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## The Election Crises in the United States and in Poland – the Role of the Supreme Courts

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In a democratic state where two powers supported by a relatively equal parts of the society struggle on political grounds, it is a frequent case that a conflict appears concerning the determination of the election result. Such a situation is not rare, thus there is the necessity of creating mechanisms solving arguments, since there must be a methodology of the definite determination of the elections outcome. Otherwise, the lack of this methodology might lead to deep, long-lasting political crises. In the recent years we could observe complications associated with this issue in numerous countries worldwide, and the example of the events Ukrainian so called “Orange Revolution” that happened at the end of 2004 and the beginning of 2005, is one of the symptoms of potential conflicts.

In Poland the model of the validation of parliamentary and presidential elections results by the Supreme Court has been applied<sup>1</sup>. Regardless numerous opinions questioning this rule, it was acknowledged as the most optimal one. A similar model exists in the United States, although it does not, like in Poland, result from

the solutions accepted in the electoral law<sup>2</sup>, but from the applied practice.

In my text I would like to analyze three crises that appeared around the presidential elections, two in the USA and one in Poland. At their background I would like to assess the decisions made by the highest judicial organs in both countries, especially their consequences for shaping a particular model of constitutional system, as well as the role of supreme courts in it. I will begin the analysis with the presentation of the election crises in the USA in 1876 and 2000.

### The Election Crisis of 1876 in the US

The crisis resulted from a very even contest between the Republican Party candidate, Rutheford B. Hayes, and the one of the Democratic Party, Samuel J. Tilden. The weakness of the Republican candidate had created, for the first time in a quarter of the century, a real oppor-

<sup>1</sup> Art. 101 of the *Constitution of the Republic of Poland of April 2<sup>nd</sup>, 1997*, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>2</sup> In the United States there is no state electoral law either for the elections to the Congress or the presidential elections. The elections are conducted according to election regulations set by each state autonomously.

tunity for Democrats to regain the highest posts in the federal government<sup>3</sup>. It ought to be remembered that since the election of A. Lincoln and the times of the Civil War, the Democrats, identified with so called rebellious southern states<sup>4</sup>, had played second fiddle and lost subsequent elections to both houses of the Congress, as well as the presidential ones.

During the elections held in 1876, however, there was a visible difference. Initially it seemed, in view of clear superiority of the Democrats and obvious weakness of the Republican candidate, that Tilden would acquire the majority of votes in the Electoral College. Yet, when this perspective began to materialize, the Republicans undertook particular actions in four states, which resulted in their advantage over the electors.

In Florida, Louisiana and North Carolina, the state authorities dominated by the Republicans and military men<sup>5</sup>, invalidated thousands of votes for Democratic candidates and electors, by which they gained their electors. However, one of the elected electors was a federal official, which made his mandate invalid. In his place the Republican governor appointed an elector from members of his party, which tipped the balance of presidential voting in this state in Hayes's favour. As a result of the Republicans' actions, the distribution of votes in the Electoral College was 185 to 184 in favour of Hayes. Invalidating their actions, even concerning one elector in Oregon, was tipping the balance in Tilden's favour.

These, not entirely honest actions of the Republicans, had led to the political confrontation in Washington. Determining how to qualify the actions in the light of legal regulations in power had become one of the most crucial elements of the battle.

In its second chapter the Federal Constitution allows the states to determine the procedure concerning

the election of their electors to the Electoral College. The role of the federal authorities had been determined as follows: the Presiding Officer of Senate in presence of the Senate and the House of Representatives performs the opening of the state confirmations of the electors election, and "*the Votes shall be then counted*".

In this situation the dispute was concerned over the issue whether the counting was to be made by this Presiding Officer of the Senate (the incumbent vice president Ferry, one of the Republican leaders), both houses separately (in the Senate the Republicans prevailed whereas in the House the Democrats held the majority) or both houses jointly (altogether the Democrats prevailed)?

The outcome of the elections depended on resolving this question, and actually confirming the manipulated elections of the electors in the states (the Democrats used similar practices<sup>6</sup> in this field too).

