

THIRTEEN
Legitimacy and the 2000 Election
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On December 12, 2000, the Supreme Court of the United States illegally stopped the presidential election and handed the presidency to George W. Bush.¹ Much of the anger about the 2000 election has been directed at the five conservatives on the Supreme Court. But it is important to remember that the Supreme Court would not have had the opportunity to intervene if there had not already been an equally serious problem of legitimacy on election day-- massive black disenfranchisement in the crucial state of Florida. There is already enough evidence to suggest that Florida State officials violated the Federal Voting Rights Act and, in the process, denied Al Gore the presidency.²

Together, the combination of black disenfranchisement in Florida and the Supreme Court's decision in *Bush v. Gore* seriously undermines the legitimacy of the 2000 election. Nevertheless, on January 20, 2001, George W. Bush was sworn into office as the forty-third president of the United States by Chief Justice William Rehnquist-- who, not coincidentally, helped deliver the presidency to Bush-- and Bush began to govern as the nation's president for a full four year term. Then, only eight months into the new administration, on September 11, 2001, the United States was attacked. Terrorists bombed the Pentagon in Washington and destroyed the World Trade Center in New York. Thousands of people were killed. The country quickly rallied around its new president, who promised to bring those responsible to justice and to wage unremitting war against international terrorism. The crisis brought on by the events of September 11, and the need for national unity at this bleak hour, might seem to settle the question of the election's legitimacy once and for all. The nation must look to its president to lead it through the difficult times that lay ahead. Whether or not his ascension to power was entirely above board, George W. Bush is, quite literally, the only president that we have.

But events are far more complicated. Whether people like it or not, the politics of the next four years and perhaps for years to come-- will be shaped in subtle ways by doubts about the legitimacy of the 2000 election. There has been, and will continue to be, an ongoing dispute over the meaning of these events and the legitimacy of the Bush presidency. That dispute, in turn, will be shaped by how well the political parties handle the crises, difficulties, and opportunities of the next several years. By themselves the terrorist attacks do not decide the eventual verdict-- they merely help define the terrain in which the dispute over legitimacy will be played out. The election of 2000 is over. But the struggle over its meaning will continue for a long time to come.

Presidents and Parliaments

¹This claim is defended in Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L. J. 1407 (2001).

²See the report of the United States Civil Rights Commission, <<http://www.usccr.gov/vote2000/stdraft1/main.htm>> (last visited on July 24, 2001).

The American Constitution deals with claims of illegitimacy differently than many other democratic systems. If the 2000 election had occurred in a parliamentary democracy, a prime minister who had been elected with razor thin margins under a cloud of suspicion would face an endless series of votes of no confidence, until new elections were called. Those elections would settle the question of legitimacy. But the U.S. Constitution has no provision for dissolving the government and holding new elections to determine who has the right to rule. It has a fixed constitutional calendar. Presidents are elected once every four years. And the Clinton impeachment has demonstrated, if any demonstration were necessary, that a sitting president is almost impossible to remove. Impeachment and removal simply does not play the same role in our system as a vote of no confidence. Once an American president is installed in the Oval Office, even under questionable circumstances, he or she will control the levers of executive power for four years absent death or disability.

As a result, the debate over the meaning and the legitimacy of the election of 2000 will be played out through the only devices available in the American constitutional system— the separation of legislative and executive power and the fixed constitutional calendar, which provides for elections in 2002 and 2004. In a parliamentary system, the prime minister is thrown out of power along with his party. But in the American system of separated powers, divided government— a president of one party and a Congress controlled by another— is not only possible but commonplace. Through varying the president's support in Congress, We the People can send signals of relative confidence or lack of confidence in the president and his party. For example, in 1994 Americans expressed lack of confidence in Clinton's presidency, throwing both houses of Congress to the Republicans for the first time in fifty years. In 1998, at the height of the Lewinsky scandal, the American people expressed confidence in Clinton by awarding the Democrats five seats in an off-year election in which the Republicans would normally have been expected to win twenty or more. And, of course, the greatest demonstration of confidence that We the People can offer a president is reelection to a second term.

