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Book Review: The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President (2001), and Supreme Injustice: How the High Court Hijacked Election 2000 (2001)

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"We Will Not 'Move On.'"

Two Books To Mark The Two Year Anniversary Of *Bush v. Gore*

"It is a sad day for America and the Constitution when a court decides the outcome of an election."

"The ... court's radicalism went far beyond routine judicial activism... The ... court did exceed its lawful powers, with astonishing inventiveness, in a case where the political stakes could hardly be higher... Yes, the decision is a scandal."

"The action of the ... court is not constitutionally defensible."

"Let no one pretend [the court] acted as judges."

"[J]udges acting beyond their authority will have effectively picked the next president."

"Judges now select the next president of the United States."

"[An] illegitimately gained presidency."

"A presidency achieved by litigation and judicial fiat."

"[A] blatant and extraordinary abuse of judicial power."

"An act of judicial usurpation."

"A power grab, pure and simple."

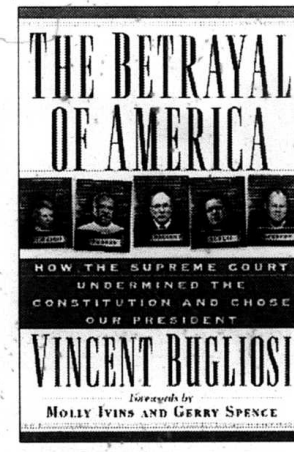
Harsh words by overwrought, sour grapes Democrats enraged by the U.S. Supreme Court's 5-4 *Bush v. Gore* decision, which exactly two years ago bestowed the presidency on George W. Bush? Overexcited rhetoric by embittered, malcontent liberals and left-wingers critical of the death-blow that decision inflicted on Al Gore's candidacy? Not quite. They are instead the fulminations of Republican and right-wing zealots blasting the Dec. 8, 2000 Florida Supreme Court decision which ordered a presidential vote recount but was stayed on Dec. 9, and then reversed on Dec. 12, by the U.S. Supreme Court in *Bush v. Gore.*

There are scores of books and hundreds of scholarly articles on *Bush v. Gore.* Among the best of these publications are Vincent Bugliosi's *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President* (Thunder's Mouth Press/Nation Books, 2001) and Alan Dershowitz's *Supreme Injustice: How the Supreme Court Hijacked the 2000 Election* (Oxford University Press, 2001). The centerpiece of Bugliosi's little book is his famous scathing critique of *Bush v. Gore,* "None Dare Call It Treason," originally published in the Feb. 5, 2001 issue of *The Nation* magazine. The Dershowitz book is calmer in tone and richer in scholarship. But both authors fundamentally agree that, as stated on the dust cover of the Dershowitz book, *Bush v. Gore* "is the most egregiously partisan ruling in the Supreme Court's history," and that "the court's majority let its desire for a particular partisan outcome have priority over legal principles."

A Dishonest Decision

As Yale law professor Akhil Reed Amar notes, *Bush v. Gore* "failed to cite a single case that, on its facts, comes close to supporting its analysis and result." Despite this, and despite what Dershowitz calls its "selective use of inapt cases [as precedents]," *Bush v. Gore* is not wholly outside the bounds of legal reasoning. But this does not mean it is an honest decision. It merely proves that, as Dershowitz points out, "clever judges can always justify their decisions by grounding them in acceptable interpretations of existing law." Thus, in analyzing *Bush v. Gore,* the issue is not simply whether the interpretation of the law by the five right-wing justices who formed the majority (Rehnquist, O'Connor, Kennedy, Scalia and Thomas) can be reasonably defended; rather, the issue is whether the majority's legal interpretation would have been the same if Bush had been seeking the recount. "I believe it is morally wrong," Dershowitz writes, "for scholars to defend the majority justices, even if they think their arguments are theoretically defensible, unless they honestly believe that the justices themselves would have offered these arguments in behalf of Gore if the shoe had been on the other foot."

And the dispiriting truth is, as both Bugliosi and Dershowitz convincingly demonstrate, that the majority justices, in Dershowitz's words, "tried to hide their bias [in favor of Bush] behind plausible legal arguments that they would never have put forward had the shoe been on the other foot."



