

# THE SEARCH FOR INCONTROVERTIBLE VISUAL EVIDENCE

PAUL F. CAMPOS\*

## INTRODUCTION

The football coach is holding up a football. He is giving a rousing victory speech to his players, who have just won their season's biggest game. The coach is Dave Wannstedt, the team is the Miami Dolphins, and the victory has made them champions of their division.

"You did it!"<sup>1</sup> he shouts amid the din of the locker room. "This is what you spent the last six months working for. Now it's time to head back to Florida, and we're not stopping until we get to Tampa!" (Last season's Super Bowl was played in Tampa). The players cheer wildly.

Suddenly, a man in a suit appears at Wannstedt's shoulder. He is whispering something in the coach's ear. A look of irritation gradually builds on the coach's face; soon, irritation gives way to incredulity. The coach heads to the locker room's front door, where a man wearing a referee's shirt is waiting.

Wannstedt begins to talk to the referee in an animated undertone. The video camera's audio equipment is not picking up the conversation, but it is obvious that the coach is not happy. After a few seconds of this the coach wheels around and barks at the camera operator, enunciating every word very clearly: "Turn . . . that . . . damn . . . thing . . . off!"

## 673 LAW PROFESSORS SAY WHAT?

On January 13, 2001 a remarkable document appeared in the pages of the *New York Times*: a full-page manifesto, signed

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\* Professor, University of Colorado School of Law

1. This dialogue reconstructs what transpired during the odd ending of the December 24, 2000 AFC Championship game. For a description of the final minutes of this game, see *Dolphins are in Playoffs on Odd Note: Team Wins AFC East Title*, WASH. POST, Dec. 25, 2000, at D7. See also *Bizarre Finish Can't Put End to Dolphins' Joy*, BOSTON GLOBE, Dec. 25, 2000, at D1.

by more than 550 professors and other instructors at American law schools, denouncing the Supreme Court's decision in *Bush v. Gore*.<sup>2</sup> A facsimile of the document—since augmented by an additional 123 signatures—has been posted on the Internet, at the deliciously solemn cyber address of [www.the-rule-of-law.com](http://www.the-rule-of-law.com). The manifesto runs as follows:

673 Law Professors Say By Stopping the Vote Count in Florida, The U.S. Supreme Court Used Its Power To Act as Political Partisans, Not Judges of a Court of Law

We are Professors of Law at 137 American law schools, from every part of our country, of different political beliefs. But we all agree that when a bare majority of the U.S. Supreme Court halted the recount of ballots under Florida law, the five justices were acting as political proponents for candidate Bush, not as judges.

It is Not the Job of a Federal Court to Stop Votes From Being Counted

By stopping the recount in the middle, the five justices acted to suppress the facts. Justice Scalia argued that the justices had to interfere even before the Supreme Court heard the Bush team's arguments because the recount might "cast a cloud upon what [Bush] claims to be the legitimacy of his election." In other words, the conservative justices moved to avoid the "threat" that Americans might learn that in the recount, Gore got more votes than Bush. This is presumably "irreparable" harm because if the recount proceeded and the truth once became known, it would never again be possible to completely obscure the facts. But it is not the job of the courts to polish the image of legitimacy of the Bush presidency by preventing disturbing facts from being confirmed. Suppressing the facts to make the Bush government seem more legitimate is the job of propagandists, not judges.

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2. 554 *Law Professors Say*, N.Y. TIMES, January 13, 2001, at A7; *Bush v. Gore*, 531 U.S. 98 (2000).

By taking power from the voters, the Supreme Court has tarnished its own legitimacy. As teachers whose lives have been dedicated to the rule of law, we protest.<sup>3</sup>

It is true that all of us who are not yet perfected saints do and say things in the heat of the moment that we later regret. It is true that we are exhorted to be charitable to each other in our judgments. It is true that none of us would wish to be judged in the light of our most intemperate, most foolish, or most dishonest statements.

All this is true, yet there must still be some sort of limit on what one can say in public without running the risk that ridicule will be heaped upon one's head. This is especially true for those who implicitly hold themselves out as members of an intellectual elite ("673 Law Professors Say") and who nevertheless sign on to something like the statement reprinted above.

