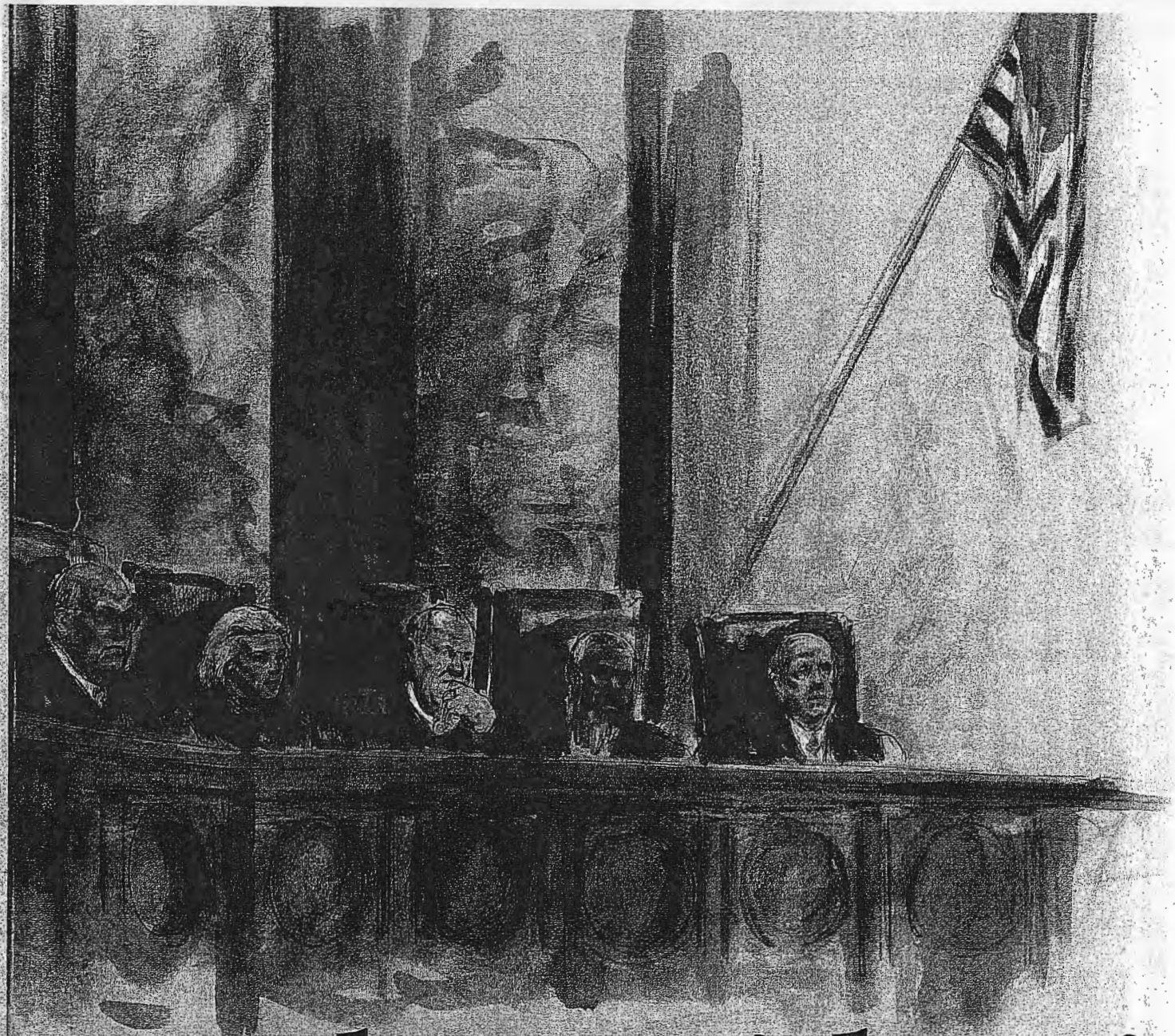

ental President'

AS BOTH CAMPAIGNS AND THE ENTIRE COUNTRY awaited the U.S. Supreme Court ruling in *Bush v. Gore,* the vice president couldn't sit still. The vote would decide who'd win Election 2000. The process kept starting and stopping. Now, Gore needed to vent his emotions, with whatever degree of optimism he could muster.

