Some Dare Call It Justice

by Stephen B. Presser

"Justice is a contract of expediency, entered upon to prevent men harming or being harmed."

—Epicurus, *Aphorisms*

The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President
by Vincent Bugliosi
New York: Thunder's Mouth Press; 166 pp., $9.95

Supreme Injustice: How the High Court Hijacked Election 2000
by Alan M. Dershowitz
New York: Oxford University Press; 240 pp., $25.00

Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts
by Richard A. Posner
Princeton: Princeton University Press; 266 pp., $24.95

H. Ward Sterett

According to leading members of the American law professoriate, the U.S. Supreme Court's decision, on December 12, 2000, in *Bush* v. *Gore* was "lawless and unprecedented," "not worthy of 'respect,'" featured "sickening hypocrisy and insincere constitutional posturing," was "a disgrace," "illegitimate, undemocratic, and unprincipled," "egregious," "a sleight-of-hand trick," and "quite demonstrably the worst Supreme Court decision in history." Off the wall as this criticism may be, it is mild compared to that leveled at the Court by Vincent Bugliosi (whose claim to fame is that he successfully prosecuted mass-murderer Charles Manson) in a slapdash paperback consisting mainly of notes and emendations to his article in the *Nation* (February 5) entitled "None Dare Call it Treason." The book features a cover with mock police mug shots of five Supreme Court justices. Those five, according to Bugliosi, "deliberately and knowingly decided to nullify the votes of the 50 million Americans who voted for Al Gore and to steal the election for Bush." "The stark reality," Bugliosi continues,

> is that the institution Americans trust the most to protect its freedoms and principles committed one of the biggest and most serious crimes this nation has ever seen—pure and simple, the theft of the presidency.

If this was indeed theft, he concludes, then "by definition, the perpetrators of this crime have to be denominated criminals."

If you love trial lawyers, hate George Bush, and want some ammunition to argue that Justices Rehnquist, Scalia, Kennedy, Thomas, and O'Connor belong behind bars, this acerbic little rant is for you. Bugliosi does a fine job spinning every fact and circumstance in Al Gore's favor, but his unbalanced account is not helpful if you really want to know whether the justices actually did trash the rule of law last year.

What they did in their December 12 decision was to stop the Florida recount effort and hand the presidential election to George W. Bush. Was this a betrayal of the Constitution? Why would anybody think so? The problem, as Bugliosi has fingered it, is that the reasoning of the Court's *per curiam* opinion—in which, by the way, seven justices (not five, as Bugliosi, Dershowitz, and most others would have us believe) joined—*was* deeply flawed. *Per curiam* ("for the court") opinions are unsigned. Rumor has it that one of the Court's swing justices, Anthony Kennedy, was the author. In any case, no one will own up to it, perhaps because the *per curiam* is more a political act of will than it is a reasoned elaboration of constitutional law. Does this amount to a national disgrace? To answer that question, we have to dirty our hands in the mire of contemporary constitutional exegesis, Florida election law, and punch-card technology. This is not a task for the squeamish.

The *per curiam* opinion declared that the Florida Supreme Court, in ordering a hand recount of the many thousands of ballots in Florida for which the voting machines could not tabulate a vote, violated the 14th Amendment of the U.S. Constitution, which forbids any state from denying any of its citizens "the equal protection of the law." The denial

Stephen B. Presser is the legal-affairs editor for Chronicles *and the Raoul Berger Professor of Legal History at the Northwestern University School of Law.*

of "equal protection," so the argument runs, lay in the failure of the Florida Supreme Court to declare a statewide standard to be used in counting, thus leaving unclear whether the recounters could find valid votes where there were dimpled chads, pregnant chads, swinging chads, hanging chads, *et cetera*. The resulting possibility for different standards, the Court declared, might be unduly prejudicial to George W. Bush, as Gore partisans proceeded to give Gore the benefit of the doubt with too many ballots.

