The Supreme Court Loses The Election

Eben Moglen*

December 28, 2000

George W. Bush is choosing his cabinet, and the rest of America's political class is talking up legitimacy and unity as hard as they can, but it is not they who have suffered the most harm from the electoral catastrophe. By mid-spring their game of politics will be going on just as before, though perhaps more nastily. But for the Supreme Court—which has been terribly disserved by the Justices who should protect and defend it—the damage will last long. Rarely in its history has the Supreme Court put itself so flagrantly in the wrong, not just with partisans who disagree with the substance of its decision, but with thoughtful lawyers regardless of partisan affiliation, and with the American people as a whole.

Among constitutional lawyers, one school of thought emphasizes the idea of "neutral principles" and "judicial restraint." For them, constitutional law should be above politics, and federal judges, aware that they are not elected, should refrain from making decisions that would somehow substitute their mere political preferences for those of elected legislators and officials.

Most such lawyers and scholars are politically conservative. It is their heroes on the Supreme Court who have just decided the outcome of the presidential election by using a principle so failing in neutrality that the Court's opinion announces that it won't apply at all in future cases. So for conservatives the Court's decision is abhorrent as to means, no matter how acceptable as to ends. In general, commentators from this quarter have been able to do no better in defense of the Court than to say that these Justices behaved no worse than villainous liberal activists of yesteryear.

The other primary point of view among American lawyers and law professors is usually known as realism. For realists, there can be no theoretical

*Eben Moglen is professor of law and legal history at Columbia University Law School. You can read more of his writing at http://moglen.law.columbia.edu.

separation between law and politics: when judges decide cases they cannot decide them as though the world of social facts around them did not exist. For realists, any Supreme Court decision affecting the outcome of a presidential election is inherently political.

But for realists, judicial political behavior is different from legislative or executive behavior, because judges have a responsibility to explain what they do in ways that people can understand. Congress can, and does, pass statutes incoherently representing the balance of interests represented by the collection of legalized bribes we call "campaign contributions." The President can and should engage in political calcuations about whether to sign or veto legislation, most of which he or she doesn't ever explain to the public. But when the Supreme Court makes a decision that affects the fate of the nation it should give reasons that fit the outcome into the larger context of past decisions, and which are subject to the testing process of application in future situations.

Realists are therefore appalled that the Supreme Court's inevitable politics so lacked integrity. The Court's primary opinion has no author, as though Justices Sandra Day O'Connor and Anthony Kennedy (who provided the votes necessary to the decision) did not wish to speak on behalf of the outcome personally. And indeed no judge in our entire legal tradition, stretching back more than a thousand years, would be proud of writing an opinion that announces that its own principle of decision can never be used in future cases, confessing intellectual bankruptcy on its face. A decision that self-confessedly cannot be part of the continuing context of our law is, as one past Justice wrote, "a ticket good for this day and train only."

The Justices released their opinions at 10pm, without a public sitting of the Court, which is unprecedented in a matter of such overwhelming public importance. The violation of established protocol bespoke no doubt the pressures on the Justices for immediate resolution, but it also symbolized the shamefulness of a *per curiam* decision for which no member of the Court would be personally responsible. History will attribute the authorship of this opinion, when the Justices' papers are made available, but the author or authors have chosen to deny to history the assent of their own voice. Silence speaks volumes.

It's one thing for a President of the United States to be obviously devious: Lyndon Johnson, Richard Nixon, and William Jefferson Clinton personally survived, if only barely, their too evident manipulations. But when the Supreme Court forfeits its trustworthiness the damage is far more severe, because it is truly the institution that is punished. Americans sullenly angry about what has happened, distrustful of the premature and insincere effusion of "it's over, everything is fine" emanating from the chattering classes, aren't mad at Justice O'Connor or Justice Kennedy. They're angry because they've been betrayed by the Supreme Court.

For the Justices have not merely damaged the Court among lawyers. The Supreme Court's politics, in addition to lacking integrity, were also foolish. To stop the counting of Florida's ballots, and then to offer unpersuasive reasons why the counting could not constitutionally continue, permanently places the Court in opposition to truth. The ballots will now of course be reviewed by private parties, who will publicize them forever. That process will almost certainly reveal, to neutral contemporary observers as well as to history, that in addition to receiving the majority of the popular vote Mr Gore would also have prevailed in the Electoral College, if the counting hadn't been stopped.

Mr Bush, who will be seen by history as an accidental president, will make his own place for better or worse by his conduct in the office to which the Supreme Court has called him. But the Court itself gains nothing if he succeeds: it is forever limited in the sight of history to the role it played in obscuring the facts for long enough to secure his inauguration. For this it is now known by citizens who can see the fault clearly in the light of day, and who had every right to expect better. History will judge remorselessly those who inflicted this harm on the institution they should have better served. Now the Court faces a society far less trusting, more deeply skeptical, shorter of constitutional faith.