To be sure, the meaning of these elections is constructed; their significance is generally appraised after the fact. It may not correlate with any particular voter's actual intentions or reasons for voting. All politics, it is often said, is local. But the construction of these meanings is an important part of the way a democratic system works, both for outside observers and for the participants themselves. Ascribing a meaning to an election is how politicians understand their mandate, and, to a large extent, it is how members of the public understand what they have done collectively.

The meaning of the 2000 election— and hence the legitimacy of the Bush presidency— has yet to be determined. If the Democrats win both houses of Congress in 2002 and then regain the presidency in 2004, they will have delivered as solid a rebuff to Bush's legitimacy as is possible in the American system of government. We the People will have rejected the Supreme Court's imperious decision to hand Bush the White House. In hindsight, the election of 2000 will have been judged a mistake, and— for reasons that I will explain shortly— the more mistaken it seems, the more it will throw into doubt the legitimacy of how Bush obtained power in the first place. On the other hand, if George W. Bush wins a second term in office by a decisive margin, this will bestow legitimacy on his first term retrospectively, and will tend to confirm the wisdom of the Supreme Court's intervention, if not the precise reasoning of *Bush v. Gore*. The election of 2000 will be considered at most a tie, which gave Bush the opportunity to establish that he truly did

represent the will of the People. Because there was no constitutional harm, there was no constitutional foul.

With the ashes of the World Trade Center still smoldering as I write these words, the country is likely to give George W. Bush every opportunity to demonstrate his qualities of leadership. If he makes the most of that opportunity, he will be rewarded with reelection and the mantle of legitimacy. But as every politician understands, a great deal can happen in four years. No one knows how long the current crisis will last, how well the new president will lead, or whether economic and domestic problems will eventually overtake concerns of foreign policy. Make no mistake: the meaning of the 2000 election and the legitimacy of the Bush presidency are still very much up for grabs. Unplanned and unexpected events will test the mettle of both parties and shape the meaning of the Bush presidency. If the Democrats play their cards right, and the Republicans are foolish, the Republican Party will be punished for overreaching and the verdict of history will be that the election was illegitimate or at least dubious. *Bush v. Gore* and black disenfranchisement will be viewed as blemishes on the American system of justice that were corrected by a wise citizenry. On the other hand, if the Republicans rise to the occasion and the Democrats misplay their hand, George W. Bush will win the White House in 2004 and establish his legitimacy. *Bush v. Gore* will be seen as badly written but irrelevant, and black disenfranchisement in Florida will be excused or conveniently forgotten.

Because the American constitutional system is not a parliamentary system-- because it has fixed election cycles and no explicit or practical method of removing an illegitimate president, all political events for the next several years will carry a dual meaning. They are both part of ordinary politics and part of the continuing struggle over the legitimacy of the 2000 election. If one thinks that black disenfranchisement was a scandal and that *Bush v. Gore* was a travesty, the last thing one should do is concede this struggle without a fight. The 2000 election is long since over. But both sides can still win the contest over its meaning.

Procedural and Political Legitimacy

How will this struggle be played out in the next few years? To answer this question we need to take a brief detour into the mechanisms of legitimacy. Legitimacy is a complicated concept with many different elements. Lawyers are mostly concerned with procedural legitimacy-- whether the rules were properly adhered to. That is one reason why so many lawyers and law professors are disturbed by *Bush v. Gore*. They feel-- and I think, quite rightly-- that rule of law values were clumsily discarded to achieve a particular result. The Supreme Court's decision in *Bush v. Gore* looked like a judicial opinion, but it was so shoddy and so badly reasoned that it seemed lawless. Equally important, the disenfranchisement of tens of thousands of black voters in Florida in apparent violation of the Voting Rights Act casts serious doubt on the procedural legitimacy of the result. If *Bush v. Gore* violated canons of juristic practice to decide who would gain power, black disenfranchisement violated precious individual liberties to the same end.

But in a democracy, political legitimacy involves far more than adherence to procedural niceties. In very large part, it is a function of the trust and confidence that people have in their elected representatives. That trust and confidence, in turn, depends on many factors-- including whether the official seems genuinely concerned about the interests of the country rather than the

official's personal or political interests, and whether the official seems competent and able to handle the challenges of the job.