It was acknowledged that the best option to make the way out of the crisis was to appoint the special commission. The commission was then responsible for the fate of the presidential elections. The commission consisted of five Senators and five Congressmen. In accordance with the expectations, the Republican majority in the Senate appointed three Republicans and two Democrats, while the Democrats prevailing in the House of Representatives appointed three Democrats and two Republicans. In this way both parties reached the balance in the commission. Additionally, the commission was to consist of five judges of the Supreme Court, four of whom were to be appointed by federal district judges. As a result of their appointment there were to be two Democrat judges and two Republican ones. The fifth judge was to be appointed by the four previously appointed judges. It was expected that they would appoint the only independent judge of this court, judge Davis. It was he actually, who could resolve this complicated situation. However, Davis, probably fearing of such an immense responsibility, took advantage of his election to the Senate from Illinois and resigned from his post.

Among the remaining judges of the Supreme Court there were neither Democrats, nor independent judges. Therefore, it was a Republican that had to be the fifth appointed judge and the fifteenth member of the commission.

The Democrats agreed for this post to be taken by judge Joseph P. Bradley, appointed by the Republicans.

<sup>3</sup> P. Zaremba, *The History of the United States*, London 1968, pp. 292 – 293.

<sup>4</sup> The Democrats had political domination in the southern states and indeed were greatly responsible for so called secession of these states and the creation of the Confederation of the Southern States by them. It must be remembered, however, that the Democrats were active also in other states, yet there they were identified with, e.g. the head of the Supreme Court R. Taney, responsible for the controversial decision in case of D. Scott.

<sup>5</sup> One must remember that military authorities still played significant role in the southern states. As a result of Reconstruction, introduced after the Civil War, there were still special regulations limiting the independence of local authorities and civil rights.

<sup>6</sup> It has to be noted that in the states where Democrats dominated, they used similar practices in "counting" votes.

They calculated that he would be the one to reject the party attitude, but would be impartial in his assessment.

As it soon appeared, these hopes were groundless. Bradley occurred to be a loyal Republican, and not only tipped the balance of the commission's decision in favour of the Republican candidate, but also was the one who had written the justification of the decision taken with the majority of one vote, two days before the inauguration of the President on March 2<sup>nd</sup>, 1877.

It is worth noting, however, that the Democrats did not particularly protest against the decision of the commission. Such a situation could happen since the Republicans in turn agreed to withdraw entirely from the policy of so called Reconstruction, and resigned completely from any repressions against the Southern states. The Democrats recognized that "loosening" restrictions towards the states already dominated by them was much more significant for the interests of the South than taking the Presidential office by Tilden, hence this could still motivate the Republican radicals to foster the anti-Southern phobias in the Northern states. This, as it seemed, step back, let the Southerners leave the state of isolation, and the Democrats to win the following presidential campaign.

The most significant legal issue to be settled by the commission was answering the question whether the confirmations of the electors' election if transferred in an appropriate way by a state official could be questioned. The question was of crucial importance for acknowledging or not the decisions of Republican and military state officials from Florida, Louisiana and South Carolina. It was there, where apart from such certificates made on the basis of the election results taking into account the invalidation of the Democrats' votes, there were also protocols prepared by the election commissions dominated by Democrats and acknowledged these votes.

A decade afterwards, drawing conclusions from the aforementioned problems, the Congress passed the bill determining the rules of conduct in similar situations in a more precise way. Till the time of the elections in 2000, such issues had not occurred on a similar scale.

Although the whole situation did not do the Supreme Court credit, it had paradoxically influenced upon the strengthening of its position. It might not have been directly involved in solving the issue as an institution, yet the presence of five of its members in the commission made it a true arbiter of the argument. Both parties of the confrontation and the state opinion were aware of the fact that without the involvement of the authority of the Supreme Court judges any other

solution would be defective. Therefore, the largest animosity focused on judge Bradley. He became the object of an extremely severe political campaign and accusations of various connections, especially of preferring the party interests to the authority of the law. The political crisis had, however, been prevented, and the Court had been strengthened as a result<sup>7</sup>.