Let us not talk falsely now: this manifesto is an embarrassment to the profession. It manifests intellectual blindness, political bad faith, and slovenly diction.<sup>4</sup> Its authors demand to be taken seriously, yet their arguments as to why add up to nothing more than their institutional affiliations. "673 law professors say . . ." It all sounds very much like the beginning of a lawyer joke that will end with a punch line; and indeed this one does.

Whatever else "the law" may be, it is not something that provides ready answers to the most difficult social and political issues. As I have argued at length elsewhere, truly difficult legal issues are no more amenable to non-controversial solutions than are the political and social controversies that give rise to such legal issues in the first place.<sup>5</sup>

Indeed, the 2000 presidential election itself was an almost perfect illustration of this very point. The choice between Bush and Gore came down to a matter of a few hundred votes out of the more than 100,000,000 that were cast nationwide. As a statistical matter, the election was a tie, and no recount,

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3. *673 Law Professors Say*, at <http://www.the-rule-of-law.com/statement.html> (last visited Oct. 10, 2001).

4. For example, "By stopping the recount in the middle," "polish the image of legitimacy of the Bush presidency," etc. *Id.*

5. See generally PAUL F. CAMPOS, *JURISMANIA: THE MADNESS OF AMERICAN LAW* (1998).

whether official or unofficial, would or will be able to determine otherwise.<sup>6</sup>

Given that Bush and Gore were able to calibrate their arguments to the voting public with such synergistic perfection that each got what was for all practical purposes exactly half of the relevant vote, what chance was there that our courts would be able to deliver a more satisfactory answer to the question of which one of them should be declared the winner? Only someone whose professional identity in some way depends on the belief that courts can succeed where politics and culture fail would imagine that the chances were good.

In other words, only someone who has been trained to think like a lawyer—or more precisely a law professor—would put much faith in the courts in such a situation. Yet, if we can trust the evidence provided by “673 Law Professors Say,” that faith remains strong among the legal professoriat. After all, these 600 plus professors did not launch their charge of the legal academic light brigade because they objected to litigating the question of who ought to be declared president; they merely objected to the role played by the U.S. Supreme Court.

By necessary implication, their manifesto enthusiastically supports the role of the Florida Supreme Court in all this. This court, as readers may recall, was to overrule the judgment of the political branches of Florida’s government and order that yet another recount of the Florida votes be undertaken before the final vote was certified.<sup>7</sup>

That is, the authors are not objecting to judicial intervention *per se*, but rather to federal judicial intervention. Although the 673 professors assert that “it is not the job of a federal court to stop votes from being counted,”<sup>8</sup> they apparently believe that it is appropriate for a state court to require already counted and recounted ballots to be counted yet again.

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6. Since the very definition of what ought to have constituted a valid vote in the Florida presidential election will itself remain controversial, the unofficial recounts that until recently were being conducted by various members of the media were not able to provide any definitive answer regarding who should have been declared the winner of the election. See, e.g., *2nd Review of Florida Vote Is Inconclusive*, N.Y. TIMES, May 11, 2001, at A29 (stating that recounts by *USA Today* and the *Miami Herald* “revealed no sweeping victory for either candidate”).

7. See *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

8. *673 Law Professors Say*, at <http://www.the-rule-of-law.com/statement.html> (last visited Oct. 10, 2001).

Their argument, then, seems to be based on a strenuous defense of principles of federalism—principles that we can be fairly sure have rarely, if ever, previously commended themselves to most, if not all, of these same indignant academics.

The sudden discovery of federalist virtues is but one of several rich ironies emanating from the penumbra of the professors' text. Let us consider a few of the others.

First, a quick perusal of the signatories confirms that, like most American law professors, the vast bulk of them have been enthusiastic supporters of the Supreme Court's breathtaking record of expansion into almost every area of American politics and culture.

How many of these outraged professors have ever questioned the Court's willingness to thrust itself into the midst of political controversies concerning such matters as contraception or abortion? How many of them protested that "it [was] not the job of a federal court"<sup>9</sup> to order cross-district busing, or to extend free speech protections to defamation or commercial speech, or to limit the power of the Congress to control campaign financing, or to cut off aid to parochial schools, or to ban school prayer, or to invent a whole new code of criminal procedure?