Procedural legitimacy with its focus on fair procedures and political legitimacy-- with its focus on trust and confidence-- are analytically distinct in theory but related in practice. Obviously, if politicians seize power by unlawful means, people may distrust them. But the converse is also true: the more trust and confidence the public has in its elected officials, the less it will be interested in worrying about their misconduct or the corners they cut to gain power. In addition, the less trust and confidence people have in their elected officials, the more they are likely to credit conspiracy theories and allegations of misbehavior, and the more they will worry about a politician's right to wield power.

The psychological connection between popular confidence and procedural legitimacy is quite important. It is very difficult for people living in a proud and long-standing democracy like the United States to accept that they are ruled by persons who have no right to their office. The tendency to reduce cognitive dissonance is very strong: it is less disturbing to believe that people who control the government are lawfully in place. This fact explains much of the quiescence that followed December 2000: Given that Bush was going to sit in the Oval Office anyway, most Americans simply didn't want to think about whether he had been lawfully elected.

For this reason, claims of procedural illegitimacy may well be most plausible after people have lost trust and confidence in their elected officials. That is why Richard Nixon's downfall came not when everything was going swimmingly in 1972, but when the economy had turned sour in 1974. It was easier to believe that Nixon was a crook when people had lost confidence in his ability to govern. To be sure, he had lost the ability to govern in large part because his administration consumed with scandals. But if the economy had been humming along-- as it was during Bill Clinton's presidency-- the distractions might not have mattered as much.

Indeed, Clinton provides the best recent example of the complicated interaction of procedural and political legitimacy. Throughout much of his tenure in office he received very high marks from the American public even though his administration was repeatedly charged with improprieties. Large numbers of Americans liked him, believed that he cared about them and their lives, and had confidence in his ability to govern the country. His private life was a mess, his campaign fundraising practices were suspicious and at best skirted the edges of the law, and his actions during the Lewinsky scandal were simply scandalous. Yet his approval ratings remained high throughout his second term, zooming to stratospheric heights as he was impeached by his political enemies. (And, in contrast to Nixon, he was helped immensely by a booming economy.)

People who had confidence in Clinton as a public servant were willing to give him the benefit of the doubt when it came to allegations of illegal conduct. They either didn't believe or didn't care that he broke the law, partly because they had confidence in his abilities as president and partly because they regarded his political enemies-- who repeatedly raised charges of illegality -- as worse than he was.

On the other hand, almost from the beginning of Clinton's tenure as president many Republican stalwarts felt that he did not deserve his office. In their eyes his election in 1992 was a fluke caused in part by the erratic antics of Ross Perot, and his reelection in 1996 was the direct result of his reckless flouting of the campaign finance laws. For these Americans, Clinton was a liar and a crook. They had no confidence in him from the word go. This lack of confidence led people to credit any number of conspiracy theories about the man. They believed that there was

no one he would not lie to, and no law that he would not break. Even before conservatives accused him of perjury and obstruction of justice, they whispered rumors among themselves about rape and murder. For these Americans Clinton's character simply undermined his right to rule. It is admittedly difficult for many liberals to understand the horror that many conservatives felt toward Clinton as a man they believed had no respect for the rule of law. It is perhaps equally difficult for many conservatives to understand why most Americans did not wish to throw the rascal out of office.

If procedural and political legitimacy are connected in the way I have described, we can better understand the problems now facing the Democrats and the Republicans. It makes little sense for professional politicians of either party to place the procedural legitimacy of the 2000 election at the center of public debate. The Republicans do not want to call attention to the question, which they regard as settled. The Democrats face the problems of cognitive dissonance and the facts on the ground: they cannot remove Bush, and they must not appear obstructionist, especially following the terrorist assaults on the World Trade Center and the Pentagon. Although many in their base may doubt Bush's legitimacy, they will not get many other people to agree that Bush lacks the right to rule until people have lost confidence in Bush as president. As a result, the political battles of the next four years may not focus overtly on who really won the election. Instead, the two parties will try to gain the greater trust and confidence of the American people. For this reason much of the next four years will resemble ordinary politics. The one exception is judicial nominations, which I will discuss in more detail later on.

