Reckless Disregard, II

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Vincent Bugliosi's *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose our President* is an expanded version of an article that he published in *The Nation* on February 5, 2001, called "None Dare Call It Treason." In its reckless disregard for the truth, it marks, with Alan Dershowitz's *Supreme Injustice: How the High Court Hijacked Election 2000*, a low point in the outpouring of criticism directed at *Bush* v. *Gore*. Or so one hopes.

For *Bush* v. *Gore*, which effectively ended the Election 2000 controversy, is in fact a complicated case whose outcome was obvious to few and whose legal arguments implicate novel and difficult questions. Yet Bugliosi, a former prosecutor for the Los Angeles County District Attorney's Office who made his name prosecuting Charles Manson and writing about it in the classic *Helter Skelter*, and then emerged in the 90s as a leading celebrity legal commentator publishing outspoken books on the O. J. Simpson trial and the Clinton impeachment, manages in his new book to rest accusations of epic proportions on analysis of breathtaking vulgarity and shoddiness.

Bugliosi presents himself as a hero of democracy, a moderate with both liberal and conservative friends, a critic whose sole concern is with "justice and fair play" and who simply wanted all votes to be counted, a lonely commentator prepared to speak the truth and declare that the "shameless and shameful felonious five" conservative justices who voted for *Bush* v. *Gore* are "criminals" who "committed one of the biggest and most serious crimes this nation has ever seen — pure and simple, the theft of the presidency." In fact, by inviting his fellow citizens to confuse his tough guy talk and colorful invective and ruthless oversimplification with responsible legal analysis and sound moral judgment, Bugliosi practices the demagoguery that is democracy's perennial bane.

Bugliosi's thin volume, whose evidence he says no reader has been willing or able to circumvent and whose logic none has managed to pierce, is a repository of commonly-put-forward bad criticism of *Bush* v. *Gore*. It is not to be supposed that these poor arguments will be driven out of circulation by identifying them and exposing their weakness. Nor will exposé force into retirement the ridiculous rhetorical excesses with which Bugliosi garlands his arguments, for example, "Considering the criminal intention behind the decision, legal scholars and historians should place this ruling above the Dred Scott case (*Scott* v. *Sandford*) [ruling in 1857 that slaves are property] and *Plessy* v. *Ferguson* [upholding in 1896 the

doctrine of separate but equal] in egregious sins of the Court." But perhaps bringing to light the rather gaping holes in arguments he regards as invulnerable to criticism can spare some labor for those whose primary concern is to understand the basic issues.

Bugliosi's case against *Bush* v. *Gore* boils down to six propositions. All but the first are frequently heard, though the frenzy of moral indignation with which Bugliosi elaborates them all sets his book apart. All are fundamentally mistaken or deeply misleading.

1) Bush did not have "'standing to sue.'" In equal-protection cases "the aggrieved party, the one who is being harmed and discriminated against, almost invariably brings the action." However, it was not the supposedly disenfranchised Florida citizens who brought the action, but Bush who "leaped in and tried to profit from a hypothetical wrong inflicted on someone else." Bush was not the plaintiff and he did not sue. It was Gore who brought the contest lawsuit and Bush who appealed. Moreover, it is absurd to suggest that a candidate has no interest in or cannot be aggrieved by constitutionally impermissible procedures for counting votes.

2) *Bush v. Gore* denied "the right to have their votes count at all" to tens of thousands of citizens who cast undervotes (ballots on which no vote for president was detected). In fact, ballots, including those designated as undervotes, were counted twice by machines, once in the original tabulation, and then a second time, as required by Florida law, when the margin between Bush and Gore was found to be less than .5% of the total votes cast.

3) *Bush v. Gore* "sets forth a very simple, noncomplex proposition-that if there are varying standard to count votes, this violates the equal protection clause of the Fourteenth Amendment." Actually, *Bush* v. *Gore* sets forth a complex proposition, that if in a statewide hand recount under the supervision of a single judicial officer varying standards between counties and even in the same county are employed, and also if some ballots that did not contain a valid machine readable vote for president are manually recounted (the undervotes, which estimates put at 60,000) but not others (the overvotes, on which machines detected multiple votes for president, which estimates put at 110,000), and also if partial recounts from some counties are included in the final-vote totals, and also if the manual recount is conducted by untrained and unsupervised personnel, then these problems, when taken together, violate the minimum requirements of equal protection.

4) "The simple fact is that the five conservative Justices did not have a judicial leg to stand on" because their previous precedents provided no support for their ruling. In *Reynolds v. Sim*s (1964) a malapportionment case cited by the majority (which Bugliosi dismisses as irrelevant but does not discuss), the Court ruled that state voting districts which elect representatives to the legislature must have roughly equal populations. In so holding the Court explained that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." This important precedent is applicable to the case of *Bush* v. *Gore*, though it

requires an argument by analogy (which lies at the heart of legal reasoning) to see why. Using varying standards to count votes in different counties and even in the same county, and manually recounting one category of votes that could not be read by machines but arbitrarily declining to recount by hand another category that also was not machine readable dilutes the weight of those votes subject to stricter standards and those arbitrarily excluded from the manual recount.

5) The equal protection theory was wildly overbroad, because "to be completely consistent the Court would have had no choice but to invalidate the entire Florida election, since there is no question that votes lost in some counties because of the method of voting would have been recorded in others utilizing a different method." Justice Souter, who in dissent concluded that the Florida recount gave rise under the Equal Protection Clause to "a meritorious argument for relief," distinguished the constitutional issues that arise in the use of different machines in place to count votes before Election Day from those that surround the use of varying standards for recounting votes by hand after the election: "It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions: local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads)."

6) A "multiplicity of problems" afflicted the Court's decision to shut down the manual recount. Most importantly, since federal law merely provided a safe harbor for electors chosen by December 12 but was not mandatory, nothing should have prevented the majority from ordering the Florida court, as urged by Justices Souter and Breyer, to devise a uniform standard and proceed with the recount. In its December 11th opinion, in response to the U.S. Supreme Court's vacating of its November 21st opinion (extending the protest period by 12 days), the Florida court on no fewer than four occasions indicated that Florida law recognized December 12 as a binding deadline for choosing electors. In refraining from ordering the remedy contemplated by Justices Souter and Breyer, the majority plausibly saw themselves as deferring to Florida law.

Bugliosi concludes that because the five conservatives justices rendered a "knowingly fraudulent decision" that was "morally reprehensible" and a "wrong against society," they "are criminals in every *true* sense of the word, and in a fair and just world belong behind prison bars as much as any American white collar criminal who ever lived." Fighting words, but self-congratulatory assurances to the reader notwithstanding, they are based on scant evidence and limp logic. How then shall we judge a prosecutor who sets himself up as judge and jury and fiercely condemns a momentous judicial decision and the Supreme Court Justices who rendered it but seems not to have read the majority opinion carefully, or

digested the dissents thoroughly, or grasped the actual features of the partial and selective hand recount which lie at the heart of the legal controversy, or grappled with the complexities of the case law, or even thought through the logical implications of his own governing principle, that all votes be counted?

Bugliosi insists that he stands above the partisan fray, that his conclusions owe nothing to the candidate he favored, and that his "credibility on matters such as this is unassailable." His pseudo-macho, over-the-top polemic, which places his performance at the center of the show, makes this one of the few plausible claims in his hysterical little book. It also renews one's appetite for good old partisan passion. The partisans at least champion a cause greater than themselves.