioner (because she has to file a *petition* to have her case reviewed), and the other side is called the Appellee or Respondent (because she has to *respond* to the petition).

During the appeal, the Appellant and Appellee submit written documents called briefs to the court making their best arguments. After the appeals court has reviewed the briefs, it might ask the Appellant and Appellee to come into court for an oral argument. During an oral argument, the Appellant and Appellee make their arguments in person before the judges, and the judges can ask the Appellant and Appellee questions to test their arguments. After oral argument, the appeals court judges confer about what the outcome should be and ultimately write an opinion explaining their decision.

But, just like with trial court, the side unhappy with the court's decision can decide to appeal. This time the appeal goes to the Supreme Court, and the whole appeals process repeats itself. However, unlike with the appeals courts, the Supreme Court's decision cannot be appealed; it is the final word on the matter. What the Supreme Court says the law means, is what the law means. That's why the "judges" on the Supreme Court are not called judges, they're called Justices. Only in exceptional circumstances can the Supreme Court of the United States decide to review the decision of a State Supreme Court, but the students will be working on one of those exceptional cases today in Bush v. Gore.



INSTRUCTIONS FOR STUDENTS

This moot court is based on the Supreme Court case of Bush v. Gore. This case demonstrates the kinds of questions that arise after a very close Presidential election and offers an example of how those questions might be resolved if they were to come to the Supreme Court again. One major problem with counting (and recounting) ballots in elections is ensuring the accuracy of the vote count. But ensuring accuracy involves multiple considerations. We want every ballot to be counted such that each and every vote goes to the candidate the voter intended it to. We also want each and every ballot to be reviewed in the same way using the same set of criteria; otherwise, some votes might go to the wrong candidate or not be counted at all. In Bush v. Gore, those approaches to accuracy came into conflict, and the Supreme Court had to decide whether Florida's method of ensuring accuracy was constitutional.

Here's how the moot court will go:

- You will be divided into one of three groups: Appellant/Petitioner (Bush), Appellee/Respondent (Gore), and Justices of the Supreme Court.
- In your groups, you should discuss the fact pattern, brainstorm ideas on the BRAINSTORMING SHEET, review and evaluate significant arguments on the ARGUMENT SHEET, and prepare their arguments to the Supreme Court for the mini moot court.
- The student Justices should also work together to evaluate potential arguments using the BRAINSTORMING SHEET and ARGUMENT SHEET and to prepare questions for oral argument using the JUSTICE SHEET.
- During the discussion period, students from each side will need to select representatives (2-4) who will act as the Advocates during the moot court, and students from the Supreme Court will need to select a Chief Justice. Advocates from each side will have 15 minutes to present their side's strongest arguments to the Supreme Court and answer questions from the Justices. The Advocates should decide how they want to divide their oral argument time. Afterwards, the mock Supreme Court will decide the outcome of the case, and the Chief Justice will announce the Court's decision.
- The oral argument should proceed as follows:

- The Chief Justice will open the argument by announcing, “We will hear argument today in Bush v. Gore. Representatives of Mr. Bush, you have 15 minutes.”
- Advocates will only have 15 minutes to present their strongest arguments to the Supreme Court and to answer any questions posed by the Justices. Advocates representing Bush will go first, followed by Advocates representing Gore.
 - After the Advocates representing Gore have made their arguments, the Advocates representing Bush have five (5) minutes for “rebuttal.” The rebuttal should focus on responding to issues that Gore raised during the oral argument.
 - NOTE: The Advocates for Bush must reserve time for rebuttal at the start of their oral argument. (Kindly remind Bush to reserve time if he or she forgets as a rebuttal is a powerful tool during oral arguments).
- Each side should begin its argument by saying, “Thank you, Chief Justice, and may it please the Court.” Then, the Advocates may proceed with their arguments.
- During each side’s oral argument, the Justices will interject with three (3) questions. All students on each side can raise their hands to answer questions posed by the Justices of the Supreme Court if their Advocates need assistance.
- Once the oral arguments have been completed, the Chief Justice will close the arguments by saying, “The case is submitted.”
- Then, the Justices will confer and write a brief opinion (no more than three (3) paragraphs) documenting their decision. The Justices should decide how they want to divide the work of writing the opinion themselves. The Chief Justice will then summarize the Court’s decision for the class.