The events of September 11 greatly raise the stakes for both political parties and may ultimately define how Bush's presidency will be understood. A national emergency can establish a leader's legitimacy because in moments of crisis and difficulty the public wants and needs to rally around its leaders. If Bush shepherds the nation successfully through the present turmoil, he will gain immeasurable stature, and his political legitimacy will be greatly enhanced. That will significantly increase his chances of reelection, although it will not guarantee it. After all, his father, George H.W. Bush, led the country to victory in the Persian Gulf War and was nevertheless rejected by the voters only a year and a half later because of a weakened economy. If George W. Bush is unable to rise to the occasion or if his leadership proves unpopular, as Lyndon Johnson's did during the Vietnam War, he may actually lose legitimacy and be punished politically for his failures. Nevertheless, even a protracted struggle against terrorism need not doom his chances for reelection: If a war drags on, the voters may be unwilling to change horses in midstream. The Democrats are in a symmetrical position. They must be patriotic and support the president in times of national crisis. Yet this does not prevent them from winning the elections of 2002 and 2004, even if the struggle against terrorism continues for many years. After all, the Republicans displaced the incumbent party in the White House in 1968 during the middle of the Vietnam War.

From the Constitutional Trifecta to the War Against Terrorism

George W. Bush entered office with a cloud on his title of president. Even absent that cloud, he entered the Oval Office having lost the popular vote. As his administration began in January 2001, Bush had two basic choices. The first strategy was conciliation and the formation of a government of national unity. Bush could openly acknowledge the controversy surrounding the election, govern from the center, and devote his first term to rectifying the country's

inadequate voting system, perhaps even working for constitutional reform of the electoral college. The second strategy, which Bush actually adopted, was steadfast promotion of the Republican agenda. Bush made no excuses or concessions about the outcome of the election. He expressed no doubts about his authority to rule. He simply claimed that he had a mandate and dared the Democrats to prove otherwise. Although Bush promised to change the tone of politics in Washington and spoke in friendly terms to his opponents, he showed no interest in compromising his basic policies. His basic strategy was to speak in the language of conciliation but to deal in the language of power.

Why did Bush adopt the second strategy rather than the first? One reason is that he is simply a much more ideologically conservative politician than he appeared to be in the election. Second, he and his advisors probably assumed that drawing attention to the controversial nature of his accession to power would not enhance his legitimacy, but would detract from it. The more he admitted that his right to hold office rested on shaky grounds, the more the Democrats would demand concessions. And the more concessions he offered, the more he would anger the base of strongly conservative Republicans who were his most steadfast supporters. Because he entered office with a minority coalition of popular support, Bush and his advisors may have judged it prudent not to risk fracturing that coalition.

A third reason why Bush did not consider governing from the center concerns the separation of powers. After the Supreme Court installed Bush in office, the Republicans had won what I call the *Constitutional trifecta*: they now controlled all three branches of government. This has not happened frequently in American constitutional history after the Era of Good Feelings ended in the 1820's, and it has been particularly rare in the last half century or so. Winning the constitutional trifecta allows one party to push its agenda relatively unimpeded, because the president, Congress, and the Supreme Court are all working in roughly the same direction ideologically. Normally a party wins the trifecta only during moments of widespread popular support and widespread popular mobilization. The last time was from 1960 to 1968, when liberal ideals dominated American politics. Even winning both the presidency and both houses of Congress (a sort of mini-trifecta) is relatively infrequent in modern times-- and if it is not accompanied by widespread popular support, the party out of power soon takes control of the presidency or one branch of Congress.

Moreover, because of the peculiarities surrounding the 2000 election, the Republicans not only won the constitutional trifecta, but the president, the congressional leadership, and a majority of the Supreme Court were much more ideologically conservative than most Americans. Yet there was no consensus or mobilization for the hard right wing of the Republican Party, and no way of mistaking the results as a clear electoral mandate for its undiluted conservatism. Indeed more people voted for Al Gore or Ralph Nader than for George W. Bush or Patrick Buchanan. Given the tenuous connection between rulers and ruled, Bush decided to push a conservative agenda quickly during the limited window of one-party rule, a window that closed when Senator Jim Jeffords of Vermont defected and became an independent. Jeffords's defection effectively ended the constitutional trifecta.

