Reckless Disregard

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Alan Dershowitz, Felix Frankfurter Professor of Law at Harvard Law School, renowned criminal-defense attorney, best-selling author, tireless TV talking head, and pro bono lawyer for residents of Palm Beach County who opposed Bush efforts last November to stop the initial recounts sought by the Gore camp, has over the years taken pride in his willingness to champion unpopular causes and to utter truths that others dare not speak. His new book, however, (consistent with the position he advanced in his just-concluded online debate in *Slate* with Judge Richard Posner) is a sustained tribute to the conventional wisdom. In *Supreme Injustice: How the High Court Hijacked Election 2000*, Dershowitz sets out to show that *Bush* v. *Gore* was a "lawless decision"; that the five conservative justices who voted for it "shamed themselves and the Court on which they serve, and they defiled their places in history"; and that the conservatives did so out of motives that were "uniquely corrupt," indeed "because of malice aforethought." Alas, the conventional wisdom is ill-served by this quick-out-of-the-gate book, which does nothing so much as show Dershowitz's willingness to advance grave and inflammatory charges about the conduct of justices of the Supreme Court that he cannot support with, indeed which require him to trample right over, fact and law.

Although he boasts of his credentials for the assignment and the extensive research he has conducted, Dershowitz's legal analysis breaks little new ground. He writes that "Five justices concluded that the Florida Supreme Court had violated the equal-protection clause of the federal Constitution when it authorized a manual recount based on the legislative standard of clear voter intent, because that general standard was subject to different interpretations by different vote counters." Describing this holding as "the most perverse misuse of the equal-protection clause I have seen in my forty years as a lawyer," Dershowitz contends that it is based on a misunderstanding of both Florida law and equal protection doctrine. In fact, Dershowitz claims, Florida law requires that properly or improperly marked ballots that cannot be read by machines be examined in the search for "a clear indication of the intent of the voter." Moreover, far from serving as a basis for invalidating the Florida court's manual recount order, equal-protection considerations ought to have led the U.S. Supreme Court to endorse it, for the ballots which the machines in Florida were unable to count, whether as a result of improper marking or machine malfunction, came disproportionately from minority voters of the sort that the 14th Amendment was specifically passed after the Civil War to protect.

Nor, to put it mildly, is Dershowitz original in alleging that the votes of the five-member conservative majority reflected "the partisan quest for immediate political victory." In the service of the conventional wisdom, however, Dershowitz does go beyond it, if only in the bluntness of his accusation, and (who would have thought it possible at this late date) in the shrillness of his rhetoric. *Bush* v. *Gore* was in a crucial respect worse than the Court's previous "evil, immoral, even dangerous decisions," not excepting, in Dershowitz's view, the court's notorious 1857 decision in *Dred Scot*, which declared African Americans, as a matter of constitutional law, to be property. "*Bush* v. *Gore* was different because the majority justices violated their own previously declared judicial principles — principles they still believe in and will apply in other cases." Indeed, maintains Dershowitz, "the decision in the Florida election case may be ranked as the single most corrupt decision in Supreme Court history, because it is the only one that I know of where the majority justices decided as they did because of the personal identity and political affiliation of the litigants."

So as to erase all doubt about where he stands and why his criticism stands out from the pack, Dershowitz trumpets the personal character of his attack:

> Let me be as clear as I can: The criticism I am making of the majority justices includes a significant ad hominem component. I am not limiting my criticism merely to the intellectual or procedural weaknesses of their arguments. I am accusing them of partisan favoritism — bias — toward one litigant and against another. I am also accusing them of dishonesty, of trying to hide their bias behind plausible legal arguments that they never would have put forward had the shoe been on the other foot. These criticisms are directed at the justices *personally*, not only at their arguments, though it is the weakness of their arguments — and their inconsistency with prior views expressed by these very justices — that provides the probable cause for probing their motives.

Certainly Dershowitz is clear about the gravity of his charge as well as his own fearlessness at bringing it. Whether he makes his case with the commensurate degree of care is another matter.

Indeed, the scandal of Dershowitz's book is that he lacks what he himself regards as probable cause for examining the justices' motives, because he fails to demonstrate the weakness of the conservatives' argument. And this is not because the argument for which the five conservatives voted in *Bush* v. *Gore* is manifestly compelling or ultimately correct but for the simple reason that Dershowitz never manages to perform the elementary task of accurately identifying it.

The holding or legal principle that Dershowitz attributes to the conservatives and which he seeks to demolish is that the Florida supreme court violated the equal-protection clause of the 14th Amendment by failing to articulate uniform standards to guide the statewide manual recount. But Dershowitz has set up his wrecking ball in the wrong place and aimed it at an imaginary structure of exaggerated flimsiness. For what the U.S. Supreme Court actually held

was that the partial and selective statewide recount of undervotes (ballots on which machines could not detect a vote for president) devised by the Florida court raised no fewer than four distinct equal-protection problems. Not only did the Florida court permit different standards, or different interpretations of its clear intention of the voter standard, to be applied in different counties and sometimes to different votes in the same county. The Florida court also arbitrarily excluded from its recount order overvotes (ballots on which machines detected multiple votes for president and which estimates indicated far-outnumbered undervotes). This was critical because some overvotes may have been improperly marked or misread by machines, yet, just like undervotes, have yielded on manual inspection a clear intention to vote for a particular candidate. In addition, the Florida court arbitrarily included in Gore's final total votes recovered from an unfinished hand recount in Miami Dade County. And it called for a statewide manual recount to be conducted by untrained and unsupervised personnel. It was these four problems taken together — and regardless of whether the recount ordered by the Florida Court was a legitimate interpretation of the scheme for contesting elections established by the legislature — which led the majority to conclude that key features of the Florida recount "do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right."

Is *Bush* v. *Gore*, when rightly restated, good law? That is a hard question. One thing is for sure. Dershowitz's polemic impedes the quest for a sound answer by blurring facts and distorting legal issues central to the case.

Moreover, if Dershowitz cannot be relied upon to restate accurately the holding or legal principle set down in *Bush* v. *Gore*, the alleged weakness of which he declares provides the probable cause for investigating the justices' motives, why should his investigation of motives be trusted? Especially when the proof of corrupt motives is an inherently delicate and subtle task, and in Dershowitz's book is built upon such questionable and easily manipulated evidence as fragments ripped from judicial opinions, brief snippets extracted from extended writings on judicial philosophy, and (in a university-press book!) allegations of personal wrongdoing from unverifiable, anonymous sources.

Supreme Injustice sheds little light on the complex issues raised by *Bush* v. *Gore* and much that it argues is plain wrong or dependent on ugly innuendo. But Dershowitz's lawyerly obfuscating and moral grandstanding and professorial posturing testify all too powerfully to a reckless disregard for the truth that has become an increasingly common feature of the professor in his role as public intellectual.