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PERFECTLY CLEAR

The Nine: Inside the Secret World of the Supreme Court (2009) by Jeffrey Toobin

By the morning of Sunday, December 10, when the briefs were due in *Bush v. Gore*, television cameras had already taken up positions on the sidewalk in front of the building. So much news had come out of the Court so fast that every news organization wanted to be ready. The press of media attention was so great that the Court's police warned the justices to keep their curtains drawn because a high-powered lens might be able to read the words on a page.

Inside the building, the clerks were all id—consumed by rage. Each side was thinking the same thing about the other: *They're trying to steal the election.* Bad as relations had been earlier in the year—and earlier in the week—things were far worse now.

As for Stephen Breyer, he was still all superego. Sure, things looked bad now, but logic—his logic—would prevail. He never gave up hope, not on this case or any other. True, a majority of the Court had granted a stay—which meant, under the legal standard, that it was "likely" that they would also rule for Bush on the merits of the case. But that didn't settle the issue, at least not for Breyer. He had an almost messianic belief in the power of reason, and he never despaired about the ability of his colleagues to see the light—or his own ability to persuade them to see it.

Besides, Breyer wasn't so far from the conservatives on *Bush v.*

Gore. As a former professor, Breyer could talk the language of legal doctrine and rhetoric as well as anyone, but he also had a bit of the pol in him, too. And Breyer the pol didn't like what the Florida Supreme Court had done. To him, the justices in Tallahassee looked like they were trying too hard to help Gore. Worse, Breyer thought their failure to set a standard for the recount made their motives even more suspect. He didn't particularly care if one described the problem as one of due process or equal protection or any other legal category. He thought what the Florida justices had done didn't pass the smell test, and that was what mattered to him.

But Breyer had a simple solution: remand the case back to the Florida Supreme Court, order those justices to set a clear standard for the whole state, and then recount the votes. Breyer loved compromise—and he thought this was a good one.

So, on Sunday, Breyer sent his law clerks out on reconnaissance missions to identify potential converts from the majority. There were really only two candidates. Publicly and privately, Rehnquist, Scalia, and Thomas had made their positions clear. They were outraged by what the Florida justices had done, and they wanted to bring the election to a close. There was no chance they would change their minds.

Breyer looked to O'Connor and Kennedy. With O'Connor, on this occasion, Breyer made the same mistake that so many others did about her jurisprudence. Just because she was usually in the middle didn't mean that she had trouble making up her mind. And O'Connor had made up her mind about *Bush v. Gore*—firmly. She thought Bush should win, the case as well as the election. If there was anything O'Connor had learned growing up on a remote ranch, it was self-sufficiency; people had no right to blame anyone else, including the government, for their own mistakes. She had convinced herself that the root of the issue in Florida was simply that some voters hadn't figured out how to cast their ballots the right way. In her view, it wasn't the job of election officials—or the courts—to puzzle over the true meaning of ambiguously marked ballots. If the voters didn't bother to learn how to vote correctly, the

state shouldn't try to figure out what these hapless souls meant to do. As for the Florida Supreme Court, those justices just looked like a bunch of Democratic hacks to O'Connor.

Never mind that Florida law called for vote counters to determine the intent of the voters—or that state law also empowered the Florida courts to make that process work. (The Florida courts once ordered a county to count the ballots of voters who used a pen, rather than the required number 2 pencil, to mark their ballots.) Never mind, too, that many ballots were incomplete because of defective voting machines, not incompetent voters. O'Connor had simply run out of patience. In part, she was responding to her perception of the public mood. She thought that the American people were fed up with the whole controversy and, like her, wanted it over. (In fact, polls showed only a slight majority in favor of ending all recounts and considerable support for a complete recount in Florida.) In any case, Breyer's power of persuasion failed. O'Connor was voting to reverse. Later, Souter made an unusual personal appeal for O'Connor's support in the case. O'Connor, like Ginsburg, had a special fondness for the reclusive bachelor justice, but his advocacy didn't work this time, either.

