The Continuing Controversy Over Bush v. Gore

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One year ago today the United States Supreme Court held in *Bush* v. *Gore* that the partial statewide manual recount of undervotes ordered by the Florida supreme court violated the Equal Protection Clause of the 14th Amendment. The Court also held that because the Florida court itself had held that under Florida law December 12 was the deadline in Florida for selecting presidential electors, no time was left to conduct a new, constitutionally adequate recount. The direct and foreseeable consequence of this decision was to secure George W. Bush's election as president.

Bush v. *Gore* set off a firestorm of criticism. For many Democrats, including prominent law professors, the fires still rage and payback time is now. Back in February, Yale's Bruce Ackerman counseled in *The American Prospect* that in retaliation for the Court's "constitutional coup" in *Bush* v. *Gore*, "when sitting justices retire or die, the Senate should refuse to confirm any nominations offered up by President Bush." The obstructionism, many Democratic loyalists today believe, should extend beyond the Supreme Court: Bush's nominees to the federal bench should also be delayed or denied, partly in punishment for Republican treatment of Clinton nominees, but also in significant measure in punishment for *Bush* v. *Gore*. The underlying rationale is that the appropriate response to the Court's flagrant political intervention in Election 2000 is a flagrantly political response.

Was *Bush* v. *Gore* a political decision? It depends on what you mean by political. According to the vulgar critique, championed most recklessly by Alan Dershowitz and Vincent Bugliosi but also espoused by leading professors of constitutional law such as Ackerman and New York University's Ronald Dworkin, naked political self-interest drove the Court's five conservatives to halt the recount ordered by the Florida supreme court. It was not, as the majority opinion stated, that in violation of well-settled Equal Protection jurisprudence the Florida recount in a variety of ways debased or diluted the weight of citizens' votes. Nor was it as the majority held that under Florida law as interpreted by the Florida supreme court (in response to a question posed to it by the U.S. Supreme Court) no time was left to conduct a constitutionally proper recount because December 12 was the outside deadline for Florida to choose its presidential electors. All that was window dressing. What really happened was that the five conservatives invoked far-fetched arguments they couldn't possibly believe in order to secure the presidency for a fellow conservative who could be counted upon to nominate fellow conservatives to the Supreme Court. This version of the criticism that *Bush* v. *Gore*

was a political decision has failed, and failed embarrassingly, because it has neglected to restate accurately the Court's holding, it has not grappled seriously with the majority's legal arguments, and it has ignored the highly peculiar features of the partial and selective Florida recount that the Supreme Court found unconstitutional.

More refined and plausible criticisms of *Bush* v. *Gore* as improperly political, rooted in the so-called political-question doctrine, have come to the fore. In his dissent, Justice Breyer sketched the lineaments of this line of criticism. First, "the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes." Second, in such "a highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself." Third, "however awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about." Echoing Breyer's criticism, Harvard's Laurence Tribe, who represented Vice President Gore in the controversy, argued recently in *The New Republic* that "despite the Twelfth Amendment's allocation of the relevant decision (which electors to count) to Congress, and despite the absence of reason to doubt that Congress could have and would have done its job without the Court's help," the Court intervened where it had no business. In so doing, "five of the justices displayed their disdain for the messy processes of democracy and their devotion to decorum and the appearance of order even in the inherently indecorous context of choosing a president." Conservatives too have found merit in such reasoning. In the October *Commentary*, Gary Rosen contended there is a "strong argument" that "under the Constitution and federal law, it was the duty of other, more democratically accountable institutions, to safeguard the integrity of the presidential election."

On reflection, however, even the strongest versions of the critique from political considerations of the Court's intervention prove at best inconclusive. Consider first Justice Breyer's criticism that the Court should have kept clear of the Florida controversy for structural reasons: The Court arrogated to itself powers of another branch because the decision of how to count electoral votes was committed by the Constitution to Congress. In fact, the Twelfth Amendment, which authorizes Congress to count electoral votes, and the Electoral Count Act of 1887 (Title III of the U.S. Code passed in the aftermath of the Hayes-Tilden controversy), which provides procedures for dealing with disputes about contested electoral votes, may suggest that Congress has *final* authority for resolving disputes about the validity of electoral votes. But nothing in the Constitution or federal law gives Congress *exclusive*authority for resolving all disputes that may arise in the process whereby states select presidential electors. Does anybody doubt, for example, that were a case to arise involving a state supreme court that ordered a statewide recount that excluded black voters or white voters or rural voters or city voters, the Supreme Court would be justified in finding, indeed would be duty bound to declare, a violation of equal protection?

