

# Symposium - Litigating the Presidency: the Election 2000 Decision and Its Ramifications for the Supreme Court - From the Editors

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## Symposium

### LITIGATING THE PRESIDENCY: THE ELECTION 2000 DECISION AND ITS RAMIFICATIONS FOR THE SUPREME COURT

FROM THE EDITORS

The world has changed significantly since the 2000 election. Specifically, the events of September 11, 2001 have altered the global political climate and further defined the role that America must play on the international stage. The concerns arising in the wake of those tragic events have all but consumed the American mind, crowding out domestic concerns from the public debate.

The resolution of the 2000 election and the way in which that resolution was reached remain both relevant and important at a time when the United States needs to maintain the legitimacy of its government so that it can lead the rest of the world. Not only is it important that our President command legitimacy when representing American interests to the international community, but it is essential that in times of crisis we as Americans can unite behind our elected leaders. To create national unity and international legitimacy, it is not as important who sits in the Oval Office as it is that he was the product of the democratic process.

The 2000 election astonished commentators, academics, legal practitioners, and ordinary citizens alike by exposing flaws in our system of electing the President. The election debacle sparked a national debate on the meaning of the electoral process and the role of the Supreme Court in American politics. Regardless of who won, the election was predetermined to have a lasting effect on the way we view presidential electoral politics and Supreme Court decision-making.

This symposium looks at the 2000 election with three goals: first, explaining how precedent and current events prepared the way for the Supreme Court to decide the presidential election; second, how the Justices reached their decisions in *Bush v. Gore*, and finally, what that decision means for the future of American presidential politics and for the future public perception of the Supreme Court.

Ann Althouse examines the problems of judicial orthodoxy in both the United States Supreme Court and the Florida Supreme Court at each stage of the Bush-Gore litigation. She argues that the United States Supreme Court's initial remand was unnecessary and that it gave the Florida Supreme Court an opportunity to insulate itself from further review. Examining the second stage of the litigation, Professor Althouse argues that the Florida Supreme Court's lack of deference to other state institutions undermines arguments that the United States Supreme Court's later scrutiny of the Florida Supreme Court violated tenets of judicial restraint and federalism. She also argues that the stay granted by the United States Supreme Court was not a political power grab. Finally, Professor Althouse examines the final disposition of the litigation in the United States Supreme Court, concentrating on the question of whether the United States Supreme Court usurped the Florida Supreme Court's authority over state law.

Jonathan Entin encourages us to disregard whether we agree with the outcome of the Supreme Court's decision in *Bush v. Gore* and focus instead on the reasoning underlying the decision. He demonstrates that there is a way to view the decision as within the bounds of reasonable judicial interpretation—as a sort of “rough justice” in the face of an imminent constitutional crisis. Professor Entin discusses the equal protection arguments at issue in *Bush v. Gore* and shines a light on the historical ambivalence of the American legal system towards universal suffrage. He examines the Supreme Court's controversial decision to end the vote recount in light of voting rights precedent and concludes that the issues raised in *Bush v. Gore* had never been addressed before. Therefore, this Court's decision had to break new ground to avoid a national crisis. Professor Entin concludes that a conscientious judge, reasoning in good faith, could have reached the same conclusion as the *Bush* majority.

Sherrilyn Ifill answers the question: do appearances matter? She addresses head-on the allegations that the Supreme Court's role in ending the presidential election dispute was misconceived and inappropriate. Three of the five concurring Justices were alleged to have an interest in the outcome of the litigation such that there were tentative grounds for each of them to recuse themselves from hearing the

case. Professor Ifill argues that these Justices should have given more serious consideration to the option of recusal to avoid the appearance of impartiality. When recusal is considered by Supreme Court Justices their decisions to recuse themselves are shrouded in secrecy and, despite the guidance of 28 U.S.C. §455(a), provide no clear guidelines to practitioners before that Court as to when recusal may be appropriate. Ultimately, Professor Ifill concludes that Supreme Court Justices are not in the best position to make sound judgments on whether to recuse themselves from hearing cases in which they are perceived to have an interest. To remedy this situation, she urges the Court to consider adopting formal, publicly disclosed procedures to govern recusals.

Professor Jamin Raskin argues that the decision in *Bush v. Gore* is indefensible under the current standing, political question, and equal protection doctrines. Unlike other critics of the decision, however, Professor Raskin does not accuse the majority of acting in bad faith. Rather, he argues that the decision was the result of the majority's conservative feelings about the Constitution and American society. Professor Raskin contends that the majority was free to decide the case based on their conservative feelings because the electoral college is fundamentally undemocratic and because there is no constitutional right to vote. As a result, he suggests that the American people amend the Constitution to guarantee the right to vote and establish direct popular election of the President.

Michael Wells and Jeffrey Netter find reasoning to support the ruling in Chief Justice Rehnquist's emphasis on Article II. Professors Wells and Netter argue that Article II should be viewed as a guarantee that election rules are put into place before elections occur to minimize problems of self-dealing by partisan officials. The decision in *Bush v. Gore* is best defended, according to these authors, if there is a good reason to read Article II as imposing a special constitutional constraint on a state court's method of statutory interpretation in presidential election cases. Such a strong case exists in the theory of public choice, which brings economic principles to bear on issues of constitutional design. It is through an examination of public choice theory that Professor Wells and Professor Netter defend the outcome of *Bush v. Gore*.