So on Tuesday afternoon, December 12, Gore decided to write an Op-Ed for The New York Times, on the assumption the Court would rule in his favor. "As I write this," the piece began, "I do not know what the Supreme Court will decide." Gore repeated the themes of the five-week post-election struggle: count all the votes "so that the will of the people" was honored; work "for the agenda that Senator [Joe] Lieberman and I put forward in the campaign," which "50 million Americans" supported; and appreciate that history and the "integrity" of the national government demanded he fight on after Election Day.

Gore acknowledged that "no single institution had been capable of solving" the electoral standoff and that this resulted in "continued uncertainty." But the greater good, he contended, was being served. Invoking Lincoln and Jefferson, he

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ILLUSTRATIONS BY DANA VERKOUTEREN

The decision, Breyer told the visitors, was '**the most outrageous, indefensible** thing' the Court had ever done

mused on the "consent of the governed" and the "wellspring of democracy." Jefferson had "justified revolution" because the people of the colonies had not given their consent. How could the U.S. Supreme Court justices "claim for themselves" the right to determine the presidency? It was up to the people. He concluded by quoting Lincoln's First Inaugural, delivered a month before Fort Sumter: "Why should there not be a patient confidence in the ultimate justice of the people?"

IT WAS ONLY A DRAFT, AND Gore might've toned it down before publication, given its intimations of revolution and allusions to the Civil War. But it was strongly worded, all the more so as the justices had *Bush v. Gore* in front of them. The vice president phoned Walter Dellinger, a former solicitor general under Bill Clinton, for counsel. "I've spent the last few hours writing an Op-Ed for tomorrow's Times," Gore told him. "I want your judgment on whether I ought to run this or not."

Dellinger liked it, suggested some changes that Gore punched into his laptop, and they were done. Gore said he would send it to Bill Daley, the campaign chairman, for one last look. "Is there anything else I need to think about?" he asked Dellinger.

"As a lawyer, I wouldn't write an Op-Ed on a case I'd argued that was pending. But, then, you're not the lawyer. You're the client, so there's no rule about keeping silent." Dellinger then added, "But still, you should be thinking about whether running this would *provoke* the Court." After all, it was Gore who'd told aides after the recounts were halted over the weekend that no one in the campaign should "trash" the Court. Might this Op-Ed be regarded as the velvet-gloved equivalent?

"O.K., let me think about it."

Gore paused for only seconds, then made up his mind. He chuckled. Said the vice president of the United States about the Supreme Court: "---- 'em."

The few people in Goreworld who heard about his remark had the identical reaction: if he had only shown that kind of animation during the campaign, he wouldn't have been in the position of having to make the remark.

The Op-Ed never ran. Before the Times closed the piece, it became moot. At 10 p.m. on December 12, the U.S. Supreme Court issued its ruling that made George W. Bush the president-elect.

That wrenching decision pitted the Court's five conservatives against its four liberals, producing vitriolic opinions not seen in a generation, in a case many thought the Court should not have taken in

Gore's Secret Plan: The Brockovich Gambit

People's choice: *Gore wanted Brockovich to gather horror stories*

EARLY ON, MUCH MORE than possible recounts, the issue of the butterfly ballot in Palm Beach County consumed the Gore campaign. If a lawsuit went his way, it would eliminate George W. Bush's lead. But how could Gore operatives efficiently collect enough horror stories to convince a judge that the ballot confused enough voters to turn the election?

At 12:30 a.m. on the Friday after Election Day, the phone rang in the Tallahassee hotel room of Ron Klain, a top Gore aide. It was Al Gore, calling from Washington, D.C. Gore had not only been thinking about the problem, but he'd done something about it. He'd called Erin Brockovich. Not Julia Roberts, who played Erin Brockovich in the movie about a town's legal fight with a polluter—but *the real Erin Brockovich*. The vice president thought "she should come to Florida and lead our efforts to collect affidavits." Gore had figured it all out. "What Erin Brockovich's good at is going to real people and getting them to tell their stories," he told Klain. "That's her specialty."

Klain was tired, "really tired." But you can't exactly put off the vice president. "Sounds fine to me, it's great," Klain said to Gore.