SUMMARY OF FACTS: BUSH V. GORE

BACKGROUND:

Under the Fourteenth Amendment to the United States Constitution, “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.” This is referred to as the Equal Protection Clause, and it basically means that the States must apply their laws equally to all of the people in the State. Applying the Equal Protection Clause to elections and voting law, the Supreme Court held in Harper v. Virginia Board of Elections that a State cannot value one person’s vote over that of another. Keep this in mind as we go through the facts.

* * *

The Presidential Election of 2000 between George W. Bush (a Republican) and Al Gore (a Democrat) was *extremely* close. In fact, the entire election came down to the State of Florida. If more voters in Florida voted for Bush than Gore, Bush would win the Presidential election, and if more voters in Florida voted for Gore than Bush, Gore would win the Presidential election. So, it became *very* important to determine which candidate won the most votes in Florida.

As it turns out, that was no easy task. At many voting booths in Florida, voters received paper ballots that listed Bush and Gore as the candidates for President and included circles next to their names. Voters made their Presidential selection by using a hole-punch to punch a hole in the ballot on the circle next to their preferred candidate’s name. Once all ballots were collected, the ballots would be fed through a machine that would read and count the votes based on the hole-punches.

But not all hole-punches were perfect: some left circles hanging from the ballot, and some didn’t punch through at all, leaving only an indentation. This led to problems with counting the votes in Florida. On some ballots, the machines failed to read any hole-punches and therefore did not register a vote for President. These were referred to as “undervotes.” On other ballots, the machines read more than one hole-punch and, again, did not register a vote for President (voters can only vote for one candidate). These were referred to as “overvotes.”

After an initial vote count, Bush led by only 1,784 votes when nearly 6 million votes had been cast in Florida. A recount conducted by the vote-counting machines only slightly diminished Bush’s lead. Gore was not happy and filed a lawsuit in Florida state court, asking for the court to order a manual recount of the undervotes. In a manual recount, actual people (rather than machines) review the uncounted ballots by hand. Gore’s case made its way through the Florida state court system until the Florida Supreme Court granted Gore’s request, ordering a manual recount in all Florida counties where the “undervotes” had not already been counted by hand.

Interpreting Florida state law, the Florida Supreme Court ordered that these counties tally the undervotes based on evidence of a “clear indication of the intent of the voter” as to which candidate the voter intended to vote for. The Florida Supreme Court did not provide specific requirements about how the counties should identify the intent of voters when conducting the recount. This time, Bush was not happy, so he filed a petition asking the U.S. Supreme Court to review the Florida Supreme Court’s order.

* * *

In particular, Bush asked the Supreme Court to decide whether the manual recount process ordered by the Florida Supreme Court violated the Equal Protection Clause. Bush argued that it did, and Gore argued that it didn’t. That’s what you’ll be deciding today.

BRAINSTORMING SHEET

Which side do you represent?

Your Group's Arguments (Rank from best to worst):

Opposition's Arguments (Rank from best to worst):

Counterarguments to Opposition's Arguments:

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Possible Supreme Court Questions:

Responses to Supreme Court Questions:

--	--

ARGUMENT SHEET

Look over these arguments below. Note whether they help Bush (Appellant/Petitioner) or Gore (Appellee/Respondent). You can also decide an argument helps both sides (Both) or neither side (Neither). If you decide that an argument helps your side, how will you draw a comparison between that argument and your side's argument? If you decide that an argument helps your opponent's side, what are potential counterarguments, and/or how might you distinguish your side's argument?

1. _____ Florida election law provides that no vote should be disregarded "if there is a clear indication of the intent of the voter." Interpreting this provision, the Florida Supreme Court held that a manual recount to identify the intent of the "undervoters" was necessary to ensure that the "undervotes" were properly counted. In Central Union Telephone Co. v. Edwardsville, the U.S. Supreme Court held that it should defer to a state supreme court's interpretation of its own state law unless that interpretation is "so unfair or unreasonable" as to prevent citizens from exercising their constitutional rights. (Remember: the constitutional right at issue in our case is the right of Florida citizens to exercise their right to vote on equal terms).
2. _____ In Reynolds v. Sims, the Supreme Court held that a State can violate the Equal Protection Clause not just by prohibiting citizens from voting, but by diluting the weight of their votes or by weighing individual votes differently.
3. _____ In Burroughs v. United States, the Supreme Court recognized that cases involving the Presidential election are uniquely important: "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."
4. _____ While the Florida Supreme Court has ordered certain counties to look for the "intent of the voter" in conducting their recounts, the standards for accepting or rejecting contested ballots might vary from county to county, or even within a single county from one recount team to another. For example, different counties might answer these questions differently: How "punched-out" must a circle on a ballot be to count as a vote? What if a

circle is just indented? Without specific, standardized rules to determine the “intent of the voter,” ballots in different counties might be counted differently.