On Sunday, a few liberal clerks thought O'Connor might have to leave the case. As David Margolick first reported, a Ginsburg clerk whose brother worked for the *Wall Street Journal* learned that the paper would be disclosing in Monday's edition the remarks O'Connor had made at the election night party at the Stoessel home. Perhaps, the liberal clerks wondered, she would now recuse herself from the case, because she had indicated so clearly that she wanted Bush to win the election. But the clerks misjudged O'Connor—and the law. O'Connor's comments at the party, while peculiar, hardly displayed a bias in this particular lawsuit, and anyway, there was no way that she was going to walk away from a case of this magnitude.

Kennedy was a different story—perhaps. It had not been an easy term for him. A few weeks before the election, he had been assigned the opinion in *Legal Services Corp. v. Velazquez*, a case where he joined the four liberals—Stevens, Souter, Ginsburg, and Breyer—in striking down a law that barred legal services lawyers from challenging the constitutionality of welfare laws. (Congress had passed the law to halt what it regarded as liberal political activism by government-funded lawyers.) Kennedy had filled his first draft with such flowery language about the First Amendment and the importance of lawyers that he faced a rebellion from his colleagues. They wanted him to tone down his meaningless rhetoric. Kennedy did, reluctantly. Now, in *Bush v. Gore*, the same quartet of liberals needed Kennedy's vote, this time for incalculably higher stakes.

For the justices, Sunday, December 10, was mostly quiet. A few clerks came into the building to wait for the briefs, which were sent by messenger to the justices' homes. The full Court didn't gather again until Monday morning at eleven, when they would hear from the lawyers in the election cases for the final time.

It had been just ten days since the first argument before the justices, but the courtroom seemed like an entirely different place on December 11. The cheerful buzz of December 1 had been replaced by a sullen hum. (Byron White did not return to watch the second argument. A few weeks later, he closed his office in Washington and moved back to Colorado. He died in 2002 at the age of eighty-four.) At the first argument, in the *Palm Beach* case, it had seemed possible that the Supreme Court would rise above the political sniping that had characterized the battle of Florida. But halting the recount made the justices look like another set of partisans. For the Court, any pretense of impartiality, much less nobility, had vanished.

Having won the stay, Ted Olson had now, in effect, to run out the clock. If he could stay out of trouble during oral argument, he would probably win the case (and the election) for his client. But Kennedy surprised him with the first question: "Can you begin by telling us our federal jurisdiction? Where's the federal question here?" This was the point the Gore lawyers had been making all along—that the election was fundamentally a state matter, which should never have wound up before the U.S. Supreme Court. Olson replied evenly that the Florida Supreme Court had violated Article II of the Constitution, which said state legislatures, not state courts,

must make the rules for presidential elections. But Kennedy came back with another of Gore's arguments: "To say that the legislature of the state is unmoored from its own constitution and it can't use its courts . . . has grave implications for our republican theory of government."

Was Kennedy switching sides? Not necessarily, because a few moments later, he jumped in with what he apparently regarded as a better argument for Bush, saying, "I thought your point was that the process is being conducted in violation of the Equal Protection Clause and it's standardless." That too, Olson agreed.

Breyer took Kennedy's question as an invitation to make a play for his vote. If the problem was that the Florida Supreme Court didn't set a standard for counting the undervotes, why couldn't they just set a standard now? Or have the Florida courts set one? Or Katherine Harris? Then the recount could begin again, right? Olson grudgingly conceded that a new standard might work. Souter made a similar point. Why not just set a new standard and restart the recount?

Joseph Klock, a prominent Miami lawyer who was representing Harris, went next and gained a measure of immortality for his lack of grace under pressure. In answer to a question from Stevens, Klock called him "Justice Brennan." (Brennan had been gone from the Court for ten years and dead for three.) A moment later, responding to Souter, Klock called him "Justice Breyer." Frustrated, Souter sighed, to much laughter, and quipped, "I'm Justice Souter. You'd better cut that out." Never one to let another justice steal the spotlight, the next voice from the bench said, "Mr. Klock? I'm Scalia!"

Gore had switched lawyers for the second argument, replacing Laurence Tribe, the Harvard law professor, with David Boies, the New York lawyer who had won both cases in the Florida Supreme Court. "I did not find, really, a response by the Florida Supreme Court to this court's remand in the case a week ago," O'Connor said to Boies. "And I found that troublesome." As for the controversy over the standard, O'Connor didn't understand the fuss: "Well, why

isn't the standard the one that voters are instructed to follow, for goodness' sake? I mean, it couldn't be clearer. I mean, why don't we go to that standard?" In oral arguments, O'Connor's chaste exclamations—*my goodness!*, *oh dear!*, and the like—were surefire clues to the way she was voting.