In assessing *Bush v. Gore,* Bugliosi and Dershowitz both make use of what Dershowitz labels the "shoe-on-the-other-foot test" by pointing out the instances in which the majority justices, in order to rule in Bush's favor, endorsed legal arguments or embraced legal principles which contradicted views they have long espoused and which they would have scorned if proffered by Gore's lawyers. Thus, Bugliosi begins his famous essay with this famous paragraph:

"[In *Bush v. Gore]* the Court committed the unpardonable sin of being a knowing surrogate for the Republican party instead of being an impartial arbiter of the law. If you doubt this, try to imagine Al Gore's and George Bush's roles being reversed and ask yourself if you can conceive of Justice Antonin Scalia and his four conservative brethren issuing an emergency order on Dec. 9 stopping the counting of the ballots (at a time when Gore's lead had shrunk to 154 votes) on the grounds that if it continued, Gore could suffer 'irreparable harm,' and then subsequently, on December 12, bequeathing the election to Gore on equal protection grounds. If you can, then I suppose you can also imagine a man jumping away from his own shadow, Frenchmen no longer drinking wine."

Bugliosi and Dershowitz are not alone in noting that the shoe-on-the-other-foot test exposes the partisan shabbiness of *Bush v. Gore.* For example, University of Virginia law professor Michael J. Klarman has written: "Had all the other facts in the Florida election imbroglio remained the same, but the situation of the two presidential candidates been reversed, does anyone seriously believe that the conservative Justices would have reached the same result? Thus, the result in *Bush v. Gore* depended on the order in which the parties' names appeared on the case caption... I cannot think of another Supreme Court decision about which one can say with equal confidence that reversing the parties, and nothing else, would have changed the result."

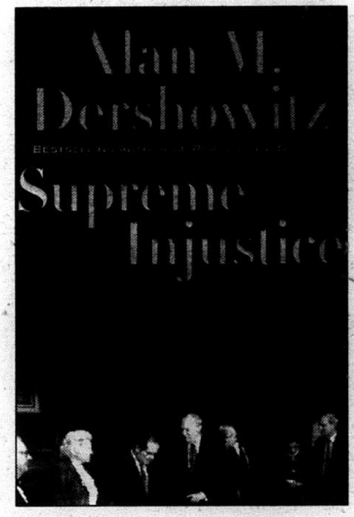
Unequal Protection

For several decades the Supreme Court has been notably unreceptive to claims that a person's rights secured by the equal protection clause of the Fourteenth Amendment were violated, and the Court currently almost always rejects such claims. The Court has insisted that unequal treatment cannot constitute a violation of the equal protection clause unless it is done purposefully, and the five justices who joined in *Bush v. Gore* regularly vote to deny equal protection claims. Yet in *Bush v. Gore* these same five justices based their decision in favor of Bush on a novel, expansive interpretation of the equal protection clause, and did so despite the absence of any allegation or proof that the unequal treatment complained of was purposeful.

In our legal system there is no such thing as a one-case rule, and the right-wing justices who constituted the majority in *Bush v. Gore* have on prior occasions denounced the notion that a judicial decision can ever be a "unique disposition." Nevertheless, after unexpectedly and atypically enlarging equal protection rights, the *Bush v. Gore* majority endeavored to ensure that its expansion of rights would never benefit anyone other than Bush, asserting (with "effrontery and shamelessness," Bugliosi notes) that its ruling was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." As Dershowitz comments waggishly: "Like a great spot-relief pitcher in baseball, this equal-protection argument was trotted out to do its singular job of striking out Vice President Gore and was immediately sent to the showers, never to reappear in the game."

Under Florida statutes and court decisions, a voter casts a legal vote that must be counted if, despite any error by the voter or by the voting machine, the intent of the voter clearly appears from the face of the ballot. Why, then, according to *Bush v. Gore*, was the Florida Supreme Court's decision to recount the presidential votes, based on the state's traditional standard that the clear intent of the voter governs, violative of the equal protection clause? Because, the five-justice majority strangely held, the general standard of voter intent was subject to different interpretations by different vote counters!

But why would this be more harmful to Bush than to Gore? And don't the same or similar disparities in vote counting equally exist when the votes are counted the first time? And why this sudden concern with uniformity at the state level by justices who, in the name of federalism, ordinarily insist that state governments be given room for "play in the joints"? To quote Bugliosi: "Varying methods to cast and count votes have been going on in every state of the union for the past two centuries, and the Supreme Court [prior to *Bush v. Gore*] has been as silent as a church mouse on the matter, never even hinting that there might be a right under the equal protection clause that was being violated."