"Well, Michael Whouley [Gore's chief political strategist] thinks that Erin Brockovich is a really bad idea. What do you think?"

"I don't know. This really isn't my part of it. Michael's down there running the political operation. If Michael thinks it, I'm sure it's right. I'm up here trying to deal, like, with Tallahassee."

"Well, I think Erin Brockovich would be great."

The call ended. Klain tried to go back to sleep, bemused by the conversation. Barely two days into the postelection morass, and Gore was recruiting somebody he'd heard about in a movie. "Bring in a camel with three heads," Klain said later. "It just seemed like the whole thing's a huge menagerie at this point. Erin Brockovich—of course!"

Twenty minutes later the phone rang. It was Gore again. "I tried to call Bill [Daley, the campaign chairman], but his phone's off the hook and his cell's turned off."

"Silly me," thought Klain. "I'd kept mine on."

"I really want to go forward with this Erin Brockovich thing. Tell Bill in the morning we're going to do Brockovich."

It was the last Klain heard of it. Brockovich was not spotted in Florida during the 37 days.

the first place because state elections weren't federal judicial matters. Yet within weeks of *Bush v. Gore*, many of the justices gave speeches trying to defuse the controversy. All was well at the High Court, they said; everybody had moved on. Given the public record, that seemed plausible. And because the Court's "conference"—where the Supremes, without clerks or anyone else, debate cases and render their votes—is ultra-secret, it's hard to pierce the judicial veil.

'You have to take responsibility,' Kennedy said, defending the decision. He prized order—but might have **voted the other way.**

BUT BEHIND THE SCENES, in remarkable post-decision moments previously unreported, the justices were stewing. In particular, the dissenters—Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter and John Paul Stevens—couldn't believe what their conservative brethren had wrought. How could the conservative Court majority decide to step into a presidential election, all the more so using the doctrinal excuse of "equal protection"? *Equal protection?* That's the constitutional rationale the *liberals* had used for a generation to expand rights, and the conservatives despised it. But now the conservatives were embracing the doctrine, claiming that different recount standards in Florida counties amounted to unequal protection? The whole thing smelled bad.

When the justices' counterparts on the Russian Constitutional Court came to town for a private gathering, the American justices let slip the recriminations. Those scenes shed light on what transpired inside the High Court as the justices determined who'd be the next president—and on the raw emotional fallout from the fateful decision.

Given the hard feelings, the amazing aspect of *Bush v. Gore* is that it just might've gone the other way. Justice Anthony Kennedy—the key swing vote, the man the Court's law clerks once dubbed "Flipper" for his equivocations—had wavered, enough that Souter thought until the very end that he'd get him. If Kennedy could be flipped, the 5-to-4 ruling for Bush would become a 5-to-4 win for Gore. They'd find an equal-protection violation, send the case back to the Florida justices to fix standards and administer the best recount they could under the circumstances and before December 18, and then leave it to the political branches—the Florida Legislature and, if need be, the U.S. Congress—to settle for good. (The political composition of Congress and the Legislature suggests Bush probably would've won in the end anyway.) But the High Court's decision short-circuited the process. The vote was close. But we never knew—until now—just how close.

A Bush Feeler: Sun, Surf and Skepticism

WHO WOULD LEAD the legal effort for George W. Bush? The campaign immediately thought of a man who combined political smarts and moral rectitude—Jack Danforth, the retired GOP senator and Episcopal priest.

Two days after Election night, Danforth and his wife, Sally, were on their way to the Caribbean. Enjoying Margaritas by the turquoise sea in Cancún, the Danforths expected the week to themselves, far from the electoral struggle of friends back home. But before they finished a second drink at La Maroma, a hostess told Danforth he had a call. It was Don Evans, the Bush campaign chairman. "We want you to represent us in a federal challenge to the constitutionality of the manual recount in Florida," Evans said.

Danforth had concerns about a strategy that revolved around federal court, a venue that Republicans had been sniping about for decades. But it wasn't some philosophical inconsistency that worried him—that his party would be seeking salvation from the one branch of government it had learned to despise. No, he was afraid of losing.