There are two ways to interpret Bush's early strategy. One is that it was an act of desperation-- knowing that the American people were not behind them, the Republicans tried to get as much done as they could in the limited time available to them. That included slashing taxes in order to forestall and cripple future federal spending initiatives, beginning an expensive missile shield program that would be difficult to walk away from, adopting a national energy

policy that favored the interests of oil companies and large business organizations, and stocking the federal judiciary with ideological conservatives who would enjoy life tenure and fundamentally reshape American constitutional law. But a more charitable reading is that the Republicans tried to lead in the hopes that most Americans would follow. They chose a strongly conservative path in order to win the approval of the American people by demonstrating that they could get things done and move the country in a direction that most Americans would eventually support. In other words, they were attempting to establish the grounds of their legitimacy for the next decade.

By the beginning of September 2001, however, the results of this strategy were decidedly mixed. The Jeffords defection and the loss of the constitutional trifecta simply confirmed what one would have expected. In a politically divided country, a president without a genuine electoral mandate-- indeed one who was actually rejected by the majority of the voters-- will find it difficult to push a program very far out of the mainstream. The bitterness of the 2000 election, and the suspicion among many Democrats that the election was effectively stolen, remained buried beneath the surface of everyday politics. Bush was unable to generate approval ratings much larger than the percentage of people who supported him in the election. The Administration's clumsy handling of foreign relations raised doubts about the president's leadership. The sinking economy undermined confidence in his domestic policies. Barely eight months into his new administration, much of his agenda was sidetracked, and the remainder appeared stalled.

Then came September 11. The terrorist attacks gave George W. Bush a chance to detach his presidency from the controversial 2000 election and to demonstrate the quality of his leadership. Ironically, although the attacks made much of the Bush domestic agenda irrelevant, in the process they diverted politics, at least in the short run, to questions of national security, in which presidential and executive prerogatives tend to dominate. George W. Bush and his party have been given a golden opportunity to win the trust and confidence of the American people. Nevertheless, this opportunity also creates enormous risks both for himself and for the country. A self-declared war on terrorism has no simple ending point or exit strategy. The public may eventually bristle at a policy of domestic security that is too heavy handed. If George W. Bush and his party can show strong effective leadership, they will be rewarded generously at the polls. His ascension to power will be legitimated, and his right to rule will be successfully detached from the election of 2000. But if he overreaches in the domestic arena, if his leadership proves inept and his military adventures ineffectual, the public will not be forgiving. The basic weaknesses of his political position will reassert themselves, greatly amplified by his subsequent failures, and questions about the legitimacy of the 2000 election will reemerge in the public consciousness like Poe's tell-tale heart.

The Task Ahead: The Case of Judicial Appointments

Suppose then, that one believes, as I do, that the election of 2000 was effectively stolen through the disenfranchisement of African-Americans and the hubris of five conservative justices. Suppose that one believes that although Bush cannot be removed, and indeed that the nation must rally behind him in the wake of the terrorist attacks, he did not legitimately win the 2000 election and that five members of the Court have betrayed their oaths of office. What is the proper political response for the opposition party to take under our constitutional system?

Let me break this question down into two parts. The first is whether the opposition should adopt a strategy of intransigence or propose a positive agenda. The second is what to do about judicial appointments.

The structure of the American Constitution provides the answer to the first question. The Democrats cannot bring the government down as they might in a parliamentary system. They face a fixed constitutional calendar. The remedy that the Constitution offers for an illegitimate presidency is forward looking-- a new election at a fixed time, and not backward looking-- the removal of a president. Therefore the opposition party's strategy must be much the same strategy as in any other moment in politics-- to win the next election and the election after that. The American people are forward looking as well. Despite any qualms about the 2000 election, they will return George W. Bush to office in 2004 if they feel he has done a good job. And they will punish obstructionism by the Democrats as surely as they punished the Gingrich-led Republicans in 1996 and 1998.