The Court's remedy for the equal protection violation it had strained to concoct was bizarre. It barred any more recounting, even though this meant that perhaps thousands of voters whose clear intention would have been evident to anyone doing the recount would be denied their legal right to have their votes counted. The Court evidently thought it was better that a significant number of legal votes be ignored than that some questionable votes should be counted. "The end result," Dershowitz tells us, "was that a large number of voters who cast proper votes under Florida law but whose votes were not counted were denied their ... right to vote for president in order to ensure that the votes of others would not be diluted by the improper inclusion of ballots that might be invalid... This is the most perverse misuse of the equal protection clause I have seen in my forty years as a lawyer."

Irreparable Harm

The most palpably dishonest aspect (Bugliosi calls it a "maddening sophistry") of *Bush v. Gore* was the majority's claim that it could not permit any further recounting because under Florida law any presidential vote recount had to be completed by Dec. 12. (*Bush v. Gore* was decided at 10 p.m. on that day.) Actually, there was no Florida legal requirement that presidential vote recounts be completed by a specified date. (The original recount underway when the Supreme Court stopped it probably would have been completed by Dec. 12 if the Supreme Court had not entered its stay order on Dec. 9.)

The stay itself is incomprehensible unless it is acknowledged that the majority justices who granted it were acting in a partisan fashion. The rule is that the Supreme Court is supposed to grant a stay of the judgment of a lower court only if the party seeking it makes a substantial showing that in the absence of the stay he will suffer irreparable harm. Yet in *Bush v. Gore*, Dershowitz shows, "the balance of harms ... unmistakably were on the side of Gore... If the counting was stopped, Bush would win... What possible harm [to Bush] could result from merely counting ballots by hand? If the Supreme Court ultimately ruled that these ballots should not have been counted, they could have been eliminated from the tally." The only conclusion to be drawn from the granting of the stay is that, as the *New York Times* said at the time, it was "highly political" and that it gave the appearance of "racing to beat the clock before an unwelcome truth would come out."

Making Presidents

Because of the strong evidence that *Bush v. Gore* was, in the words of Prof. Klarman, an example of "partisan preferences trumping law," supporters of the decision have few lines of defense. One involves raising the flag of pragmatism by taking a result-oriented approach. The decision, they say, saved the nation from a constitutional and political crisis in which the issue of who won the presidency would have had to be decided (as the Constitution provides) by Congress. There are three problems here. First, the recount, if it had been permitted to go forward, might have resolved the election dispute; and even if the election had ended up in Congress that body might well have resolved the controversy before the scheduled inauguration. Second, the pragmatic argument presupposes that courts are (to borrow words used by Justice Thomas in another context) "mighty Platonic guardians" better able to resolve political disputes than elected politicians. Third, as Bugliosi rightly says, the pragmatic argument boils down to this absurd assertion: "If an election is close, it's better for the Supreme Court to pick the President, whether or not he won the election, than to have the dispute resolved in the manner prescribed by law."

Another possibility for *Bush v. Gore* defenders is for them to accuse their opponents of irresponsible criticism of a court decision. But in light of the frenzied attacks launched against the Florida Supreme Court, taking this course of action is untenable, for to do so would expose *Bush v. Gore* defenders as hypocrites who maintain that, in Dershowitz's words, "judicial fiat is to be condemned when it produces a Gore victory and praised when it produces a Bush victory."

Another option for *Bush v. Gore* defenders is to call their opponents sore losers—to admonish the decision's critics to cease complaining about the plain fact that five right-wing Republican justices, appointed by right-wing Republican presidents, installed a right-wing Republican as president. But it is absolutely certain that right-wingers would still be raging deliriously if the Florida Supreme Court decision had prevailed and Gore had become president by virtue of the recount. Bill Kristol, the doyenne of right-wing and Republican militants, announced, after the Florida court's decision (but prior to its reversal in *Bush v. Gore*): "[S]ome of us will not believe that Al Gore has acceded to the presidency legitimately... We will therefore continue to insist that he gained office through an act of judicial usurpation. We will not 'move on.'" Is it only right-wingers who are permitted to "not 'move on'"?

For decades, right-wing Republicans have excoriated "liberal judicial activists" on the federal bench and labored (with great success) to replace them with "strict constructionist" federal judges who "will interpret the law, not make it." Although five of their justices, in a stunning display of partisan politics cloaked in the forms of law, have elected a president, the right-wing Republicans solemnly deny that the five justices are activists. And perhaps they are literally correct. After all, they said their judges would not make law; they never said their judges would not make presidents.

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