5. _____ Florida, as well as the vast majority of other States, allows each county to make its own decisions about which balloting systems to use in elections. This leads to differences in vote counting based on county. For example, in counties using a hole-punch system, 3.92% of ballots did not register a vote for President when fed through a machine; in counties using a more modern system, only 1.43% of ballots did not register a vote for President when scanned by a machine. Historically, the Supreme Court has never suggested that these differences create an Equal Protection Clause problem, and if it did now, the Court might have to review the balloting systems of all counties in almost all the States.

6. _____ Although the Supreme Court has ruled that a State cannot weigh individual votes differently without violating the Equal Protection Clause, the Supreme Court has never questioned a State’s determination as to what constitutes a valid “vote” under state law.

7. _____ In Florida precincts using punch-card ballots, voters were instructed to punch out the ballot cleanly: “AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.”

8. _____ In Moore v. Ogilvie, the Supreme Court reviewed an Illinois law that set requirements for candidates seeking to be Members of the Electoral College.¹ The law required that a candidate obtain 25,000 signatures from registered Illinois voters, and specified that the candidate needed at least 200 signatures from each of 50 counties in the State. However, 93.4% of Illinois’s registered voters resided in the 49 most populous counties, and only 6.6% resided in the remaining 53 counties. The Supreme Court found an Equal Protection Clause violation because the county-based procedure diluted the influence of citizens in more populous counties in the nominating process.

9. _____ The Supreme Court does not have its own enforcement powers. Once the Court has decided what the law means, it relies on the other branches of government and the people of the United States to defer to that decision and enforce the law accordingly. This requires these actors to view the Court as an “honest broker” or removed from politics.

10. _____ The Constitution does not guarantee citizens the right to vote for Members of the Electoral College (see the footnote below for a brief explanation of the Electoral College). Rather, it allows the States to choose how the Members from its State will be selected. Once a State chooses to select its Members by a statewide election, though, then the Equal Protection Clause prevents the State from treating the votes of its citizens differently.

¹ You might think that the winner of the U.S. Presidential election is the candidate who receives the most votes. But this is not the case. Article II of the United States Constitution says that an institution called the Electoral College decides the winner of the Presidential election. The Electoral College is just a body of Members sent by the 50 States (and Washington, D.C.) whose only purpose is to decide the next President. Each State (and Washington, D.C.) sends a number of Members to the Electoral College equal to the number of U.S. Senators it has plus the number of Members it has in the House of Representatives. For example, Pennsylvania has two Senators and 18 Representatives in the House, so it has 20 Members (or votes) in the Electoral College. In total, there are 538 Members of the Electoral College, and the winner of the Presidential Election is the candidate who receives a majority of Electoral College votes.

JUSTICE SHEET

You are a Supreme Court Justice hearing Bush v. Gore. Answer the following questions by referencing the SUMMARY OF FACTS and BRAINSTOMRING and ARGUMENT SHEETS.

1. Pretend that you are listening to the oral arguments of the attorneys representing Bush. What three (3) questions would you ask? Select three (3) Justices to ask one question each during Bush's oral argument. You may interject with your questions at any time.

A.

B.

C.

2. Pretend that you are listening to the oral arguments of the attorneys representing Gore. What three (3) questions would you ask? Select three (3) different Justices to ask one question each during Gore's oral argument. You may interject with your questions at any time.

A.

B.

C.

3. After hearing the oral arguments, you have to decide who wins the case. Write a brief court opinion (no more than three (3) paragraphs) ruling either in favor of Bush or Gore. You should decide how you want to divide the work of writing the opinion yourselves. Remember, if you are ruling in favor of Bush, then you are arguing that the recount ordered by the Florida Supreme Court is unconstitutional because it would treat voters differently in violation of the Equal Protection Clause. If you are ruling in favor of Gore, then you are arguing that the recount is constitutional because it would not treat voters differently, or at least not in a way that rises to the level of an Equal Protection Clause violation.

Quite simply, if you are ruling in favor of Bush, Bush wins the Presidential election; if you are ruling in favor of Gore, Gore wins the Presidential election. No pressure!

_____ Bush

_____ Gore