Thus, the Democrats must pursue the methods of ordinary politics. In foreign affairs, they must work hand in hand with the president and support American troops in the war against terrorism. In domestic affairs, they must offer their own positive agenda and attempt to force the president to compromise. They must demonstrate that their values are more in tune with the majority of the American public and therefore that they are the appropriate party to lead the nation. They must prove to the American public that the wrong party has gained control of the White House and is pushing the wrong agenda, and that although there is nothing that can be done about the past, there is much that can be done about the future.

None of this means that the Democrats must accept the election of 2000 as fully legitimate. It means only that they must wisely utilize the limited remedy that the Constitution provides. Their position is symmetrical to that of the Republicans -- who can establish the procedural legitimacy of the 2000 presidential contest by winning reelection in 2004. If Democrats win the battle of political legitimacy-- if they can convince the American people that Bush is a failed president whose leadership was deficient and whose agenda was out of touch with the mainstream-- the question of *procedural* legitimacy will take care of itself. They will win the verdict of historical judgment. No one, least of all the Republicans, should confuse this with *getting over* the 2000 election.

The case of judicial appointments is special. Here the Democrats have not only the right but the duty to obstruct the president's conservative agenda. That is so regardless of their support of his efforts in the world of foreign affairs. If their objections are principled and reasonable, they will suffer no punishment from the American people for derailing extremist judicial appointments, especially appointments to the Supreme Court. And fighting over judicial nominations-- particularly to the Supreme Court-- offers them the most appropriate platform on which to discuss *Bush v. Gore* and the procedural legitimacy of the 2000 election. First, the question of procedural legitimacy can be raised more forthrightly in the case of judicial nominations, when the president was installed by judicial fiat. Second, the public is likely to view opposition to the president on judicial appointments quite differently from opposition on questions of war and foreign policy.

In a thoughtful essay for this book, Cass Sunstein has argued that Bush should not be allowed to appoint judges who are out of the mainstream because he will throw the federal judiciary and the United States Supreme Court out of balance. The danger, Sunstein argues, is that Bush will appoint judges and justices who will make the Constitution reflect the Republican

Party platform. In Sunstein's view this is wrong because the Court should always have an appropriate balance of conservatives, moderates, and liberals. It is the duty of the elected branches not to stray too far from that balance. The need for maintaining that balance, Sunstein suggests, would apply whether Bush's legitimacy was doubtful or clear, and whether or not the Supreme Court had decided *Bush v. Gore*.

I agree with Sunstein that the current Supreme Court majority has been altogether too disrespectful of democratic processes, that their political values are badly skewed, and that their invocations of text and original intention are opportunistic, ideologically biased, and self-serving. I also agree with much of his general indictment of their decisions. But I do think that *Bush v. Gore* makes a considerable difference here. I think that the question of legitimacy is crucial in explaining why the Democrats can and should fight over judicial appointments with energy and vigor.

Unlike Sunstein, I don't think that the issue is preserving a natural balance on the Court. Indeed, I don't think that there *is* a natural ideological balance to the Court that must be preserved over the generations. I see no reason, for example, why Lyndon Johnson should have appointed a conservative segregationist to replace Justice Tom Clark in 1967 rather than a liberal egalitarian like Justice Thurgood Marshall. It is true that the Warren Court was getting rather liberal by 1967, and adding Thurgood Marshall would push it even further to the left, particularly on issues of race. But I don't see this as particularly troubling. In my view, Johnson's 1964 landslide victory gave him the political authority to appoint Thurgood Marshall.

The problem today is not that the current Court is unbalanced -- it surely is. The problem is that George W. Bush lacks the political authority to appoint members of the federal judiciary to unbalance it further. That is why *Bush v. Gore* matters. George W. Bush is asserting a legitimate power to reshape the Constitution through judicial appointments that he simply does not possess. It is the obligation of the Democratic opposition in the Senate to resist his attempts.