This was novel Supreme Court doctrine (as Bugliosi and Dershowitz properly remind us), since previously only *voters* who had been injured had standing to sue for relief and since virtually every state in the nation allows a fair amount of vote-counting discretion at the precinct and county levels. As Dershowitz puts it,

> The implications of [the U.S. Supreme Court's] reasoning are so far-reaching that, taken to their logical conclusions, they would invalidate virtually every close election in our past and our future . . .

There is no doubt that there was vote-counting chaos in Florida, and since "equal protection" has a democratic ring and seven of the justices were willing to subscribe to the rationale, members of the Court must have felt it better from a public-relations standpoint to present America with a decision in which seven justices concurred, even if that decision were tough to defend. This was a political calculation, but one that failed to save the Court from its critics, who pounded on the fact that only five of the justices were willing to say the lack of "equal protection" meant that the recount had to stop. Two of the seven, Justices Stephen Breyer and David Souter, would have sent the case back to the Florida Supreme Court with instructions to come up with a uniform standard.

What Breyer and Souter conveniently ignored, and what the five others emphasized, however, was that the state lacked time to implement a uniform standard and still comply with a federal law requiring that electors be chosen by December 12, pursuant to a means of selection in place at the time of the election. This statutory directive, known as the "safe harbor" provision, provided that electors chosen in conformity with its provisions could not be challenged in Congress (which has, under the Constitution, the role of counting Electoral College votes) and was passed in the wake of a similar presidential election donnybrook in 1876. As only U.S. Seventh Circuit Court of Appeals Judge Richard Posner makes clear, the need to comply with the December 12 deadline is the key to understanding what the U.S. Supreme Court did, where the Florida Court went wrong, and why a much better legal rationale for the Court than the equal-protection argument exists—and was, in fact, advanced by the three justices (Rehnquist, Scalia, and Thomas) who wrote a concurring opinion. They argued that the Florida Supreme Court, in its two opinions in the controversy, had ignored the federal provision and had, in effect, changed the rules prevailing on election day. Thus, the state court had interfered with the desire of the Florida legislature to take advantage of the federal "safe harbor" provision.

When the smoke seemed to clear on election night, Bush was declared the winner in Florida by less than a thousand votes. Gore then conceded to Bush, only to withdraw that concession a few hours later when he realized that the closeness of the race would trigger an automatic machine recount of the Florida vote. When that recount inexplicably halved Bush's lead, Gore, rather than conceding again, made the decision that plunged the nation into weeks of uncertainty. He decided to protest the vote counts in four overwhelmingly Democratic Florida counties and ask for hand recounts, hoping that zealous—and primarily Democratic—vote counters would successfully troll for more Gore votes.

Bush argued that a protest required proof of an error in "tabulation," a term that Republican Secretary of State and now congressional candidate Katherine Harris, the Florida official assigned to interpret the election law, correctly read to mean *machine*, not *voter*, error. A *Democratic* Florida trial court judge upheld Harris's interpretation, but the Florida State Supreme Court overruled Harris and the judge. The Court held that a "tabulation" error could include a failure to count a ballot where the "clear intent" of the voter was manifest on the ballot; threw out the statutory deadlines for submission of recounts; and denied Harris the discretion Florida statutes gave her to enforce deadlines. In short, the Florida Supreme Court *rewrote Florida election law*. Bush then asked the U.S. Supreme Court to reverse the Florida Supreme Court, on the grounds that its rewriting of the election laws amounted to changing the rules after election day, in violation of the "safe harbor" federal statute.

Dershowitz, Bugliosi, and most Democrats (and thus, most legal academics) confidently predicted that the Supreme Court, which normally defers to a state court in the interpretation of that state's laws, would not intervene. But the federal justices took the case and, by a unanimous vote, vacated the Florida decision while gently suggesting to the Florida Supreme Court justices that they might have paid insufficient attention to the *federal* "safe harbor" law. In short, the justices told the Florida court it had made a mistake, and offered it the chance to rectify it.