Although a few of these professors have occasionally questioned the wisdom of one or another of the decisions alluded to above, I cannot find a single name on the list of signatories who might fairly be characterized as someone who has consistently supported doctrines of judicial restraint. Among the liberal legal professoriat, *Bush v. Gore* has elicited the peculiar brand of outrage that the serial adulterer often manifests when he discovers his wife is having an affair.

Second, the whole premise of "673 Law Professors" is that there was something extraordinary about the Court's decision in *Bush v. Gore*. But as other professors—some of them strong supporters of Al Gore—have pointed out, this simply is not the case. For example, Professors Pam Karlan and Richard Pildes have made it clear in their comments at this Symposium that the decision lies comfortably within a line of recent precedents—precedents of which neither of these liberal legal scholars approve—but that nevertheless provided the *Bush v. Gore*

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9. *Id.*

majority with plenty of formalistic cover for the case's substantive outcome.<sup>10</sup>

If we move beyond purely formal considerations, there is nothing at all original about the legal or political audacity of *Bush v. Gore*. Is the majority's opinion less convincing than the Court's argument in *Romer v. Evans*?<sup>11</sup> Does it display more—to use the appropriate jurisprudential term of art—sheer chutzpah than the plurality opinion in *Planned Parenthood v. Casey*?<sup>12</sup> For that matter, are the opinion's arguments less tendentiously circular than those found at the heart of *Marbury v. Madison*,<sup>13</sup> the very urtext of American judicial review?

To ask these questions in a dispassionate way is to answer them. Indeed, I agree with the manifesto's signatories that the Court's decision in *Bush v. Gore* was a display of monumental judicial hubris. Yet what they refuse to see is that it is precisely this feature of the case that makes it a quite ordinary manifestation of what we have come to call “the rule of law” in our political and legal culture. As teachers whose lives have been dedicated to the rule of law, it is both funny and sad that the signatories fail so utterly to grasp the dramatic irony inherent in their protest.

Finally, we should note that the signatories describe themselves as being persons of “different political beliefs.” In one sense this is surely true: a good number of them no doubt voted for Ralph Nader rather than Al Gore. But of course, the first question that would leap to the mind of any reader of the manifesto who has not been trained to think like a law professor is, “how many of these professors voted for George W. Bush?”

It just so happens that I ran a little experiment, designed to gather data on this very question. Three days after the symposium, whose proceedings are being published in this volume of the University of Colorado Law Review, I published an opinion editorial which, among other things, offered to make its

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10. Richard H. Pildes, Remarks at the University of Colorado Law Review 2001 Symposium: New Structures for Democracy (Feb. 23, 2001); Pamela S. Karlan, Remarks at the University of Colorado Law Review 2001 Symposium: New Structures for Democracy (Feb. 24, 2001).

11. 517 U.S. 620 (1996).

12. 505 U.S. 833, 867 (1992) (stating, for example, that “the Court's interpretation of the Constitution [occasionally] calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”).

13. 5 U.S. (1 Cranch) 137 (1803).

author literally eat his own words if but three Bush voters were to emerge from the 673 signatories of the manifesto.<sup>14</sup> I sent a copy of the editorial to the manifesto's web site (which explicitly solicits comments from readers and provides several links to other "relevant" commentary).<sup>15</sup>

Although I have heard from many readers around the country regarding the editorial in the months since, not one signatory has taken advantage of my offer. My admittedly unscientific—yet, to anyone even casually familiar with the makeup of the American legal academy, all too plausible—conclusion is that not a single Bush voter is to be found among these 673 teachers whose lives have been dedicated to the most scrupulous observance of what they style "the rule of law."

Again, I want to emphasize that, in my opinion, *Bush v. Gore* is in many ways an outrageous decision. Indeed, it would be fair to say that it was the most outrageous judicial opinion I have encountered since *Palm Beach Canvassing Board v. Harris*.<sup>16</sup>

It is an oversimplification to say that, while lawyers and law professors who liked the substantive outcome of *Palm Beach Canvassing Board v. Harris* and hated that of *Bush v. Gore* found the latter case outrageous and the former quite "ordinary," those whose substantive preferences were reversed mirrored the jurisprudential reactions of their left-leaning colleagues perfectly. It is an oversimplification, but not much of one.<sup>17</sup>

Depressingly enough, despite (or perhaps in some sense because of) nearly a century of attempts to demystify legal argument, by everyone from Roscoe Pound and Felix Cohen to Duncan Kennedy and Richard Posner, the crudest sort of legal realism continues to predict such outcomes with monotonous accuracy.