The Constitution evolves and grows with the times. Alterations in constitutional meaning sometimes come from amendments, but in large part they come from changes in judicial interpretation. And those changes, in turn, come from changes in the personnel of the federal judiciary. In the American system of government, the appointments process is the great engine of constitutional transformation. There is nothing particularly illegitimate about this. The appointment of judges by politicians is the mechanism through which changing social and political mores and the demands of social movements eventually get reflected in constitutional interpretation. Presidents, who are elected by the nation as a whole, tend to appoint judges who reflect their political principles and constitutional values. The Senate plays an important role in moderating and shaping the president's choices, especially when it is controlled by the opposite party. The checks and balances provided by the Senate's advice and consent keep the judiciary more representative of the country as a whole. Nevertheless, if one party keeps being returned to the White House, over time its appointments will inevitably shape constitutional interpretation. For example, if the people keep supporting politicians with conservative values, we really should not be shocked if conservative values begin to surface in judicial interpretations. As I like to tell my students, if you don't like what the Rehnquist Court has been doing for the past decade, you (or your parents) shouldn't have voted for Richard Nixon, Ronald Reagan and the first George Bush. Perhaps the most important reason why the Constitution has started to look like the Republican Party platform is that the Republicans dominated presidential politics between 1968

and 1992. The Democrats did not get a single Supreme Court appointment between 1967 and 1994.

The president's authority to stock the federal courts with his ideological allies stems from his victory at the polls. The problem with judicial appointments by the present administration is that George W. Bush lacks just this sort of legitimacy. He may occupy the White House by the grace of his brother the governor of Florida and five justices of the Supreme Court. But he shouldn't have the right to appoint life tenured judges who are out of the mainstream unless he won a mandate from We the People. He won no such mandate. Indeed, more people opposed his candidacy than favored it.

Thus, judicial appointments are the central area in which *Bush v. Gore* and the question of Bush's legitimacy will be directly raised and should be directly raised in the next four years. It seems altogether fair for the Democrats to remind the public that the Supreme Court put Bush in office, and essentially picked the man who would pick their successors and colleagues. Not only will he replace Supreme Court justices, he will select the lower federal court judges who are charged with implementing the Supreme Court's decisions in the vast majority of cases.

The composition of the Supreme Court is especially crucial because America is in the midst of a constitutional revolution. In 1991, George W. Bush's father, appointed Clarence Thomas to the Supreme Court to replace Thurgood Marshall. Since 1991, the same five conservatives have been rewriting the law of federal state relations, limiting federal regulatory power, protecting commercial speech, resisting campaign finance reform, eviscerating the great writ of habeas corpus, narrowing civil rights remedies for women and minorities, expanding them for white males, and making it increasingly difficult for citizens to sue states for violations of their civil rights. As a result, we live in the midst of a constitutional transformation that, if carried to its logical conclusion, could prove as profound as the rights revolution of the 1960s. Yet most, if not all, of these decisions were decided by a bare 5-4 majority in bitterly contested opinions-- not coincidentally the same 5-4 majority that decided *Bush v. Gore*. The fate of this conservative constitutional revolution rests with the appointment of the next several justices of the Supreme Court. If Al Gore had won, the revolution would have been stopped dead in its tracks. Democratic appointments to the Supreme Court and the federal judiciary would have cut back on some of these doctrinal innovations and overruled others.

By handing Bush the presidency however, the five conservatives did their best to keep their revolution going. By stopping the recounts in Florida, they gave themselves the chance to add a sixth vote and move constitutional doctrines even further to the right. As I have noted, constitutional revolutions are usually backed by electoral majorities who repeatedly return a political party to power. If George W. Bush had received an electoral mandate, he would be in a position little different from that of his father. He could have appointed a Thomas-like conservative and dared the Senate to refuse to confirm him or her, resting on the authority of the Republicans' electoral mandate. George W. may well try the same thing anyway, appointing a conservative Hispanic rather than an African- American. But there is a crucial difference between 1991 and 2001. His father clearly won the election. George W. did not.

Even if George W. Bush had won a clear electoral majority, he would still face the problem of lacking a mandate for his judicial politics because he lost the popular vote. After all, there is little evidence that a majority of the American public supported the far right wing agenda of either the five conservatives or the Republican Party. But *Bush v. Gore* exacerbates the problem of legitimacy. By delivering the presidency to George W. Bush, the Five Conservatives

entangled his fate with theirs. He should not be permitted to reshape the Constitution without a legitimate mandate from the People. They should not be permitted to profit from their own wrong.