## The Election Crisis of 2000 in the US

The presidential election held in 2000 involved fierceness that had not been known for a long time, which resulted from the fact that both vice president Al Gore and governor George Bush, who were running for the office, acquired almost equal support in surveys, which showed analogically in the equal distribution of votes in the Electoral College.

After votes from all the states, apart from Florida, had been counted, it occurred that vice president Gore received 267 votes of electors, whereas governor Bush 246 votes. The necessary majority for the election in the Electoral College was 269 votes; hence the results of voting in Florida, having 25 votes in the College, were to be decisive. The first results of the voting in that state were favorable for Bush, who overtook his rival by 537 votes. It was an extremely little difference, making less than 0.001% of given votes. This preliminary results meant the victory of Bush in the elections. Bush even received congratulations from the rival. Moreover, in four other states where Gore had won, the difference was also minimal<sup>8</sup>.

However, it was already in the morning of the November 8<sup>th</sup>, 2000 that the staff of the vice president Gore questioned the results of voting in Florida stating that in three constituencies, due to the faulty work of voting devices<sup>9</sup>, the electoral intention of the voters had been distorted, and their votes were counted for the wrong candidate. Therefore, it was demanded that the procedure of counting votes in these constituencies

<sup>7</sup> For more on the circumstances of this election crisis see: P.L. Haworth, *The Hayes-Tilden Disputed Presidential Election of 1876*, Cleveland 1906; W. Severn, *Samuel J. Tilden and the Stolen Election*, New York 1968; W. Rehnquist, *Centennial Crisis: the Disputed Election of 1876*, New York 2003.

<sup>8</sup> In New Mexico the difference was 0.006%, in Wisconsin 0.22, in Iowa 0.31, whereas in Oregon 0.44%. Altogether these states gave College 33 votes.

<sup>9</sup> Voting in Florida (like in many other states) was performed with the use of devices perforating holes on voting cards beside the name of a preferable candidate.

was to be resumed (especially in Palm Beach constituency, where actually candidate Buchanan, neighboring Gore on the voting list, had acquired a far larger number of votes than in other constituencies). What is more, Gore's staff remarked, a couple of thousand votes would arrive by mail (mainly from soldiers who were on missions beyond the USA territory), which were to be, according to them, for the Democrat. However, when it soon appeared that the overseas votes made the superiority of Bush larger, the whole impact of the Gore's staff (and actually an army of lawyers who arrived to Florida), was directed at questioning the results in Palm Beach and forcing yet another counting of votes. This initiated probably the most spectacular legal struggle in history, which was additionally conducted in the awareness of the whole world.

The situation was also complicated by the political distribution of power in Florida authorities. The state administration was held by the Republicans, with the governor Jeb Bush, the brother of the candidate for the Presidential office, whereas in the state legislative and supreme court the Democrats prevailed. Gore's lawyers were intending to acquire solutions in court, yet they remembered that eventually it would be the federal Supreme Court that would settle the case. There the Republicans prevailed 5:4. On the other hand, the time worked in favour of the Republicans, since the ultimate results of the elections in Florida were to be transferred to Washington by the Republican state secretary of the state.

Bush's lawyers forced the initiation of the recount procedures at the level of state courts, in which situation the Supreme Court of Florida, dominated by the Democrats, complied with the suggestion of Gore's lawyers, that in this counting the intentions of electorate ought to be examined. Thus, thousands of votes were thoroughly analyzed both from the perspective of the placing of a perforated hole on a voting card, and the way a hole was perforated<sup>10</sup>. Such a procedure lasted for a very long time, and soon it had become obvious that the election commissions would not manage to count votes before the date of transferring the complete protocols from the elections of electors by the state of Florida to Washington.

Nevertheless, the staff of Bush, unwilling to take the risk of the results of this counting, forced the introduction of the decisions taken by the Supreme Court

of Florida to the federal Supreme Court. In this way the case *Bush v. Gore*<sup>11</sup> had been resolved.