"Don, I have three questions," Danforth told Evans. "Is there a chance of us prevailing? If not, what will this do to the reputation of Governor Bush? And what about logistics? I don't even have a coat and tie down here." So weak did Danforth consider any federal claim that any lawyer who filed it was jeopardizing his credibility.

No day at the beach: *Danforth wondered if Bush could prevail*

The next morning, Evans called back and said, "We've thought about it and we want you to do this." If there were misgivings, they belonged to Danforth. As much as he might've liked to re-enter the political game, he couldn't imagine how a recount could automatically be unconstitutional.

The Bush campaign arranged to send a private plane to take Danforth to Tallahassee. Danforth checked out of the hotel, though he remained uneasy. He decided he needed to talk to Bush himself. In his next call with Evans—this time with the leader of Bush's team, Jim Baker, on the line as well—Danforth said so.

"Well, you're the lawyer," Baker agreed.

Danforth assumed they'd put him right through. The phone rang, but it was Evans again. "Jack," he said, "it sounds like your heart's not in this. Maybe it's best for you not to do it. Have a nice vacation."

A month after the decision, Souter met at the Court with a group of prep-school students from Choate. Souter was put on the Court in 1990 by Bush's father, advertised as a "home run" for such constitutional crusades as overturning *Roe v. Wade*. Instead, Souter turned out to be a non-doctrinaire New Englander who typically sided with the liberal justices. It didn't make him a liberal—this was a passionately modest man in matters of law as well as life—as much as it reflected how far the rest of the Court had yawed starboard. Souter told the Choate students how frustrated he was that he couldn't broker a deal to bring in one more justice—Kennedy being the obvious candidate. Souter explained that he had put together a coalition back in 1992, in *Planned Parenthood v. Casey*, the landmark abortion case in which the Court declined by a 5-to-4 vote to toss out *Roe*; Souter, along with Kennedy and Justice Sandra Day O'Connor, took the unusual gesture of writing a joint opinion for the majority in that case.

If he'd had "one more day—one more day," Souter now told the Choate students, he believed he would have prevailed. Chief Justice William Rehnquist, along with Justices Antonin Scalia and Clarence Thomas, had long ago become part of the Dark Side. O'Connor appeared beyond compromise. But Kennedy seemed within reach. Just give me 24 more hours on the clock, Souter thought. While a political resolution to the election—in the Florida Legislature or in the Congress—might not be quick and might be a brawl, Souter argued that the nation would still accept it. "It should be a political branch that issues political decisions," he said to the students. Kennedy, though, wouldn't flip. He thought the trauma of more recounts, more fighting—more *politics*—was too much for the country to endure. (Souter and Kennedy, as well as the other justices, declined to be interviewed on the record.)

If he'd had 'one more day—**one more day,**' Souter told students, he thought he could have won a majority for Gore's case

Mild-mannered by nature, Kennedy had a grandiose view of his role. In a memorable profile of the justice in California Lawyer magazine back in 1992, Kennedy had agreed to let the writer into chambers just before going into the courtroom to announce a major ruling. "Sometimes you don't know if you're Caesar about to cross the Rubicon or Captain Queeg cutting your own towline," Kennedy ruminated to his listener. Then the justice self-consciously asked for solitude. "I need to brood," Kennedy said. "I generally brood, as all of us do on the bench, just before we go on." The difference was that most of them didn't do it on cue.

The margin of victory for George W. Bush wasn't 154, 165, 193 or 204 votes (depending on which numbers you believe from the abbreviated recounts). Nor is the operative margin Florida Secretary of State Katherine Harris's initial number of 930. The sands of history will show Bush won by a single vote, cast in a 5-to-4 ruling of the U.S. Supreme Court. The vote was Tony Kennedy's. One justice had picked the president.

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In a Virginia hotel, near the makeshift Bush transition office, Karl Rove—the campaign's political guru—was watching MSNBC when the Court ruling was announced. He called Bush in Texas; the governor was watching CNN, which took longer to decipher the opinions. "This is good news," Rove told Bush. "This is great news."

"No, no, this is bad news," Bush replied. Rove was the first person Bush talked to as the verdict came in—Bush had no sense initially he'd just been declared the winner by the stroke of the Court's pen. It was very confusing. "Where are you now?" he asked Rove.