In oral argument, Boies didn't have his best day. Souter repeated his concern about the lack of a standard in the Florida decision (and the possibility that different counties might adopt different rules), but he was also looking for a way to restart the count. He said to Boies, "We've got to make the assumption, I think, at this stage, that there may be such variation, and I think we would have a responsibility to tell the Florida courts what to do about it. On that assumption, what would you tell them to do about it?"

Boies hesitated. "Well, I think that's a very hard question"—which produced nervous laughter in the audience. Actually, it wasn't a hard question. The Supreme Court could simply set a standard or instruct the Florida court to set one.

There was a better answer, and Stevens jumped in and provided it. "Does not the procedure that is in place there contemplate that the uniformity will be achieved by having the final results all reviewed by the same judge?" Under the Florida decision, Judge Lewis in Tallahassee was going to monitor all controversies over the ballot counting. The review by a single judge would take care of any disparities. Boies had the wit to grab for Stevens's lifeline, saying, "Yes, that's what I was going to say, Your Honor."

Olson had only a few minutes for his rebuttal, and he did what good oral advocates always do—he shifted his argument in the direction his audience was already going. He had started by focusing on Article II, but he sensed more interest than he expected in equal protection. Several justices—among them O'Connor, Kennedy, Souter, and Breyer—were concerned about the possibility of different standards in different counties. "There is no question, based upon this record, that there are different standards from county to county," Olson said. "And that will happen in a situation where the process is ultimately subjective, completely up to the dis-

cretion of the official, and there's no requirement of any uniformity. Now we have something that's worse than that. We have standards that are different throughout 64 different counties. We've got only undercounts being considered where an indentation on a ballot will now be counted as a vote, but other ballots that may have indentations aren't going to be counted at all." With those remarks in their ears, the justices retreated to their conference.

It was not a normal conference. Because of the urgency, the justices had already exchanged several memos on the case, even before oral argument. So by the time they met with one another, it was clear that Rehnquist, Scalia, Thomas, and (almost certainly) O'Connor were committed to reversing the Florida Supreme Court. Stevens and Ginsburg would affirm, and Souter and Breyer were also looking for a way to keep the recount going. Kennedy had circulated a memo earlier that suggested strongly that he agreed with the conservatives, but at the conference he temporized, leading both sides to believe that they might get his vote.

After the conference, on Monday afternoon, Stevens made the first bid for Kennedy's support. Realizing that Kennedy considered the absence of a single standard in the recounts to be a problem, Stevens drafted an order of just a few sentences remanding the case to the Florida Supreme Court for the setting of a statewide standard to continue the recount. He sent his messenger scurrying down the marble hallway to Kennedy and the rest of the justices. He heard nothing back, except from Ginsburg, who said she would join if it was a way of bringing the whole Court together. (The rush of events in *Bush v. Gore* strained the Court's technology, which was, in 2000, still rather primitive. As a security precaution, the e-mail system circulated only within the building. Plus, there was only a single, communal computer from which the justices and clerks could obtain access to the Internet. Because only Thomas and Breyer used computers regularly at the time, there was little pressure from the

justices to update. For the most part, the justices communicated with one another by hand-delivered memos, which were typed by their secretaries.)

As he often did, Rehnquist set out to write an opinion for the Court, even without a clear commitment that it would command a majority. He grounded it in Article II, rejecting the Florida court's attempt to change the legislature's plan for the election. But as the chief wrote, he knew he had only four votes for sure—his own, Scalia's, Thomas's, and (almost certainly) O'Connor's.

It all came down to Kennedy, which was as he preferred. The magnitude of the occasion suited Kennedy's taste for self-dramatization. By Monday afternoon, after Rehnquist had circulated his draft of an opinion, Kennedy decided that he would try to write one himself. He thought Rehnquist's reliance on the obscure section of Article II did not comport with the magnitude of the issue at stake. Instead, Kennedy would strike down the Florida court's ruling on equal protection grounds. In a peculiar way, Breyer's advocacy for the middle road turned out to hurt his cause rather than help it. In Kennedy's mind (and, later, O'Connor's), Breyer and Souter's misgivings about the Florida Supreme Court's decision made opposition to it more respectable. O'Connor in particular did not relish the idea of joining with the three conservatives in such a politically charged case. By siding with Kennedy in a position that at least resembled Breyer and Souter's view of the case, O'Connor could convince herself that she was safely in the middle of the Court.