In the meantime, though some of the recounts Gore had asked for were completed, one had been suspended at the direction of county authorities, and one had missed the new deadline set by the Florida Supreme Court. Katherine Harris then certified George Bush, whose lead had been whittled down by a couple of hundred more ballots, the winner of Florida's electoral votes. Gore had lost two machine tabulations, and a third (albeit incomplete) hand recount. Unbowed, he invoked another section of Florida election law and sought to "contest" Harris's certification of Bush as the winner.

To "contest" a certification successfully, as Posner explains, requires a showing that "legal votes" were "rejected by the precinct counters on whose totals the certification was based to such a degree to change or place in doubt the result of the election." While a "protest" proceeding (conducted before "certification") claims "tabulation" error, a "contest" proceeding is supposed to assert fraud or some other massive irregularity. Gore argued that the vote-counting machines had overlooked indications of clear voter intent and that, since other provisions of the Florida statutes suggest that a vote should not be declared invalid if "a clear indication [exists] of the intent of the voter as determined by the canvassing board," the fact that many precinct canvassing boards had ignored dimpled, pregnant, hanging, or swinging chads meant that they had failed to register the intent of voters. Because the vote was so close, Gore argued, the certification

ought to be reversed, and additional recounts should be taken.

Once again, the Democratic trial-court judge ruled against Al Gore. Sensibly, he interpreted the "contest" statute to apply only to situations in which gross irregularities were suspected, not to close elections. By now, Gore had lost the original count, the mandatory machine recount, the certification, and the attempt at a "contest." He appealed, once more, to the Florida Supreme Court, which once more reversed the trial court and declared that "voter intent" was so important that, given the closeness of the election, Gore should be granted his "contest" and the certification should be nullified pending the outcome of statewide recounts.

This time, the Florida Supreme Court justices (all of whom were appointed by Democratic governors, six of whom were Democrats, and one of whom was an independent) split four to three, with the Florida chief justice, in dissent, warning that the Florida Court was changing the rules in violation of the federal "safe harbor" law and stood to be slapped down by the U.S. Supreme Court for ignoring that Court's directives. It looked as if the four-person Florida court majority simply favored Gore and had bent the law to accommodate his interests.

Almost immediately, the U.S. Supreme Court issued a stay of the Florida Supreme Court's second decision, halting the recounts. This was because, as Justice Scalia explained, Bush would be "irreparably harmed" by allowing a recount to go forward when some of the votes recounted might be illegal ones, thus tainting the validity of his election. (This explanation is hooted at by Bugliosi and Dershowitz, though defended by Posner.) Then the U.S. Supreme Court issued its December 12 opinion, ending the dispute.

Bugliosi and Dershowitz seethe with anger over the U.S. Supreme Court's action, not only because they, like the Florida Supreme Court, favored Gore (Dershowitz, to his credit, acknowledges his preference) but because they believe the justices should have deferred to the Florida court's interpretation of Florida election law. They have a point, given that, in most cases, the majority of the Rehnquist Court has taken the position that interpretation of state law is a job for the state courts. Dershowitz, Bugliosi, and other commentators who defend the Florida Supreme Court's action claim that the Florida Court's interpretation of the election code was simply part of its task of interpreting and resolving ambiguities and did not, therefore, justify intervention by a federal court. This argument fails to explain, however, how Democratic trial-court judges could so clearly rule that the statute contained no real uncertainties and that Gore's arguments were without merit. Indeed, if the Florida Supreme Court had followed normal court practice, they would have upheld the Florida trial courts in their rulings for Bush, since a higher court should not overrule a lower court that is not in clear error. It is hard to conclude that the Florida Supreme Court's majority was not influenced by its preference for Al Gore.

Are Bugliosi and Dershowitz correct in claiming that the U.S. Supreme Court majority's preference for Bush determined the outcome of its December 12 decision? The weakness of the equal-protection rationale (which almost no one, conservative or liberal, has seriously sought to defend) suggests as much. But Posner, admittedly a Republican appointee, argues to the contrary. First, he demonstrates that the Florida Supreme Court went beyond the traditional task of interpretation to rewrite Florida election law in violation of the federal "safe harbor" provisions. More importantly, perhaps, he explains why, apart from legal doctrines, there were good reasons for the U.S. Supreme Court to end the dispute on December 12.