"In the McLean Hilton—standing in my pajamas."

"Well, I'm in my pajamas, too," said the new president-elect.

Rove laughed at the vision of them both, at this historic moment, in their PJs. Soon enough, Bush talked to his field general, Jim Baker, who talked to Ted Olson and the other lawyers on the team. Within half an hour, Bush was convinced Gore had finally run out of tricks.

A month later, the animosities within the Court finally spilled over at a gathering inside the marble temple. It was a meeting known only to the participants, as well as a few translators and guests. Yet, in illuminating how *Bush v. Gore* came to be, it was the seminal event. It happened in January as Inauguration Day approached—after the 37 days of Florida, but while emotions were still raging. It was the time when the justices let their guards down, without knowing they were providing an X-ray into their hearts.

THE AMERICANS WERE playing host to special visitors from Russia. Their guests were six judges, all part of that country's decade-long experiment with freedom after Communism. It was the fifth gathering between the judges and their counterparts at the Supreme Court—an attempt by the most powerful tribunal in the world to impart some of its wisdom to a nascent system trying to figure out how constitutional law really worked in a democracy. It was by no means obvious. To outsiders, the idea that unelected judges who served for life could ultimately dictate the actions of the other two branches of American government, both popularly elected, was nothing short of unbelievable.

These were always collegial meetings inside the Supreme Court. This time—over the course of two days, January 9 and 10—seven American justices participated, everyone but Souter and Thomas. The justices from the Constitutional Court of the Russian Federation—Yuri Rudkin, Nikolai Seleznev, Oleg Tyunov, and Gennady Zhilin—were joined by judges from the Constitutional Court of the Republic of Dagestan and the Constitutional Supervision Committee of the Republic of Northern Ossetia-Alania. They all met in the Court's private ceremonial conference rooms: for an informal reception, the blue-motif West Conference Room; for hours of discussions about law and American heritage, the rose-motif East Conference Room, with a portrait of the legendary 19th-century chief justice John Marshall above the fireplace.

But this year, the discussions weren't about general topics such as due process or free expression or separation of powers. Some of the

Russians wanted to know how *Bush v. Gore* had come to pass—how it was that somebody other than the electorate decided who ran the government. That was the kind of thing that gave Communism a bad name. "In our country," a Russian justice said, bemused, "we wouldn't let judges pick the president." The justice added that he knew that, in various nations, judges were in the pocket of executive officials—he just didn't know that was so in the United States. It was a supremely ironic moment.

Bush v. Gore was the elephant in the room—the ruling was on the minds of the Russians, but would it be rude to raise it? Once one of them did, it elicited an extraordinary exchange, played out spontaneously and viscerally among the American justices, according to people in the room. It could have been a partial replay of the Court conference itself in *Bush v. Gore*.

Justices don't discuss their decisions with others. That's because their views are supposed to be within the four corners of their written opinions. A good legal opinion isn't supposed to need further explanation. Memorialized in the law books, a Court opinion spoke for itself to future generations. But *Bush v. Gore* was so lean in its analysis, so unconvincing in its reasoning, that it led all manner of observers to wonder just where the Court had been coming from. Maybe that's why some of the justices so readily engaged their guests.

'Where are you now?' Bush asked Rove as the news broke. '... In my pajamas.' 'Well, **I'm in my pajamas, too,**' Bush replied.

STEPHEN BREYER, ONE OF the dissenters and a Clinton appointee, was angry and launched into an attack on the decision, right in front of his colleagues. It was "the most outrageous, indefensible thing" the Court had ever done, he told the visiting justices. "We all agree to disagree, but this is different." Breyer was defiant, brimming with confidence he'd been right in his dissent. "However awkward or difficult" it might've been for Congress to resolve the presidency, Breyer had written, "Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about." To have judges do it instead—as the country learned in the Hayes-Tilden presidential stalemate of 1876—not only failed to legitimize the outcome, but stained the judiciary. That was "a self-inflicted wound" harming "not just the Court, but the nation."

