

*Washington State Republican Party v. King County Division of Records,
Elections and Licensing Services, et al.*

No. 76399-2

CHAMBERS, J. (concurring). I concur fully in the judgment and reasoning of the court. I write separately to express my view on a broader subject. I have observed a recent trend of political interest groups seeking judicial intervention before matters are placed on the ballot, before the people vote, and before election officials have fulfilled their duties to canvass and count the votes. *See Maleng v. King County Corr. Guild*, 150 Wn.2d 325, 76 P.3d 727 (2003) (pre-election challenge to initiative); *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 911 P.2d 389 (1996) (same); *MacDonald v. Secretary of State*, No. 76321-6 (Wash. Dec. 14, 2004); *cf. Sane Transit v. Sound Transit*, 151 Wn.2d 60, 104-06, 85 P.3d 346 (2004) (Chambers, J., dissenting). This trend perhaps was exacerbated by *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).

In my view, there is little to commend judicial intervention into the electoral process before the process is complete. First, the necessary procedures of judicial decision making do not lend themselves to instant resolution of electoral issues. Our procedures are based upon a deliberative and adversarial process. Proper judicial decision making requires notice and an opportunity for interested parties to be meaningfully heard. At the trial

Washington State Republican Party v. King County Division of Records, Elections and Licensing Services, et al., No. 76399-2

level, we engage in discovery, evidentiary hearings, and make findings of fact and conclusions of law. At the appellate level, we must be thoughtful and deliberate both to insure a just and correct result in the instant case, and because our decisions set precedents for the future.

Judges should never shy from their constitutional duties. Any election or ballot measure, including resolutions, initiatives, referendums or the election of officials, which violates constitutional, federal, or state laws may, in due course, be declared void and unenforceable by the judicial branch. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *see also Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 191-92, 11 P.3d 762 (2000) (striking unconstitutional initiative). But courts, in my view, should be reluctant to issue temporary restraining orders or grant emergency review of election matters *before* election officials have had sufficient opportunity to fulfill their duties. Because we play a part in a government of separated powers, we are not a Council of Revision, routinely advising the other branches as to the constitutionality of proposed laws. James T. Barry III, *Comment, The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235 (1989) A trip to the court house should not become a customary election routine.

We have, however, in barely more than a week heard two cases involving Washington’s 2004 gubernatorial election. While it may be

Washington State Republican Party v. King County Division of Records, Elections and Licensing Services, et al., No. 76399-2

perceived that one case was resolved in favor of those representing the Republican party, *MacDonald v. Secretary of State*, and one resolved in favor of those representing the Democratic party, the two decisions are consistent and well grounded in sound principles of separation of powers and good government. In each case this court has declined to issue writs to elections officials instructing them how to fulfill their duties. I fully support this court's action in the 2004 gubernatorial election, but in the future courts should resist requests that we oversee the election process. This takes us to the second reason why courts should be wary of entering these disputes; to maintain proper separation of powers.

The legislature should make the law, the courts should interpret the law, and the executive should execute the law. The legislature has empowered county election officers and canvassing boards to administer elections. For courts to micromanage elections officers is to inappropriately blur the executive and judicial functions of government.

Our legislature has established a comprehensive body of laws detailing how elections should be conducted. So long as those laws are constitutional, the courts are obliged to enforce those laws. There is a certain amount of subjectivity inherent in the legislatively established process of comparing signatures and counting absentee and provisional ballots. *See* RCW 29A.60.210. The legislature, probably in recognition of this inherent subjectivity, has given local county election officials the

*Washington State Republican Party v. King County Division of Records,
Elections and Licensing Services, et al., No. 76399-2*

authority and the discretion to recanvass ballots or voting devices until the last day to certify the election. RCW 29A.60.210. Should election officials fail to carry out their duties within the law; there are procedures for challenging the results. *See* ch. 29A.68 RCW (contesting elections). This temporary restraining order should not have been granted by the trial court. I concur.


