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Down to the Wire by Peter Berkowitz

A review of Deadlock: The Inside Story of America's Closest Election by the Political Staff of The Washington Post (The Washington Post Company, 2001), 36 Days: The Complete Chronicle of the 2000 Presidential Election Crisis by Correspondents of The New York Times (Times Books, 2001), Bush v. Gore: The Court Cases and Commentary edited by E.J. Dionne Jr. & William Kristol (The Brookings Institution, 2001), and The Perfect Tie: The True Story of the 2000 Presidential Election by James W. Ceaser and Andrew E. Busch (Rowman and Littlefield, 2001).

Now that the dust has settled, constitutional democracy in America can be seen to have weathered the political storm unleashed by election 2000. There is no denying that the 5 week post-election battle was messy, awkward and ugly, descending at times into farce and at others into absurdity. It was riddled with opportunistic invocation of high principle and carefully calculated exploitation of rhetoric, rich in ironic posturing and breathtaking reversals of fortune, long on partisan grasping for advantage and short on detached observation and dispassionate evaluation. The freakish results of the November 7 voting produced remarkable challenges, and, after a sleepless night, Democrats and Republicans alike hit the ground running in the early morning hours of Nov. 8 and fought over Florida's 25 decisive electoral votes with ingenuity, perseverance and evident belief in the justice of their cause. The fighting was brought to a close by the US Supreme Court's stunning December 12 decision in Bush v. Gore, which halted the manual recounts ordered by the Florida State Supreme Court. As a result, George W. Bush got the electoral votes he needed to become the 43rd President of the United States.

All in all, it may not have been the United States's finest moment, and as long as people talk about it, they will fling at the other side accusations of hypocrisy and vulgar politics and lawlessness. This in itself is not a cause for alarm. In a democracy, calm does not follow a storm. Certainly not in a sprawling, bustling, and diverse democracy. Indeed, that cacophony of voices you hear, dominated of course by the louder and shriller, is part of the necessary process in a living democracy of picking up the pieces and moving on.

The closest election in American history was due, argue James W. Caesar and Andrew E. Busch, in The Perfect Tie, an intelligent and lively analysis of the lengthy pre-election campaign, to the confluence of several extraordinary events. On the evening of November 7, 2000, "as the election returns for Congress showed the House and Senate moving toward parity between the two parties, the presidential race edged, eerily, toward an astonishing

outcome: two candidates separated in the national popular tally by a few hundred thousand votes, an electoral college result that without the state of Florida produced no majority, and a popular-vote margin in Florida of under 2000 ballots."

The crux of the problem was that the national election hung on a margin of victory in Florida --- fewer than 2000 votes out of approximately 6 million cast, a difference of less than .045% --- was considerably smaller than the margin of error in counting votes. And this was true whether votes were counted by machine --- as they were not once but twice, in accordance with Florida law, which requires an automatic machine recount in the event that the initial tabulation shows a margin of victory of less than .5% --- or counted by hand, as provided in the event of an error in the vote tabulation which could affect the outcome of the election.

In these circumstances, it was a piece of well chosen propaganda for the Gore forces to insist at every opportunity that all they were asking was for every vote to be counted. To this, team Bush was entitled to reply: that ballots were counted twice; that if a machine determined that no vote had been cast on an undamaged ballot which had improperly marked, this should not be considered an error in vote tabulation, and the hand counts were inherently subjective and open to partisan abuse. While these points do not dispose of Gore's legal challenges, they suggest that the big question in Florida was not, as the Democrats liked to put it, whether all votes would be counted. Nor was it enough to insist, as the Republicans preferred, that all ballots had been counted and recounted. The real question was: what was to count as a counted vote.

Drawing upon the combined reporting and writing of 40 members of the political staff of The Washington Post, David von Drehle, a veteran Post political writer, in his riveting book Deadlock, crafts a blow-by-blow chronicle of the fast-paced events and constantly shifting momentum and, by going behind the scenes, restores the humanity to the actors large and small, in many instances arousing sympathy for both sides. Adopting a different approach, the New York Times offers in 36 Days a compilation of its daily reporting and selected op-eds. Although the contemporaneous accounts in the book are already dated, they do serve as a record of the country's day-to-day struggle to keep up with, and make sense of, the many fronts on which the battle for Florida's electoral votes was waged.

The courts proved to be the decisive battle ground. Trailing by a hair after the initial tabulation, Gore promptly went to canvassing boards in select, heavily Democratic counties and, consistent with the protest provisions of the Florida election code, requested manual recounts. In response, Bush asked a federal court to halt on the grounds that performing them in select counties without clear standards for determining what constitutes a legal vote violated voting rights protected by the First Amendment and the Fourteenth Amendment. Subsequently, Gore supporters filed a variety of lawsuits, including challenges to the notorious butterfly ballot in Palm Beach County and, in Martin and Seminole counties, to the validity of thousands of overseas absentee ballots. However, it was Gore's own lawsuit, filed in Leon County Circuit Court under the contest provisions of the Florida election code,

challenging Florida's certified election results, then heard on appeal by the Florida supreme Court, which culminated on December 12 in the US Supreme Court's controversial ruling in Bush v. Gore.