In contrast to Breyer, Ginsburg—Clinton's other appointee—was more baffled than annoyed, attempting to rationalize the legitimacy of the ruling that so ripped away her confidence in the neutrality of the Court. "Are we so highly political, after all?" she said. "We've surely done other things, too, that were activist, but here we're applying the Equal Protection Clause in a way that would de-legitimize virtually every election in American history."

"I'm so tired," offered Justice John Paul Stevens. "I am just so exhausted." His weariness may have reflected the fact that he was the oldest member of the Court at 80—or that he'd been fighting these battles from the left for 24 years, and the number he won was decreasing.

O'Connor talked pedantically about the Electoral College, which, of course, had nothing to do with the Russians' curiosity. Rehnquist and Scalia—the intellectual firebrands on the Court's right flank—said almost nothing, leaving it up to a floundering Kennedy to try to explain a 5-to-4 ruling in which he was the decisive vote, the justice who gave the presidency to Bush. The virtual silence of Rehnquist and Scalia led some in the room to wonder if the two justices were basically admitting their ruling was intellectually insupportable, all the more in a setting where there might be give-and-take. Maybe they didn't think this was the right forum or audience in which to engage a debate. In any event, Kennedy was left holding the bag.

"Sometimes you have to be responsible and step up to the plate," Kennedy told the Russians. "You have to take responsibility." He prized order and stability. Chaos was the enemy. This was vintage Kennedy, who loved to thump his chest about the burden of it all. For example, back in the controversial 1989 decision that flag-burning was protected by the First Amendment, Kennedy joined the 5-to-4 majority, but dramatized his discomfort. "This case, like others before us from time to time, exacts its personal toll," he wrote. "The hard fact is that sometimes we must make decisions we do not like."

Everything Kennedy did or thought seemed to him to carry great weight. It had to—he was a justice of the Supreme Court. It was as if Kennedy kept telling himself, and us, that—but for him and his role—the Republic might topple. In *Bush v. Gore*, that meant entering the breach to save the Union from an electoral muddle that could go on and on. The equal-protection stuff? That was the best he could come up with on short notice. It was apparently no big deal that there was another branch of the government right across the street—democratically elected, politically accountable, and specifically established by the Constitution, as well as by federal statute, to finally determine a disputed presidential election. "Congress" wasn't even mentioned in the opinions by the Court's conservatives. Congress was the appropriate, co-equal branch not because it was wisest, but because it was legitimate.

What was Kennedy's explanation for becoming the deus ex machina? It was Bush and Gore who should be blamed for bringing their problems to the Court. "When contending parties invoke the process of the courts," he wrote, "it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." But that was theatrical nonsense. The justices refused to hear 99 percent of the appeals they were asked to take. Since 1925, their discretion was unbridled—they could decline to take a case because it failed to raise significant issues, because the questions involved were purely state affairs, because they'd decided a similar appeal in recent years, or for no reason at all. Accepting jurisdiction in the presidential election of 2000 showed not respect for the rule of law, but the hubris of kings. Any imminent constitutional "crisis" was only in the imaginations of the justices.

Nobody "forced" Kennedy or four of his brethren to hear *Bush v. Gore*. In the very first instance, they had to choose who chose—whether the Court or Congress was the proper branch to settle the presidential dispute. The justices chose themselves. ■

How History Will View the Court

Final ruling: The legal academy may still be blasting *Bush v. Gore*, but fears that the court would forfeit the public trust were overblown. BY STUART TAYLOR JR.

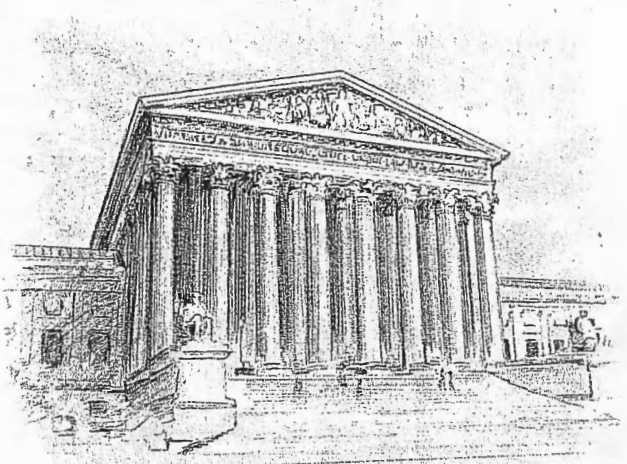
LAST JANUARY, A MONTH AFTER THE SUPREME COURT handed down its hugely controversial decision in *Bush v. Gore*—ending the month-old election stalemate and turning the White House over to George W. Bush—legal scholars across the country joined in protest. In a full-page ad in The New York Times, 554 law professors accused the high court of "acting as political proponents" for Bush, and "taking power from the voters." Worse, the ad scolded, "the Supreme Court has tarnished its own legitimacy."