Into Monday night, Kennedy and O'Connor and their clerks collaborated on a draft opinion, drawing largely from the memos they had written in the two election cases over the previous two weeks. (Scalia paid a rare visit to them both that day to encourage their joint effort.) They took the statement of facts from the draft that Rehnquist had circulated and then built their own equal protection argument. By early evening, Kennedy was happy with what he had produced. His vote was now secure. His clerks passed word to the Stevens chambers that Kennedy would not be joining his opinion.

With that, Stevens decided he would keep his plane reservation for Florida the following morning, December 12. He could finish his dissent on the telephone with his clerks.

The Equal Protection Clause suited Kennedy's romantic conception of the work of the Supreme Court. The provision was the source of some of the Court's most dramatic and historic rulings, like *Brown v. Board of Education* in 1954 and *Reynolds v. Sims* in 1964, which established the rule of "one person, one vote" in legislative districting. Kennedy's own best-known ruling involved equal protection; in 1996, he had written for a six-justice majority in *Romer v. Evans* that Colorado could not ban its cities from passing laws to protect homosexuals. Kennedy was no liberal, to be sure, but neither was he afraid to use the Constitution as an engine to guarantee equal treatment of all people.

So it wasn't surprising that Kennedy embraced equal protection more than the opaque and technical Article II grounds of Rehnquist's opinion. Taken in its most charitable light, Kennedy's opinion in *Bush v. Gore* could be said to extend the principle of "one person, one vote" from the question of how districts are apportioned before the election to the question of how votes are counted after the election. As Kennedy wrote, "The right to vote . . . is fundamental, and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." (*Dignity* is a favorite Kennedy word.) Counties had different rules about whether "dimpled chads" should be counted; individual counties sometimes changed the standard in the middle of a recount. "This is not a process with sufficient guarantees of equal treatment," Kennedy wrote starchily.

The problem with Kennedy's analysis, as innumerable commentators subsequently pointed out, was that no court, much less the Supreme Court, had ever before imposed any kind of constitutional rule of uniformity in the counting of ballots. Most states, including

Florida, used different voting technologies in a single election. Kennedy was right that the recount might have produced inconsistencies and anomalies. But he was wrong on the larger, far more important point. A recount would have been more accurate than the certified total. The Court's opinion preserved and endorsed a less fair, and less accurate, count of the votes.

O'Connor realized the problems with Kennedy's equal protection analysis. Even at the oral argument, she raised some of them herself in her final questions for Olson, who had emphasized the difficulty of having "different standards from county to county." O'Connor replied, "Well, there are different ballots from county to county, too, Mr. Olson, and that's part of the argument that I don't understand. There are machines; there's the optical scanning. And then there are a whole variety of ballots; there's the butterfly ballot that we've heard about and other kinds of punch card ballots. How can you have one standard when there are so many varieties of ballots?"

Still, in the end, O'Connor discounted her own apt summary of the issue. Notwithstanding her recognition of the problems with the equal protection argument, O'Connor decided to sign on. But she did so in characteristic fashion. Her position was really a version of Breyer's—that the process just didn't sound fair, and it needed to be stopped. To O'Connor, equal protection was a more moderate-sounding way of doing it than Rehnquist's Article II approach. But unlike Kennedy, O'Connor had an aversion to grand pronouncements; she liked opinions narrowly tailored to the facts before the Court, and that was especially true of *Bush v. Gore*. She didn't want to be making a lot of new law that might come back to haunt the Court in future cases. So late on Tuesday morning, December 12, as Kennedy's opinion was starting to be put into final shape, O'Connor told Kennedy she wanted it clear that this opinion would not be creating a whole new set of rights and regulations for elections.

Kennedy responded by adding what became the most notorious sentence in the opinion—indeed, a single sentence that summed up so much of what was wrong with what the Court did. "Our consid-

eration is limited to the present circumstances," Kennedy wrote, "for the problem of equal protection in election processes generally presents many complexities."