Richard Posner is the premier expounder of judicial "pragmatism," the doctrine that what judges do is more important than what they say and that the proper judicial role is not simply the neutral application of preexisting law but the crafting of intelligent and efficient legal solutions to unanticipated dilemmas. *Breaking the Deadlock* is a fine introduction to Posner's jurisprudence, and even if you disagree with it (as I do), you may concede that, in this instance, pragmatism has some merit.

Had the Court refused to step in, Posner says, the Florida legislature, exercising its Article II constitutional power and confronting a Florida Court bent on helping Al Gore, would have appointed a slate of Bush electors. This action would probably have been ruled illegal by the Florida Supreme Court, which would then have mandated a slate of Gore electors, thus plunging Florida into a constitutional crisis that would have had to have been resolved by the U.S. Congress, by the Florida governor (Bush's brother), or—even more likely—by the U.S. Supreme Court in further opinions to be issued several weeks, or months, later. During all of this time, the United States would have been without a legitimately elected chief executive, possibly precipitating a domestic and foreign catastrophe. It was better, then–given the insubstantiality of Gore's legal case—to end the matter on December 12. The fact that Gore conceded almost immediately after the Supreme Court's December 12 opinion suggests that Posner may have gotten the practical situation correctly. Still, did the Court *really* do the right thing?

Not according to Bugliosi and Dershowitz, who ignore the possibility of disaster, had the justices failed to act, while pointing to Justice John Paul Stevens' dissenting remarks in *Bush* v. *Gore*. The majority's decision, Stevens said, "can only lend credence to the most cynical appraisal of the work of judges throughout the land." "One thing . . . is certain," Justice Stevens continued.

> 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. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

Bugliosi and Dershowitz, employing the "cynical appraisal" Stevens lamented, claim Stevens' remarks prove what damage the highest federal court wrought. But if you actually read Stevens' opinion, you see that he is criticizing the majority not for casting doubt on the impartiality of federal judges, but for its opinion that the Florida justices *ignored the law*. It is, in fact, the partisanship of the *Florida* justices that the Supreme Court majority spotlighted, and that Stevens (and Dershowitz and Bugliosi) believe is better swept under the rug.

The bloody shirt of *Bush* v. *Gore* will doubtless be waved for years to come by law professors, and Bugliosi's and Dershowitz's screeds will succor them. Still, given Al Gore's and the Florida Supreme Court's spectacular intransigence (the *real* cause of this imbroglio), the U.S. Supreme Court probably did the best thing for the country, and Posner's book, finally, gets it right. c

The Coming Ordeal

by Srdja Trifkovic

Does America Need a Foreign Policy?
by Henry Kissinger
New York: Simon & Schuster;
352 pp., $30.00

◆

This latest book by the former secretary of state illustrates the difficulty of separating a piece of writing from its creator (Alan Greenspan on macroeconomics, Bill Gates on information technology, Steven Spielberg on cinematography). Would a similar, slim volume attract national attention if came from an assistant professor at a Midwestern college? Would it be considered "important," a "*tour de force*," even "profound" by so many reviewers? Would it be deemed worthy of a *Chronicles* review?

The answers are yes, no, and yes. There are many books on foreign policy around, few that recognize the forest rather than just a few individual trees. Kissinger's stature and debonair arrogance combining the roles of a one-man think tank and a prophet are arresting, but even published under a lesser name, *Does America Need a Foreign Policy?* would have been noticed for its boldness and readability. Though Kissinger steps with gusto on many liberal toes, the dominant *bien-pensants* are obliged to be smilingly polite to him, even when it hurts.