That criticism has yet to subside. Some nine months into the Bush presidency, the debate over the ruling among legal scholars goes on. Many of the country's most respected legal minds have weighed in on *Bush v. Gore*. The critics contend the court should never have taken the case in the first place. It was a matter of state law, and should be left to state courts, as is the tradition, they argue. The majority's claim that the Florida State Supreme Court's recount procedures violated the Constitution's equal-protection clause is both novel and out of whack with conservative doctrine, they add. And they smirk at the justices' suggestion that their legal analysis should not carry the power of precedent.

The attacks are framed in unusually unflattering terms. Here's a sample. Yale Law School's Bruce Ackerman: "A blatantly partisan act, without any legal basis whatsoever." Harvard's Alan Dershowitz: "The single most corrupt decision in Supreme Court history." American University's Jamin Raskin: "Bandits in black robes."

But do such judgments reflect the merits of the ruling itself, or the professors' own ideological bias? It's hardly a secret that legal academia is a liberal bastion. Conservatives generally defend the result. There are dissenters, but the most forceful ones don't want their names in the newspaper. In the judgment of one such conservative legal thinker, the court's equal-protection argument was "laughable," and, he adds: "I think history will judge the decision harshly." He and many others have suggested that the court's conservatives would have handed down a far different ruling if Bush had been the one demanding a manual recount, and Gore had been demanding that it be stopped. In a recent book, U.S. court of appeals Judge Richard Posner, a highly respected Reagan appointee with liberal views on some issues, was kinder to the justices. He argued that the decision was poorly reasoned and badly written—but in the end fundamentally right, a "kind of rough justice" that was necessary to avert a political crisis threatened by the Florida court, which had "butchered" Florida's election laws and behaved like a "banana republic" in rigging an unreliable process for the recount.

As the academic establishment tells it, *Bush v. Gore* left the Supreme Court practically in ruins, and caused Americans to lose faith in the court's ability to put the law above politics. But is that true? Do Americans hold the court in lower esteem than they did a year ago? No.



If Bush is seen as a good president, historians will probably view the decision favorably—**and vice versa**

Historically, Americans have ranked the court higher than Congress and the president in confidence ratings, and those ratings have not diminished in the months since the decision. In a Gallup poll, for instance, 49 percent of those surveyed expressed "a great deal" or "quite a lot" of confidence in the court immediately after the election ruling; 50 percent said so this June. That's a smidgen higher than the court's 47 percent approval rate in June 2000, long before the big controversy. It's hardly a surprise that the court is less popular among Democrats than before, and more popular with Republicans. Eighty-eight percent of Bush voters and only 19 percent of Gore voters polled by NEWSWEEK last December thought the decision was fair.

The deeper question is how the court will look in the cold, impartial eyes of history. A hard question to answer, especially since those eyes are neither cold nor impartial. Historians, like law professors, are often influenced by their own political world views. What's more, Bush himself may influence how future scholars judge *Bush v. Gore*. If Bush is ultimately considered a successful president, historians may come to look kindly on the court decision that put him in the White House. And vice versa.

No matter what history decides, the ongoing dispute has certainly raised the high court's profile in the minds of the public. The television networks think Americans are just dying to know what really goes on behind that crimson curtain. Not one, but two Supreme Court dramas will debut on TV in January. One, on ABC, stars Sally Field as a liberal justice. The other, on CBS, stars James Garner as the chief justice. Law professors will argue about the fate of the court for years to come. But for Hollywood, at least, the verdict is in.

TAYLOR *is a National Journal columnist and* NEWSWEEK *contributor.*

ILLUSTRATION BY DANA VERKOUTEREN