In other words, the opinion did not reflect any general legal principles; rather the Court was acting only to assist a single individual—George W. Bush. That was not what Kennedy meant, but that was what he wrote. The sentiment amounted to a natural consequence of the Court's misbegotten encounter with the 2000 election. The business of the Supreme Court is to take cases that establish principles of general application. But as Kennedy's sentence all but conceded, there was no general principle in *Bush v. Gore*—only a specific designation of the winner of one election. More than any other, this sentence invited skepticism about the majority's true motives in the case.

By midafternoon on Tuesday, as the four justices in the minority circulated their dissenting opinions, tempers grew even shorter. Ginsburg had devoted her professional career to the use of the Equal Protection Clause of the Fourteenth Amendment, and it galled her to see that provision perverted by Kennedy's opinion. In a late draft of her dissent, Ginsburg drew on certain early press reports about the black vote in Florida to suggest in a footnote that, if there was any equal protection violation by the state, it was more likely by state and local authorities than by the Florida Supreme Court. The footnote sent Scalia into a rage, and he replied with a memo—in a sealed envelope, to be opened only by Ginsburg herself—accusing her of "fouling our nest" and using "Al Sharpton tactics." Ginsburg backed down and removed the footnote.

Still, the cumulative effects of the dissents worried Kennedy and O'Connor. They needed to show that their views were not as outlandish as the dissenters made them seem. So they decided to seize on the fact that Souter's and Breyer's opinions (which Stevens and Ginsburg joined in substantial part) said the case should be remanded to the Florida Supreme Court for the setting of a standard. Kennedy wrote, "Eight Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court

that demand a remedy. The only disagreement is as to the remedy." The statement was borderline disingenuous. In truth, the main point of Stevens's, Souter's, and Breyer's opinions was that the recounts should continue, not that they had "problems."

Stevens was already in Florida, but his clerks screamed at Kennedy's clerk that the sentence distorted Stevens's opinion. (In the confusion of the moment, they actually yelled at the wrong clerk, not the one who had responsibility for *Bush v. Gore*.) In response to the tirade from the Stevens chambers, Kennedy changed the reference to "Seven Justices." Souter and Breyer would have been within their rights to protest as well, but they decided not to bother. That was a mistake. As a result of this sentence, as Kennedy intended, *Bush v. Gore* is often referred to by its supporters as a 7–2 case. In truth, it was never anything but 5–4.

The crisis of *Bush v. Gore* came upon the Court so quickly that the normal flow of business continued unabated, sometimes with comic results. At about nine in the evening on Tuesday, as the last of the opinions were being proofread before being sent to the printer in the basement, a court of appeals law clerk named Anil Kalhan showed up in advance of an interview with O'Connor that was scheduled for the next day. Kalhan thought he would visit friends who were already clerking. But his arrival outraged several other law clerks, who thought that an outsider like Kalhan could not be trusted to keep the result in *Bush v. Gore* secret. Some suggested, in apparent seriousness, that Kalhan be "detained," so he could neither leave nor call outside the building. In any event, no one told Kalhan the result, and he drifted into one of the conference rooms where televisions had been set up to watch the media reports on the announcement. He was not detained, and neither did he get the clerkship.

Over the course of the day, the usual crew of about a dozen regulars in the Supreme Court pressroom had been joined by about fifty other reporters. At 9:40 p.m., Ed Turner, the Court's deputy public information officer, entered the room and announced, "We're going to make a line." He read out the names of the permanent members

of the Supreme Court press corps, and they dutifully queued up in the marble hallway. The newcomers stacked up behind them. At 9:52, the large cardboard boxes of opinions appeared, and the line moved at the nervous, half-running pace of paratroopers jumping out of a plane. Members of the public information staff had arranged for reporters to make a quick exit to the street through the door of the Supreme Court gift shop. The television reporters sprinted across the plaza to their camera positions on the First Street sidewalk.

