TO: Interested Parties
FROM: Court Accountability, Revolving Door Project, Take Back the Court, & True North Research
DATE: October 31, 2024
RE: Remembering *Bush v. Gore*

Yesterday, the U.S. Supreme Court made clear its willingness to intervene in the 2024 election, with a majority of the justices allowing a purge of Virginia voters asserted by the state to be non-citizens — despite the fact that many are citizens who have been misidentified by the state. The National Voter Registration Act explicitly bans this kind of purge in the 90 days before an election, but a right-wing majority nonetheless allowed it to pass. In light of this decision and the possibility of future interventions in what is likely to be a close election, we must learn some lessons from a direct historical parallel: *Bush v. Gore*.

We cannot forget the fundamental wrongheadedness of the Court's ruling in *Bush v. Gore*, which was possible only with the votes of at least two justices whose conflicts of interest merited recusal, one of whom reportedly "provided the early framework" for the decision before oral arguments were even presented to the Court. The conflict-tainted *Bush v. Gore* ruling was one of the most consequential decisions in modern U.S. history, and indeed, at least two justices on today's Court have little ability to appear impartial in any election litigation. If we are bound to traverse this all-too-familiar path, there are a few things we must keep in mind.

1. Conflicts of interest tainted the decision in *Bush v. Gore.*

Justices Clarence Thomas and Sandra Day O'Connor had conflicts of interests in the case that should have been grounds for recusal. A justice's recusal is required "in any proceeding in which" a justice's "impartiality might reasonably be questioned," and when a justice or their spouse "is known by the [justice] to have an interest that could be substantially affected by the outcome of the proceeding," under 28 U.S.C. 455.

Clarence Thomas's wife, Ginni Thomas, was helping vet potential Bush appointees in 2000 for the right-wing Heritage Foundation. In 2001, she was promoted to the position of "Director of Executive Branch Relations," a role in which she worked with the new Bush administration and made a six-figure salary. It was clear at the time that Ginni Thomas would directly benefit from an election resulting in a Bush administration rather than a Gore administration, and her husband's vote made it a reality. And so it surely appears that the justice's wife had a fairly direct "interest" that was "substantially affected by the outcome of the proceeding."

Sandra Day O'Connor also had an interest in the case. On election night 2000, as she thought she was witnessing a Gore win, the justice reportedly said, "This is terrible." Her husband subsequently explained to those around her, "She's very disappointed because she was hoping to retire."

On December 4, 2000, the same day that the justices issued their per curiam opinion in *Bush v. Palm Beach County Canvassing Board*, O'Connor reportedly asserted to people at a party hosted by some wealthy friends of hers, "You just don't know what those Gore people have been doing. They went into a nursing home and registered people that they shouldn't have. It was outrageous." As Jeffrey Toobin wrote in his book that first revealed the incident, her claims were an "unproved accusation, which had circulated only in the more eccentric right-wing outlets."

Thomas and O'Connor thus had exactly the kind of "extrajudicial sources" of "bias or prejudice" that could lead an observer to reasonably question their impartiality, therefore requiring recusal. Had both justices recused, the case would have gone 4-3 for Gore. If even one had recused — say Thomas, who stood to gain financially — it would have been a 4-4 tie, leaving in place the decision of the Florida Supreme Court to proceed with the recount.

Additionally, one of Justice Scalia's sons accepted a job on election day 2000 at Greenberg Traurig, where firm partner Barry Richard represented Bush in Florida. Another son worked at Gibson Dunn, which represented Bush before the Supreme Court. Although the ties of his adult sons are more attenuated than the direct conflicts of Thomas and O'Connor, they still raise the appearance of potential bias and suggest that his impartiality might reasonably be questioned.

The current Supreme Court's ethics scandals have been widely reported, but the conflicts of interests that flow from those scandals are wider than is generally appreciated. At SupremeTransparency.org, our organizations have been tracking amicus briefs filed by organizations funded by or otherwise involved with powerful individuals who are closely tied to one or more justices — people like Harlan Crow, Leonard Leo, Charles Koch, and Paul Singer.

