Neal Kumar Katyal

Politics Over Principle

Two centuries ago, our greatest chief justice, John Marshall, declared that America was a "government of laws, not men." No longer. The price of George W. Bush's victory has been the immolation of America's last great standing institution: the Supreme Court. By elevating politics over principle, the court revealed itself to be no better than any other institution or actor that touched this election. Its decision will prompt an attack on the court from Congress, lower court judges and scholars. And the court has only itself to blame.

The unsigned majority opinion can be summed up simply: It is lawless and unprecedented. The Supreme Court has never, in its 200-year history, decided that if ballots cannot be counted with absolute perfection, they cannot be counted at all. Nor has the court made a habit of intervening in elections in which the court itself was a central issue. This break with the court's tradition is even more chilling when we consider that the Rehnquist court has been built on the rock of respecting states' rights, not interfering with them.

In the ironic name of equality, the Rehnquist court deprived thousands of Florida voters of their right to be heard. It claimed that because manual counting was done under different standards in different counties, the Florida Supreme Court violated the Constitution. This is a novel principle in the law, because different counties use different procedures all the time. They use different ballots, have different registrars, different members of their canvassing boards and they open and close their polls at different times. But that does not make any of these actions unconstitutional.

Under the court's newfound insistence on equality, every election across the country in which the evaluation of ballots varied would become constitutionally suspect. Rather than being the end of the process, the court's decision opens up a host of new lawsuits and challenges in many states. And these legal challenges could entangle and cloud every close election. It is for that reason, among others, that the Supreme Court should have followed its path of deferring to the highest court of a state on matters of state law.

Since the New Deal, the Supreme Court has been received well by the public and Congress. Now all that is jeopardized. As Justice John Paul Stevens said in his dissent, "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."

The first line of attack may arrive from the Senate. In an evenly divided Senate, where 60 votes are necessary to end a filibuster, it will be fairly easy for members to block attempts to fill any of the vacancies that might occur on the court in the next few years. (Several times in our history, Congress has reduced the court's membership as a penalty for its acting politically.)

A second attack could come from lower court judges, who may begin to dismiss what the Supreme Court says in its decisions. The high court has no police to enforce its will—only its legitimacy. And the vital function of the court is to give guidance to the thousands of lower court judges across the country. But as some federal judges have already begun to say privately, why should lower court judges give respect to a nakedly political court?

A third attack will come from scholars. The decision will be Exhibit A in a new academic movement dedicated to exposing the Supreme Court's political biases.

A final attack may come from the bar. For years, Supreme Court practitioners have been sophisticated legal advocates, able to parlay court precedents and constitutional text into clear principles of law. Now it turns out that they look, and will have to behave, much like lobbyists.

At two moments in the 19th century, the Supreme Court tried to step in and resolve divisive political conflicts. It failed both times. In 1857, the court attempted to resolve the slavery question in the infamous *Dred Scott* case. Its lawlessness there prompted a civil war. In 1876 five justices sat in an extrajudicial capacity on the Tilden Commission, and used political methods to decide the election. Once more, the price was the loss of the court's legitimacy.

At a time when the presidency and Congress have been rocked by scandals, Americans needed one institution they could trust. It's too bad the court couldn't provide it for them.

The writer is an associate professor of constitutional law at Georgetown University. He helped prepare legal briefs for the Gore campaign during the post-election litigation.