There is, in the end, a chillingly Orwellian character to this sort of selective blindness. The speed with which those who were condemning the intervention of the Florida Supreme

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14. Paul F. Campos, Editorial, *Law Professors' Site a Real Hoot*, ROCKY MTN. NEWS (Denver), Feb. 27, 2001, at 32A.

15. *673 Law Professors Say*, at <http://www.the-rule-of-law.com/statement.html> (last visited Oct. 10, 2001).

16. 772 So. 2d 1220 (Fla. 2000).

17. For a rare example to the contrary, see Robert F. Nagel, *From U.S. v. Nixon to Bush v. Gore*, WKLY. STANDARD, Dec. 25, 2000, at 2022.

Court turned to praising the intervention of the United States Supreme Court (and vice versa) was more than a little reminiscent of a famous scene from *Nineteen Eighty-Four*, in which "it became known . . . that Eastasia and *not* Eurasia was the enemy."<sup>18</sup>

On a scarlet-draped platform an orator of the Inner Party . . . was haranguing the crowd. . . . His voice, made metallic by the amplifiers, boomed forth an endless catalogue of atrocities, massacres, deportations, lootings, rapings, torture of prisoners, bombing of civilians, lying propaganda, unjust aggressions, broken treaties. It was almost impossible to listen to him without being first convinced and then maddened. At every few moments the fury of the crowd boiled over and the voice of the speaker was drowned by a wild beastlike roaring that rose uncontrollably from thousands of throats. The most savage yells of all came from the schoolchildren. The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's hand. He unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different. Without words said, a wave of understanding rippled through the crowd. Oceania was at war with Eastasia! . . .

The thing that impressed Winston in looking back was that the speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax.<sup>19</sup>

## CONCLUSION

The scene inside of Foxboro Stadium, the site of the Miami Dolphins' playoff game, can only be described as surreal. Because the game appeared to have ended nearly an hour earlier, the stands of the massive stadium are almost completely empty. A single lone fan, out of the more than 50,000 that originally attended the game, can still be seen sitting in the stands. His name is Jeff McBride, and he is a Patriots fan who has refused to accept his team's apparent season-ending defeat.

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18. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 181 (1949) (emphasis added).

19. *Id.* at 181-82.

"I'm not going to go until somebody tells me the game is over,"<sup>20</sup> McBride later tells a reporter. "I don't care if they're 0-16 or undefeated, I'm going to stay."

Yet what gives the stadium a surreal air is not anything in the stands; it is what is happening out on the field.

The Dolphins and the Patriots have emerged from their locker rooms (many of the players on the sidelines are still wearing towels around their waists). They have done so because the National Football League's Manhattan office has overruled referee Johnny Grier's call on what appeared to have been the game's final play.

League officials viewing replays of that play have determined that, in their opinion, Patriots quarterback Drew Bledsoe's arm had actually entered into a throwing motion, and that therefore the game clock should not have expired. They have called Grier and ordered him to put three seconds back on the game clock, and to reassemble the teams for yet another attempt to complete a game that everyone else assumed was long over.

Under the NFL's instant replay rules, a league official in the press box is allowed to reverse any ruling on the field during the final two minutes of a game if, in his opinion, he views "incontrovertible visual evidence" that the ruling in question was mistaken. This is apparently the first time that league officials not actually present at the site of a game have reversed a call (such a procedure is not mentioned in the league's official rules).

In any case, backup Patriots quarterback Michael Bishop's desperation pass falls harmlessly to earth, and the final score remains exactly what it was before the league office intervened *sua sponte*.

Afterwards, Dolphins tight end Hunter Goodwin brings a broader perspective to the game's bizarre conclusion. "That was like the Florida Recount," he said. "That was one of the weirdest things ever. But after last month in the state of Florida, you just expect anything."

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20. See sources cited *supra* note 1.

