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Mr. President

A Second Bush Administration

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WHAT THE COURT HAS WROUGHT

John J. Dilulio Jr. • Michael S. Greve
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An Act of Courage

Under Rehnquist's leadership, the Court did the right thing. BY NELSON LUND

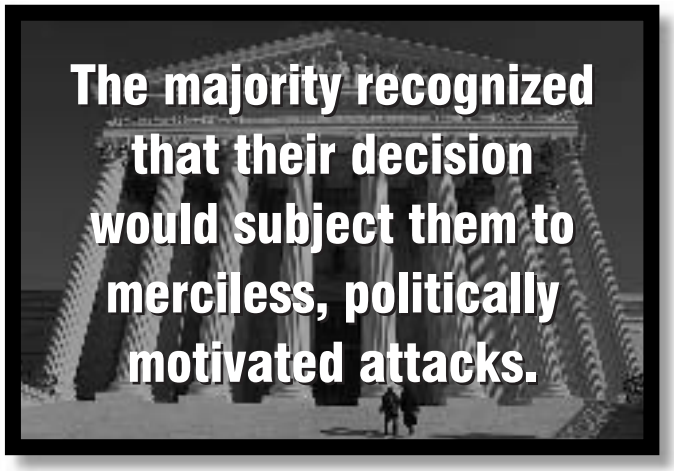
GENERATIONS of law students have learned that the U.S. Supreme Court should avoid entanglement in "political" cases in order to preserve its reputation for impartiality. Unless, of course, such cases involve certain selectively chosen constitutional principles, which invariably call for the uninhibited expenditure of this carefully husbanded political capital.

Some of the more conservative justices have bought into this excessive and asymmetrical concern with protecting the Court's reputation. The decision in *Bush* v. *Gore*, however, suggests that a majority are now willing to enforce the law more evenhandedly, even when that very evenhandedness will subject the Court to strident political attacks.

The High Court's decision at first glance looks important primarily for its effect on this one presidential contest. The holding is deliberately narrow, and seems unlikely to have significant effects on future elections. The broader significance lies in a passage near the end of the majority opinion, where the justices stress their sensitivity to the limits of judicial authority and the wisdom of leaving the selection of the president to the political sphere. Despite these considerations, they say, it sometimes "becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."

The Court could easily have avoided this responsibility, and that is what many observers expected. These expectations had a real foundation. In 1992, for example, the Court reaffirmed the judicially created right to abortion, even while strongly hinting that some of those who voted to do so had serious misgivings. One important reason they gave for their decision was a fear that overruling *Roe* v. *Wade* would be *perceived* as a capitulation to political pressure.

Bush v. *Gore* rejects this beguiling logic. The majority, including two justices who had joined the 1992 abortion opinion, recognized that their decision would subject them to merciless, politically motivated attacks. But rather than take the easy way out, they courageously accepted their "unsought responsibility" to require that the Florida court comply with the Constitution.



The significance of this act of courage comes into focus when we consider the strongest argument offered by the dissenters. Justice Breyer, who admitted that the Florida court's decision was arbitrary and unconstitutional, suggested that the Twelfth Amendment assigns Congress (rather than the federal courts) the responsibility for correcting such problems. This is a plausible interpretation of the Constitution, especially if one also concludes (as Justice Breyer did not) that the Constitution authorized the Florida legislature to override the Florida court's attempted retroactive rewrite of the state election statute.

But Justice Breyer's position does not rest on a disinterested interpretation of the Constitution. Rather, it is based on the tired theory that "the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself." Justice Breyer thought the risk not worth running because the majority's decision does not "vindicate a fundamental constitutional principle."

What would it mean to "vindicate a fundamental constitutional principle"? As it happens, we know what Justice Breyer means. Just a few months ago, he wrote the majority opinion in a 5-4 case that split the Court much more bitterly than this one. In that case, moreover, Justice Breyer adopted a far-fetched interpretation of a state statute that contradicted the state's interpretation of its own law. The result was the invalidation of a state statute that had been drafted specifically to conform with Supreme Court precedent. And what fundamental constitutional principle was vindicated? The right to what is euphemistically called "partial-birth abortion." Now there's something worth fighting for.

If the Twelfth Amendment argument is the best that the *Bush* v. *Gore* dissenters had to offer, the worst was Justice Stevens's claim that Governor Bush irresponsibly impugned the impartiality of the Florida judges by appealing their ruling. Justice Stevens also noted that the real loser in this year's election will be the nation's "confidence in the judge as an impartial guardian of the rule of law." It is

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certainly true that almost no one will believe that *all* the judges who ruled in the election cases were impartial, or devoted to the rule of law. Justice Stevens, however, was entirely wrong to place the blame for that fact on his colleagues and on Governor Bush.

The blame rests squarely on Florida's supreme court, which violated the Constitution, and on the High Court dissenters, who would have let the Florida judges get away with it. "Impartial guardians of the rule of law" are willing to enforce the law even when they know they will be excoriated for doing so. Which is why the majority decision in *Bush* v. *Gore* deserves a spirited defense. ♦

From *U.S.* v. *Nixon* to *Bush* v. *Gore*

Political problems deserve political solutions.

BY ROBERT F. NAGEL

NOW THAT THE U.S. Supreme Court has effectively stopped the Florida recount, it is natural to believe that the justices have once again saved us from political and legal disaster. There is no doubt that the Florida Supreme Court's stunning decision to order manual recounts across Florida created the specter, as Chief Justice Wells said in dissent, of chaos. What the Florida decision did was demonstrate how legal argumentation in America has metastasized. When even the plainest meaning is subject to the relentless pressure exerted by all those urgent words streaming from the mouths of lawyers, our institutions are exposed to something close to intellectual anarchy.

To get a clear view of the nature of that chaos, recall one detail from the Florida court's work. In its first decision, the court said that Florida secretary of state Katherine Harris had abused her discretion by enforcing the seven-day statutory deadline for certifying the vote, and it instructed her to observe a twelve-day deadline. In its second decision, a four-justice majority of the same court concluded that the secretary had subsequently abused her discretion by enforcing the court's *own* twelve-day deadline.

If words like "seven" and "twelve" cannot hold, nothing can hold, and uncertainty stretches away to the horizon. Touchingly oblivious to the anarchical implications of its own opinion, the Florida court simply assumed that the manual recount could proceed in an orderly and timely fashion. In fact, of course, everything was thrown up in the air. Before the U.S. Supreme Court stayed the recount, lawyers were arguing before a trial judge about the procedures for conducting the recounts. Those determinations might have been appealed. The recounted vote itself might have been challenged, and that determination might have been appealed. The Florida legislature could have nullified the recount by statute, but that statute could have led to a lawsuit and an appeal. In counting the electoral votes, Congress eventually would have resolved the uncertainty, but if words do not hold, the congressional count could be questioned in court and any decision appealed, and so on until it is time for another presidential election.

It is understandable, then, that many now feel relief that the U.S. Supreme Court has reestablished order by permanently halting the recount. But there is irony, and eventually perhaps futility, in using the lawyers who sit on the Supreme Court to stabilize what lawyers and lower courts have destabilized. After all, in recent decades the Court itself has done much to establish the very judicial role that the four Florida justices embraced so heedlessly. It announced a constitutional right to abortion when not a word can be found in the Constitution on that subject. It converted into an authorization for racial preferences a federal statute whose plain words and ascertainable purpose prohibited racial discrimination. Through "interpretation," it grafted a complicated sexual harassment code onto a federal law that was silent on that specific subject. Indeed, the mod-

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