The reason this book deserves scrutiny from those of us who advocate a "realistic" foreign policy—one based on American national interests, pragmatically defined—is its deeply deceptive nature. In the opening chapter, Kissinger advances a set of guiding principles with which we can have little quarrel—and proceeds to violate them with concrete policy recommendations (most notably regarding missile defense and NATO) that are fundamentally irrational and manifestly determined by his ideological prejudices. His *a priori* assumptions are apparent also in his failure to tackle the implications of the ongoing migratory deluge of the West and of the looming demographic collapse of European nations and their overseas descendants in the coming century. More remarkably still, he is either unaware of or indifferent to the deep moral and spiritual crisis of the Western world. The fact that a man of Kissinger's stature and influence does not deign to consider the possibility that we are at the edge of a cultural abyss is perhaps the most depressing feature of the book.

Kissinger opens by observing that the United States currently enjoys political, military, economic, and cultural preeminence unrivaled by even the greatest empires of the past. Its behavior occasionally evokes charges of American hegemony, yet its policies reflect either rehashed maxims inherited from the Cold War or domestic ideological schisms. The left sees America as the ultimate arbiter of domestic evolution all over the world. In their view, foreign policy amounts to an extension of U.S. social policy on a global scale; for the right, the solution to the world's ills is unabashed American hegemony. Kissinger rejects both "an attitude of missionary rectitude on one side and a sense that the accumulation of power is self-implementing on the other." The real challenge, he says, is to merge the traditions of exceptionalism by which American democracy has defined itself and the circumstances in which they have to be implemented, taking into account the structural differences between four main international systems in the world today.

The first of those—Europe and the Western hemisphere—is America's oyster. Peace based on democracy and economic progress rules supreme. "States are democratic; economies are market-oriented; wars are inconceivable except at the periphery, where they may be triggered by ethnic conflicts." On the other hand, the great powers of Asia—larger in size and far more populous than the nations of 19th-century Europe—treat one another as strategic rivals. Wars involving India, China, Japan, Russia, Korea, or Indochina are not imminent, but they are not inconceivable, either. The conflicts in the Middle East, by contrast, are akin to those of 17th-century Europe: Their roots are neither economic nor strategic but ideological and religious. Finally, there is Africa, which, with its chaotic ethnic conflict, poverty, and disease, has no precedent in European history.

Dealing with this variety of systems demands a subtlety Kissinger does not find either in congressional heavy-handedness or in the "ubiquitous and clamorous media that are transforming foreign policy into a subdivision of public entertainment." He attributes an additional reason for America's difficulty in developing a coherent strategy to several Beltway attitudes. Cold War aficionados favor hegemony for its own sake; Vietnam-era peaceniks suffer from a Clintonesque wooly-headedness that precludes coherent thinking; and yuppie technocrats believe that a national foreign-policy strategy is not required, since we can count on the pursuit of economic self-interest and globalization to produce global peace and democracy. So long as the post-Cold War generation of national leaders is embarrassed to elaborate an unapologetic concept of enlightened national interest, Kissinger warns, it will achieve not moral elevation but a progressive paralysis:

> Certainly, to be truly American, any concept of national interest must flow from the country's democratic tradition and concern with the vitality of democracy around the world. But the United States must also translate its values into answers to some hard questions: What, for our survival, must we seek to prevent no matter how painful the means? What, to be true to ourselves, must we try to accomplish no matter how small the attainable international consensus, and, if necessary, entirely on our own? What wrongs is it essential that we right? What goals are simply beyond our capacity?

In the tension between globalist-missionary impulses (the legacy of Woodrow Wilson) and hardheaded realism ("Jacksonianism"), Kissinger clearly bends toward the second. Wars or interventions, either to stop "atrocities" or to spread American values, should be avoided; a realistic attachment to the national interest—the art of the diplomatically possible—has greater potential to realize moral purposes. Kissinger illustrates his point with the example of the Balkans. In Kosovo, the Clinton administration had aggravated a bad situation in the name of "morality" and helped the Albanians' irredentist objectives, which extend beyond Serbia. In Bosnia, the "moral" position—the one that would have minimized suffering—would have allowed ethnic partition, rather than force three communities to remain in a quasi-multiethnic polity that had no precedent in history and no connection to any fundamental American interests.

So far, so good. The problems emerge