On December 12<sup>th</sup>, 2000 the attention of the whole country, and without much exaggeration it can be stated that the attention of the whole world, was drawn to the edifice of the Supreme Court placed just beside the Washington Capitol housing the Congress. The Court answered two questions: the demand to cease the recount, as well as invalidating the decision of the Supreme Court of Florida, which by consenting on this "examination of the intentions" of voters had actually changed the content of the state election law during the elections. When it comes to the first question, the judges occurred to be above the party divisions, and ordered to cease the further recount with the majority of 7:2. Referring to the second question, however, the result of the voting reflected the party preferences (5:4) in favour of the Republicans, which meant that the state court was denied the right to make changes in the election law regulations during elections.

The decision of the Supreme Court had automatically aborted the argument. Against the expectations of his supporters, Gore did not risk to contest openly the decision that had been taken. In this way the state authorities confirmed the victory of Bush, who was able to assume the office due to the electors' votes.

The situation described had increased, in an unprecedented way, the authority of the Supreme Court of the USA in the constitutional system of this state. As the highest arbiter of political cases, the Court had actually taken the superior position within the American federal government. The Court confirmed that as the guardian of the obedience of the law it plays the crucial role in American democracy.

## The Election Crisis of 1995 in Poland

Like the above described American elections, the presidential elections in Poland in 1995 were held in the situation of balanced confrontation between the president in office Lech Wałęsa and the candidate of Sojusz Lewicy Demokratycznej (the Alliance of Democratic Left Wing) Aleksander Kwaśniewski. It was already in the first round that the difference of votes between two victorious candidates was minimal – Kwaśniewski received 35.11 % of votes, whereas Wałęsa 33.11 %.

<sup>10</sup> A voting device was perforating a triangular hole. For a vote to be considered valid it was necessary that paper be torn from a voting card in at least two out of three apexes.

<sup>11</sup> *Bush v. Gore*, 531 US 98 (2000).



The second round brought an extremely severe confrontation of both candidates, in consequence of which the ultimate result was slightly more favourable for Kwaśniewski, who received 51.72 % of votes (Wałęsa 48.28%). The dramatic situation stemmed from the first surveys, according to which it was Wałęsa's victory, yet according to the following ones – hour by hour – the situation was changing until eventually in the morning of the November 20<sup>th</sup>, 1995 it became clear that Kwaśniewski had won. The difference of votes in favour of Kwaśniewski was circ. 650,000, with around 19 million of votes in total.

However, the problem of the elections validity appeared almost immediately. Two issues, extremely intensely exploited during the campaign, were raised as significant factors that, according to the opponents of Kwaśniewski, had influence on the validity of the elections.

Firstly, these were financial matters. Kwaśniewski's staff had taken advantage of all the possible opportunities to present Wałęsa as a person who got enriched using the "Solidarity" symbol. It was to show the contrast with Kwaśniewski, who took pride in declaring modest property. It occurred, however, that he concealed the property owned by his wife (including the famous shares in the insurance company "Polisa"). Despite this, the left-wing propaganda was more effective, and voters were convinced that Kwaśniewski was the candidate who was more transparent financially.

Secondly, it was the issue of education. Although Wałęsa was still presenting himself as a working class representative, he had a secondary school education. Kwaśniewski had registered as a candidate with an academic degree. The issue of the superiority of Kwaśniewski's education had been intensely exposed in his campaign. This specific "superiority" of his education was one of the most significant factors determining the decisions of voters during the elections, which was vivid in almost all the analyses of election decisions made particularly by hesitant voters.

While the first issue did not present any legal possibility of questioning the actions of Kwaśniewski's staff, the other one involved making an untrue declaration during the candidate's registration, since Kwaśniewski, as it occurred, could not confirm his university education.

Therefore, almost 6,000,000 protesting notes were forwarded to the Supreme Court, in which it was pointed that as a result of an untrue declaration voters were mistakenly expressing their support for Kwaśniewski<sup>12</sup>.