That these powerful individuals lend their support to groups that file amicus briefs shows that they have interests in a range of cases, raising questions about the impartiality of the justices whose lifestyles they subsidize. In light of the possibility of high-profile election ligation, we must not lose sight of the interests of the justices' wealthy friends and benefactors, and the resulting potential for conflicts of interest.

Indeed, investigative reporting has shown that Ginni Thomas actively sought to keep Trump in the White House, and flags tied to the January 6 insurrection have been flown for weeks over Samuel Alito's homes, both of which raise reasonable questions about the justices' impartiality.

2. *Bush v. Gore* was wrong on the merits.

The 5-4 partisan majority used faulty reasoning to reverse the Florida Supreme Court's decision to allow a recount, and people of all political stripes said as much at the time.

A number of scholars have argued that the majority erred in its analysis of equal protection. For instance, Erwin Chemerinsky has argued that Bush lacked standing (Bush was neither a voter nor a Floridian), while Pamela Karlan has argued that an analysis based on procedural and substantive due process would have required a recount — which is perhaps what turned the Court to its equal protection reasoning in the first place.

Even some conservative legal commentators at the time criticized the majority's equal-protection analysis, despite supporting the outcome. One-time Supreme Court nominee Robert Bork wrote that he found "serious difficulties" in the majority's argument — instead embracing the extreme claims that courts have no role and must defer to state legislatures, as first proposed by O'Connor and then urged by Chief Justice Rehnquist. That discredited and ahistorical construct, which has been dubbed the "independent state legislature" theory, was rejected by the Supreme Court in 2023, although it could be revisited.

At the time, in 2000, the majority even asserted that its ruling should not be considered precedent, as it famously wrote, "Our consideration is limited to the present circumstances." The justices have only cited the per curiam opinion twice since then.

But who would have won had the Supreme Court allowed the recount to continue? While some large newspapers at the time hastily declared that Bush would have likely been the winner, they largely ignored that the judge overseeing the recount indicated that he likely would have counted overvotes, a recount method which likely would have resulted in a Gore victory. One of the major subsequent unofficial recounts by media organizations showed that more people intended to vote for Gore than Bush, but many did not punch through the ballot hard enough to dislodge the "chad."

3. The consequences of *Bush v. Gore* were damaging to the U.S.

Bush v. Gore is one of the most consequential Supreme Court cases ever decided, and should any similar cases arise in relation to the 2024 election, they must be covered with the knowledge that they could have similarly consequential effects. The ruling gave the White House to Bush just months before the terrorist attacks of 9/11, which was used to back Bush's lies about Iraq to initiate a war there that cost hundreds of thousands of lives and billions of dollars.

President Bush was also able to reshape the federal judiciary, installing right-wing judges whose rulings continue to ripple through our political system more than 15 years after he left office.

After he was elected in 2004 as an incumbent, he was able to make John Roberts Chief Justice; Roberts participated in *Bush v. Gore* litigation, along with Brett Kavanaugh and Amy Coney Barrett. This year, Roberts has already maneuvered the Court to help Trump in this election, in ways that are already consequential, including by preventing a trial on Trump's criminal prosecution from happening before the 2024 presidential election. Roberts' maneuvers also raise questions about his impartiality toward Trump.

Conflicts of interest can create a lasting scar on the legacy of our institutions and the trajectory of our democratic republic, and so **we must pay attention to them and loudly call them out** when they occur — especially when they affect our ability to protect our rights, including the right to vote and have our votes counted. **Any "*Bush v. Gore* 2.0" cases must be treated with the utmost scrutiny.**

Throughout this Supreme Court term, we will have experts available to speak about the consequences of billionaire influence on our judicial system, including Lisa Graves, Executive Director of True North Research and Managing Director of Court Accountability; Mike Sacks, Senior Advisor to Court Accountability; Sarah Lipton-Lubet, Executive Director of Take Back the Court; and Jeff Hauser, Executive Director of the Revolving Door Project. Please don't hesitate to reach out to press@truenorthresearch.org, alexa@takebackthecourt.today, or courts@therevolvingdoorproject.org to get in touch.