

SUPREME INJUSTICE

**How the High Court
Hijacked Election 2000**

Alan M. Dershowitz

OXFORD
UNIVERSITY PRESS
2001

OXFORD
UNIVERSITY PRESS

Oxford New York

Athens Auckland Bangkok Bogotá Buenos Aires

Cape Town Chennai Dar es Salaam Delhi Florence Hong Kong Istanbul

Karachi Kolkata Kuala Lumpur Madrid Melbourne Mexico City Mumbai

Nairobi Paris São Paulo Shanghai Singapore Taipei Tokyo Toronto Warsaw

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Published by Oxford University Press, Inc.

198 Madison Avenue, New York, New York 10016

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Library of Congress Cataloging-in-Publication Data

Dershowitz, Alan M.

Supreme injustice: how the high court hijacked
election 2000 / Alan M. Dershowitz.

p. cm. Includes bibliographical references and index.

ISBN 0-19-514827-4

1. Bush, George W. (George Walker), 1946—Trials, litigation, etc.
2. Gore, Albert, 1948—Trials, litigation, etc.
3. Contested elections—United States.
4. Contested elections—Florida.
5. Presidents—United States—Election—2000. I. Title.

KF5074.2.D47 2001 324.973'0929—dc21 2001032193

Auden, W.H. "Law Like Love," from *W.H. Auden: Collected Poems* by W.H. Auden, ed. by Edward Mendelson. Copyright 1976, renewed in 1991, by the estate of W.H. Auden. Reprinted by permission of Random House, Inc.

Butterfly ballot on pp. 23, 24: Photograph by Greg Lovett; courtesy *The Palm Beach Post*.

Cartoon on p. 23: *Official Florida Presidential Ballot*, courtesy InfoImagination.

Book designed by Susan Day.

Indexed by Peter Brigaitis and Marie Nuchols.

Typeset by Rainsford Type.

Printed by Quebecor Printing Book Group.

9 8 7 6 5 4 3 2 1

Printed in the United States of America
on acid-free paper

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**This book is lovingly dedicated to the memory
of my late father-in-law, Mordecai (Mortie) Cohen,
to whom justice and compassion came naturally.**

And

**to my mother-in-law, Dorothy (Dutch) Cohen,
who inspires by her example and caring insights.**

Others say, Law is our Fate;
Others say, Law is our State;
Others say, others say
Law is no more,
Law has gone away.

—From "*Law Like Love*," by W. H. Auden (1939)

Acknowledgments

This book could not have been produced so quickly without the much-appreciated assistance of so many people. First, my primary assistant, Howard Anglin, coordinated the extensive research. Though the task was daunting, Howard was always pleasant and enthusiastic. He was ably assisted by David Yocis, Daniel Schwartz, Lee Fink, and especially John Orsini, on whom I can always count.

Maura Kelley typed much of this manuscript, as she has so many others over the years, and her 24/7 availability is sincerely appreciated. Manny Lim coordinated the typing and retyping effort and kept my office going during the turmoil of finishing this project. Thanks and much appreciation.

My appreciation to the dean, faculty, and staff of New York University School of Law for hosting me during my sabbati-

cal year, and especially to Professors Richard Pildes, Jim Jacobs, and Yochai Binkler for sharing insights with me about the election cases.

My greatest debt is to my family, especially my wife, Carolyn, who read my drafts and made them better, and my daughter, Ella, who gave me some great ideas. My appreciation to them also for allowing me to turn our small apartment into a library, archive, and office during the months I labored over this book. My brother, Nathan, reviewed the drafts and helped improve them. My son, Elon, as usual, coached me on how to make my ideas clearer and more accessible. Other family members encouraged, kibitzed, and tolerated my *mishagas*.

At Oxford University Press, I thank copyeditor Sue Warga for an excellent job of making the book clearer and more readable; editorial director Peter Ginna for very helpful comments on several drafts of the manuscript and for coming up with the book's subtitle; editorial assistant Farahnaz Maroof for a tremendous amount of all-around assistance, including useful comments on early drafts; production editor Helen Mules for carefully and cheerfully shepherding the manuscript through production; managing editor Ruth Mannes for keeping us to a very tight schedule with aplomb; publicists Sarah Hemphill and Sara Leopold for setting up a wonderful group of events for the book; and Tom Willshire and Vera Plummer for getting so many copies into the bookstores.

A special word of gratitude to Tim Bartlett, who came to me with the idea for this book and guided it from beginning to end. All of his suggestions improved the book. A final word of appreciation to my friend Floyd Abrams, for his input on the title.

Contents

Acknowledgments	xi
Introduction	3
1. Five Justices Decide the Election	15
2. The Final Decision	55
3. Would the Majority Have Stopped the Hand Count if Gore Had Been Ahead?	95
4. The Inconsistency of the Majority Justices with Their Previously Expressed Views	121
5. The Importance of <i>Bush v. Gore</i> to All Americans	173
Notes	207
Index	261

SUPREME INJUSTICE

Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear.

*—Justice John Paul Stevens in his dissenting opinion
in Bush v. Gore*

Introduction

The five justices who ended Election 2000 by stopping the Florida hand recount have damaged the credibility of the U.S. Supreme Court, and their lawless decision in *Bush v. Gore* promises to have a more enduring impact on Americans than the outcome of the election itself. The nation has accepted the election of George W. Bush, as it must under the rule of law. It will have an opportunity to reassess this result in 2004. But the unprecedented decision of the five justices to substitute their political judgment for that of the people threatens to undermine the moral authority of the high court for generations to come.