In a 5-4 decision, notable for its unexpected arguments by the conservative majority and distressed dissents from the liberals, the Court held that the statewide manual recounts of undervotes (undamaged ballots on which machines detected no vote for President) ordered by the Florida Supreme Court suffered from a variety of infirmities --- absence of a uniform standard for determining the intention of the voter on similar ballots, arbitrary exclusion of overvotes (undamaged ballots on which machines detected a vote for more than one candidate for President), arbitrary inclusion of the results of partial or unfinished recounts, and use of untrained and unsupervised personnel to conduct the hand recount --- that taken together constituted a violation of the Equal Protection Clause of the 14th Amendment and must end. The majority opinion rejected the remedy proposed by Justices Breyer and Souter, who in dissent also found equal protection problems with the Florida recount, but would have ordered the Florida Supreme Court to fashion a recount that met the minimum requirements of Equal Protection. However, on the grounds that the Florida State Supreme Court had itself interpreted Florida law to require that controversies in Presidential elections be settled by December 12 Federal safe-harbor deadline --- according to Federal law, Congress was required to accept state decisions about presidential electors made by December 12 on the basis of laws in place before the election --- the majority concluded that any new recount, even one that met the minimum requirements of equal protection, would be inconsistent with Florida law, and remanded the case for further proceedings not inconsistent with its opinion.

In the end, Team Bush and Team Gore more or less performed as one might expect of able and ambitious partisans thrown into a showdown. It is another matter whether the courts, by design that part of the political system most removed from party politics, performed as one might expect. The conduct of the Florida State Supreme Court and the United States Supreme Court is explored from a variety of angles in Bush v. Gore, the valuable volume of leading court decisions and unusually varied commentaries edited by E.J. Dionne Jr. and William Kristol. Alas the book omits the Florida Supreme Court's crucial December 11 opinion where, in response to the US Supreme Court's December 4 decision vacating the Florida court's November 21 decision and demanding clarification of its reasoning, the Florida Supreme Court four times suggests that Florida law recognized December 12 as the deadline for resolving disputes in elections for the President.

In judging the courts big questions are at stake concerning the relation between state governments and the US Constitution. Did the Florida State Supreme Court, in twice overruling lower state courts, interpret the Florida election code, resolving ambiguities and filling in gaps? Or did it repudiate the scheme established by the legislature and, in violation of the federal constitution, create a new election code and establish an arbitrary and incomplete method for recounting votes? Was Bush v. Gore a genuinely complex case in

which compelling legal arguments could be formed on both sides of the question? Or did Justices, whether in the majority or in dissent, forsake their obligation to apply the law and act for act for primarily political reasons?

If one had to rely only on the initial barrage of vehement criticism by leading professors of constitutional law, one would never know that the answers to these questions turn on complicated matters of Florida and federal law. The consensus, which seemed to form overnight, combined a breathtakingly cynical interpretation of the US Supreme Court's ruling and breathtakingly uncritical acceptance of the Florida Supreme Court rulings reversed by the US Supreme Court. It held that the five-member majority --- Chief Justice Rehnquist, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas --- inflicted long-term damage on the Supreme Court's reputation and sullied the Bush presidency. Drive by the desire to put the conservative candidate in office, the majority abandoned their conservative judicial philosophy, which requires judicial restrain and deference to states and, on the basis of an opinion whose legal arguments were indefensible, brought the democratic process in Florida to a screeching halt.

Alas, the professional chorus of angry accusation has been as unreliable as it has been self-righteous. The professors have attributed to the more conservative members of the Court a cartoon version of federalism, according to which judicial deference means indifference to, or slavish acceptance of, state action, as if any member of the Court ever denied the supremacy of the Constitution and the federal government. The professors have routinely misstated the holding of the case, suggesting that the Court ended the Florida recount only because of the absence of uniform statewide standards for determining legal votes, when the Court explicitly found not one but four discrete equal-protection flaws which taken together, it held, violated the requirements of equal protection. The professors have simultaneously and inconsistently lambasted the US Supreme Court for failing to defer tot he Florida Supreme Court and have lambasted it for taking seriously the Florida Court's interpretation of Florida law, according to which December 12 was the deadline for selecting presidential electors. The professors have loudly deplored the Supreme Court's interference with the democratic process but have remained largely silent about the manner in which the Florida Supreme Court repeatedly swept aside broad legislative grants of discretion to democratically elected officials. The professors have proclaimed that Bush v. Gore damaged the legitimacy of both the Court and President Bush, a claim which, to the extent that it is intended as an empirical proposition, is not supported by the data. And the professors have leapt to attribute partisan motives to the Justices, as if the alacrity with which they have focused on the explanatory power of naked self-interest did not call attention to the professors' own partisan passions and predilections, the strong ties that many of them had to the Clinton administration, and the intertwining of their professional interests and ambitions with a Gore presidency.

It was a frequently heard Republican criticism of Al Gore that he waged an unprecedented challenge to reverse the results of a presidential election. In the aftermath of Bush v. Gore, a frequently heard Democratic criticism of the US Supreme Court was that the five-member

majority inserted itself into a presidential election in an unprecedented manner. But what is unprecedented is not inherently improper. Indeed, what, if not an unprecedented challenge, would justify unprecedented deeds and decisions. Election 2000 put American political institutions and office-holders to a rare and revealing test. It was in many ways a disagreeable and discordant sight. In some respects it was awesome to behold. It presented the spectacle of democracy surviving a storm.

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