Justice Breyer also argued that the decision in *Bush* v. *Gore* was improperly political in a prudential sense: The Court ought not to have gotten involved because whatever decision it reached would have exposed it to bitter political criticism, squandering its accumulated political capital and diminishing its future effectiveness. In fact, the Supreme Court declines to hear the vast majority of cases that it is asked to review, and inevitably political considerations — What does the nation need? What can the people bear? What can a court, with its institutional strengths and weaknesses, hope to accomplish? — influence the justices' decisions about which cases to decide. Once they choose to hear a case, the justices may bring the same practical considerations to bear in reaching a decision. However, calculating the consequences of a legal decision on the Court's political capital or reputation is a very imprecise science. Contrary to the anguished warnings and dire predictions from dissenting justices and prominent law professors, the data suggest that *Bush* v. *Gore* has not caused the Court to lose legitimacy. Six months after the decision, the June 2001 Gallup Poll showed a larger fraction of the population giving the Court a high rating than in June 2000, six months before the decision.

Finally, Justice Breyer charged that *Bush* v. *Gore* was wrongly political in a functional sense: The Supreme Court was ill equipped to gather the pertinent information and poorly situated to articulate the general principles that a properly legal resolution of the controversy required. The trouble with this view, which has been embraced by many in the legal academy, is that it ignores the extent to which virtually all of the important controversies in Florida, and certainly those which the Supreme Court reviewed, had from the early goings been transformed into legal disputes. Put aside the lawsuits — such as the challenge to the notorious butterfly ballot in Palm Beach County and the complaint filed by Democratic loyalists in Martin and Seminole Counties challenging overseas absentee ballots — that never reached the U.S. Supreme Court. Both cases that did stemmed from lawsuits filed by Vice President Gore that worked their way through the Florida judiciary. During the protest phase of the Florida controversy, the canvassing boards in Palm Beach and Volusia County, along with the Florida Democratic party and Al Gore, filed a lawsuit against Secretary of State Katherine Harris, challenging the seven-day statutory deadline she sought to impose for the conclusion of manual recounts. In the contest phase, Gore filed a lawsuit challenging Secretary of State Harris's official certification of Bush on November 26 as the winner of Florida's 25 electoral votes. In both, Gore lost the initial judgment. And in both, the Florida supreme court, on appeal, reversed the trial court and ruled in Gore's favor. In reviewing these decisions, the U.S. Supreme Court was asked to consider whether the Florida court's judgments were consistent with federal law and the Constitution. And that is not in the first place a political question. It is a legal question. Thus it is highly misleading for Justice Breyer to contend that Congress was better suited to resolve the controversy because it knows the people's will better and elections are about the people's will. In fact, elections are about expressing the people's will through legally established formal procedures, and the unelected

justices on the Court, by virtue of their training and institutional role, are better suited and better positioned than the elected lawmakers in Congress to say accurately what the law is and determine reliably when it has been violated.

To argue that *Bush* v. *Gore* was not a political decision is not to deny that it was a decision with many political dimensions: The Court intervened decisively in a national election; judgments about the role assigned to the Court in our constitutional system likely and with propriety influenced the justices' decision whether to hear the case and how to rule; given that the next president would appoint their successors or colleagues, all nine justices had an awkward interest in the outcome of the controversy; and in the way of hard cases, a fair examination of the Constitution, well-settled law, and the facts invited the Justices to give room in their deliberations to the political consequences of judicial intervention and the institutional capacity of the Court to decide the issues presented to them in a principled fashion.

This recognition of the political dimensions of *Bush* v. *Gore* does not imply that members of the majority in *Bush* v. *Gore* repudiated law and engaged in politics to advance their partisan preferences. Nor does it suggest that Justice Breyer's own puzzling position that the Court should have stayed out of the controversy even as he agreed in his dissenting opinion that the Florida court had ordered a constitutionally infirm recount was politically driven.

By and large our system of separated but also "connected and blended" powers leaves political decisions to the political branches and legal decisions to the judicial branch, while recognizing that there are inescapably legal dimensions to politics and political dimensions to the law. This is an important point that the critics have relentlessly obscured. One of the reasons that *Bush* v. *Gore* was a hard case is that the Court faced an essentially legal question — whether a lower *court* had complied with federal law and the Constitution — that was closely bound up with political questions about the allocation of powers between Congress and the Court, about the prudence of judicial intervention, and about the effectiveness and equity of judicial remedies.