The Supreme Court, which consists of only nine relatively unknown justices with small staffs, has wielded an enormous influence on the history of our nation. It is the most powerful court in the world—the envy of judges in every other country. Presidents accept its rulings, even when disagreeing. The public

eventually embraces much of what the justices say in their judgments. Legislatures rarely seek to overrule their decisions. Though only one part of our delicate system of checks and balances, the high court speaks the final word on many of the most divisive and important issues of the day.* This enormous power has always been viewed as legitimate because of the unique status of the justices as transcending partisan politics, eschewing personal advantage and pronouncing the enduring constitutional values of our nation. We defer to them because we respect them.

Now in one fell swoop, five partisan judges have caused many Americans to question each of the assumptions undergirding the special status accorded these nine robed human beings. *Bush v. Gore* showed them to be little difference from ordinary politicians. Their votes reflected not any enduring constitutional values rooted in the precedents of the ages, but rather the partisan quest for immediate political victory. In so voting, they shamed themselves and the Court on which they serve, and they defiled their places in history.

Because the Supreme Court lacks the legitimacy and accountability that come with election and the power that derives from the sword and the purse, its authority rests on public acceptance of its status as a nonpartisan arbiter of the law. This moral authority is essential to its continued effectiveness as an important guarantor of our constitutional liberties. Unless steps are taken to mitigate the damage inflicted on the Court by these five justices, the balance struck by our Constitution between popular democracy and judicial oligarchy will remain askew.

*The awesome power of the United States Supreme Court to declare unconstitutional the actions of the other branches of government is nowhere explicitly granted by the Constitution itself. It was asserted by the justices in *Marbury v. Madison* (1803).

Preserving this delicate balance is essential to our liberties and to our system of checks and balances. That is why I have written a book about the Supreme Court decision rather than about the election. Here I offer a critical assessment of the decision itself as well as the motivations of the justices who rendered it. I provide both direct and circumstantial evidence that some of them were motivated by partisan advantage, while others were motivated by expectation of personal gain. I explore the dangerous implications of the decision in *Bush v. Gore* for all Americans, regardless of party affiliation or ideology, especially since the Supreme Court—prior to this case—was among the last institutions whose integrity remained above reproach. Finally, I propose steps that can be taken to avoid any repetition of this supreme injustice.

The majority ruling in *Bush v. Gore* marked a number of significant firsts. Never before in American history has a presidential election been decided by the Supreme Court.¹ Never before in American history have so many law professors, historians, political scientists, Supreme Court litigators, journalists who cover the high court, and other experts—at all points along the political spectrum—been in agreement that the majority decision of the Court was not only “bad constitutional law”² but “lawless,”³ “illegitimate,”⁴ “unprincipled,” “partisan,”⁵ “fraudulent,” “disingenuous,” and motivated by improper considerations.⁶ In addition to the remarkable expert consensus regarding this case, there is also widespread popular outrage at what the high court did. Though the level of this outrage tends to mirror party affiliation, it is safe to say that the degree of confusion over what actually happened is not limited to one party. There are millions of Americans who do not strongly identify with the Democratic Party—indeed, even some who voted for George W. Bush—but who cannot understand how five justices could determine the outcome of a presidential election. Moreover, the furor within the Supreme Court itself—among some

justices and law clerks—is unprecedented in the annals of this usually harmonious institution.

In light of these factors, many Americans who believed that the Court was an institution that could be trusted to remain above partisan politics are now experiencing a genuine loss of confidence in the impartiality of the judicial branch of our government. This widespread loss of confidence, reaching to the pinnacle of our judiciary, should be the concern of all Americans, because the Supreme Court has played such a critical role in the history of our nation. Without its moral authority, we would be a less tolerant, less vibrant, and less free democracy. The high court, throughout its long and distinguished history, has helped us—not always perfectly or swiftly—through crises of institutional racism, religious intolerance, McCarthyism, systematic malapportionment, presidents who deemed themselves above the law, and governors who defied the Constitution. The Court stepped in when the other branches of government were unwilling or unable to enforce the constitutional rights of unpopular minorities. The justices were always at their greatest when they could act unanimously and on principles that could be easily justified and widely accepted. When they act in an unprincipled and partisan manner—as they did in *Bush v. Gore*—they risk losing respect and frittering away the moral capital accumulated by their predecessors over generations. That is what Justice Stephen Breyer was referring to when he wrote in his dissent in *Bush v. Gore*:

[I]n this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years. . . . It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. . . . [We] risk a self-inflicted

wound—a wound that may harm not just the Court, but the Nation.

That is why all Americans must care about this case and must derive the appropriate lessons from it. The Supreme Court's moral capital will certainly again be needed in our future, and so it is a tragedy that it has been dissipated for short-term partisan gain in a case in which the Supreme Court had no proper role.

The Constitution, after all, places the power to elect our president in every institution of government but the judiciary. The people vote for electors.⁷ The electors vote for the president. If this process produces no clear winner, then the Constitution (and the laws enacted pursuant to it) assigns varying roles to the Senate, the House of Representatives, the state legislatures, and even the governors.⁸ No role, however, is explicitly given to the Supreme Court. James Madison, in recording his own views of the constitutional debate as to how the president should be elected, dismissed selection by the appointed judiciary as “out of the question.”⁹

Indeed, the justices themselves seemed to initially recognize the absence of a judicial role when they unanimously remanded *Bush v. Gore* back to the Florida Supreme Court for that court to explain whether it had improperly changed the election law as enacted by the Florida legislature. The high court suggested that if the state supreme court had changed duly enacted state legislation, then it may have violated Article II of the Constitution, which vests in state legislatures the authority to select the manner by which electors should be chosen. It seems ironic that the U.S. Supreme Court would take upon itself a judicial function nowhere specified in the Constitution—effectively ending a presidential election—while seeming to deny to the Florida Supreme Court its traditional role in interpreting and reconciling conflicting statutes.