<sup>12</sup> In these protests also other cases of breaking the election law had been mentioned, however they were not of such a sig-

These cases were resolved on the December 9<sup>th</sup>, 1995<sup>13</sup> by the Supreme Court as a whole, namely the Chambers of Administration, Labour, and Social Insurance. The content of the resolution was indeed amazing, since firstly the Court decided that:

*"Referring to the accusations concerning the information on the education, the Supreme Court with all the members of the Chamber of Administration, Labour and Social Insurance fully agrees with the opinion expressed in the grounds for the decision of the Supreme Court from the 5th December 1995, III SW 1094/95 (also confirmed in the grounds of all other decisions on the legitimacy of large groups of protests) that Aleksander Kwaśniewski does not have university education, hence the information concerning this matter presented in the registration of this candidate was untrue. The Supreme Court emphasises the discrepancy between this information and the real state, since it is not necessary to analyze subjective elements behind the deliverance of such information. Since the question whether delivering it was willful or not, purposeful or not, does not make any difference to the fact that the information was untrue. In this situation, it must be stated that delivering such information by the Election Comity registering the candidate for the president's office and publishing it in the announcement of the State Election Commission was the breach of the bill on the election of the President".*

However, instead of drawing legal conclusions on these grounds, in the further part the Court began incomprehensible pondering concerning the situation whether or not this breaking of the law had affected the result of the elections<sup>14</sup>. Hence, the Court remarked that, "no measurable or verifiable influence of the stated breach of the election law on the election results had been recognized", as well as, "the Court did not decide that the proved breach the election law had altered or even could alter in a significant way the proportion of votes for the two candidates".

The final conclusion of the Court was worth of Pilate:

*"The Supreme Court emphasises that this resolution is but a statement of the lack of the legal grounds for questioning the*

nificance as the ones concerning the effects of the lie referring to Kwaśniewski's education.

<sup>13</sup> Resolution of the Supreme Court of December 9<sup>th</sup>, 1995, III SW 1102/95, <http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20SW%201102-95.pdf>.

<sup>14</sup> The Supreme Court made an attempt aiming at the presentation of particular general conditions concerning the relation between the act of misinformation included in the public documents referring to Aleksander Kwaśniewski and the process of individual assessment and voting decisions taken on this basis.

*validity of the elections. It is thus beyond the competence of the Supreme Court, what is raised in the protests, to assess the personal virtues and moral features of the person elected for the office of the President of the Republic of Poland”.*

There are no reasons to argue with the premises of the Supreme Court's decision, taking into account the fact, that it was its own members who, in an unprecedented number of five separate votes, criticized the opinion of the majority. However, the assessment of the Supreme Court's decision in the context of how the democratic state of law is comprehended as the supreme constitutional rule still remains a fundamental issue.

By its resolution the Supreme Court approved of the situation when the highest office of the state, the office appointed to “guard the obedience towards the Republic's Constitution”<sup>15</sup> was taken by an individual, who broke this law intentionally fighting for the office. The Court had also released itself from the moral judgment of this fact by conducting incomprehensible pondering over the question of how the stated blatant breaking of law had affected the decisions of voters.

## Conclusions

Deep political crises resulting from the balance of power between the most important groups participating in elections force political elites to search for the ways of easing these potential tensions. In the situations discussed above, the highest judicial organ of a state accepted the role of the arbiter. However, the results of this arbitrage, as it has been described, were entirely different.

The decisions taken by the American judges in 1876 and the Supreme Court in 2000 served the strengthening of their position in the American constitutional system. They also enhanced the role of law as the most important arbiter of political arguments preventing violent solutions. In conclusion, they contributed to the construction of legal order, referred to in American system as rule of law.

The decision of the Polish Supreme Court in 1995, on the contrary, proved that in the law of the III<sup>rd</sup> Republic was a completely relative phenomenon. The

Court showed, that law might actually be used as a means to achieve various purposes, without the need of obeying any rules, and the individuals perceiving law in such way acquire de facto protection from the highest judicial organ of the state. The grounds of the resolution of the Supreme Court were actually preserving the deep erosion of the Polish legal system, and turned the rules of a democratic state of law into the meaningless clichés. The negative effects of this situation are still present.

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<sup>15</sup> Art. 28 §1 *Constitutional Bill of October 17<sup>th</sup>, 1992 on the Mutual Relations between Legislative and Executive Power of the Republic and on the Local Government* (so called *Little Constitution*), <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19920840426>.