Flipping madly through the pages, the correspondents struggled to make sense of the ruling. Because of the rush, the clerk's office did not prepare a summary, which is customary at the beginning of all Supreme Court opinions. The journalists' confusion was understandable, as the Court's chaotic process was reflected in its finished product. Its opinion, largely written by Kennedy, was again labeled per curiam, "by the court," which was the designation the justices usually used for uncontroversial rulings. Rehnquist insisted on its use here because the final opinion of the Court had been jointly assembled and the phrase would give a pretense of unanimity to the Court's action. The end of the per curiam stated that the case was "remanded for further proceedings not inconsistent with this opinion." That was a familiar phrase in the Court's jurisprudence, but its meaning was, at first, unclear in the context of *Bush v. Gore*. Did it mean the recounts could continue? Foggy thinking by the Court had produced muddy writing, but closer parsing eventually showed that the answer was no.

Inside the Court, televisions had been set up in a pair of nearby conference rooms for the law clerks. The liberals migrated to one gathering, the conservatives to the other. Not surprisingly, the two rooms split close to evenly, like the rest of the country on this night. The liberals had Thai food and beer; the conservatives pizza and Scotch. They were unanimous only in their hooting derision for the television reporters. None of the justices came to watch; instead they made their way to their cars and drove home.

It had been at least twenty-five years since the nation turned its

collective attention to the Supreme Court to resolve a question of such importance. In 1974, the justices had risen to the occasion when, in *United States v. Nixon*, they unanimously ordered the president to turn over the White House tapes and, in a larger sense, comply with the rule of law. Here, in a moment of probably even greater significance, the Court as an institution and the justices as individuals failed. Indeed, their performance on this case amounted to a catalog of their worst flaws as judges.

In one respect, though, the Court received unfair criticism for *Bush v. Gore*—from those who said the justices in the majority "stole the election" for Bush. Rather, what the Court did was remove any uncertainty about the outcome. It is possible that if the Court had ruled fairly—or, better yet, not taken the case at all—Gore would have won the election. A recount might have led to a Gore victory in Florida. It is also entirely possible that, had the Court acted properly and left the resolution of the election to the Florida courts, Bush would have won anyway. The recount of the 60,000 undervotes might have resulted in Bush's preserving or expanding his lead. The Florida legislature, which was controlled by Republicans, might have stepped in and awarded the state's electoral votes to Bush. And if the dispute had wound up in the House of Representatives, which has the constitutional duty to resolve controversies involving the Electoral College, Bush might have won there, too. The tragedy of the Court's performance in the election of 2000 was not that it led to Bush's victory but the inept and unsavory manner with which the justices exercised their power.

There was only one bright spot in this dismal panorama. John Paul Stevens's dignified, clearheaded, and insistent eloquence honored the Court. Alone among the justices, Stevens was consistent and logical and constitutionally sound in his thinking. From his home in Fort Lauderdale, he composed a peroration that serves as the best epitaph for this sorry chapter in the Court's history: "The [per curiam opinion] by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges

throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. 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 pellucidly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." (At the last moment, one of Stevens's clerks prevailed on him, just this once, to give up his favorite word—*pellucidly*—and substitute the more familiar *perfectly*, which is how the famous sentence now reads.)

With one exception, the justices tried to put *Bush v. Gore* behind them and resume business as usual. Three weeks later, Scalia and Ginsburg followed their custom of welcoming the New Year with each other's families. Breyer, characteristically, made a systematic effort to take many of the disappointed liberal law clerks to lunch. In restaurants, often at embarrassingly high decibels, Breyer urged the young lawyers to maintain their faith in the Court and believe that their views might someday return to favor. O'Connor tried to avoid discussing the case. Kennedy pretended the whole matter was no big deal.

David Souter alone was shattered. He was, fundamentally, a very different person from his colleagues. It wasn't just that they had immediate families; their lives off the bench were entirely unlike his. They went to parties and conferences; they gave speeches; they mingled in Washington, where cynicism about everything, including the work of the Supreme Court, was universal. Toughened, or coarsened, by their worldly lives, the other dissenters could shrug and move on, but Souter couldn't. His whole life was being a judge. He came from a tradition where the independence of the judiciary was the foundation of the rule of law. And Souter believed *Bush v.*

Gore mocked that tradition. His colleagues' actions were so transparently, so crudely partisan that Souter thought he might not be able to serve with them anymore.

Souter seriously considered resigning. For many months, it was not at all clear whether he would remain as a justice. That the Court met in a city he loathed made the decision even harder. At the urging of a handful of close friends, he decided to stay on, but his attitude toward the Court was never the same. There were times when David Souter thought of *Bush v. Gore* and wept.