



## BUSH V GORE: THE US SUPREME COURT SUBSTITUTES ITSELF FOR THE ELECTORATE?

**Events:** The 2000 US presidential election, held on 7 November, was contested between Vice President Al Gore, the Democratic candidate, and Texas Governor George W. Bush, for the Republicans. Having initially conceded defeat in a close-fought election, Gore retracted his concession in the early hours of 8 November, as uncertainty grew over the result of the election in Florida, whose 25 electoral college votes would have given either candidate the overall majority needed to win. Doubts of various kinds had surfaced about the accuracy of the count, not least linked to the working of the punch-card ballots used in Florida. In these circumstances, Gore requested hand recounts of votes in four of Florida's counties, and the Florida Supreme Court eventually ordered a state-wide recount of ballots. The US Supreme Court heard two cases, both known as *Bush v Gore*. In the first, the Court granted a temporary delay in enforcing the Florida Supreme Court's order and, in the second, which concluded on 12 December, the Court ordered that the Florida recount be stopped. Gore, as a result, withdrew his objections to the electoral outcome and Bush duly became the 43rd president of the USA. It is generally believed that had the state-wide recount gone ahead, Gore would have won Florida and the presidential election.

**Significance:** The Supreme Court's capacity to terminate the election of 2000 and, in essence, deliver the presidency to George W. Bush derives from the system of judicial review that operates in the USA. The US constitution makes no mention of judicial review, but, arguably, embodies the logic that made its emergence inevitable. As the constitution laid down legal standards for the behaviour of government institutions, these needed to be supervised or policed, and the judiciary (more specifically, the Supreme Court) was the only institution equipped for this purpose. In the case of *Bush v Gore*, the Supreme Court determined that the actions of the Florida Supreme Court were not compatible with the US constitution because they did not afford Bush the 'equal protection of the laws', as stipulated in the Fourteenth Amendment. The judgement has been defended on the grounds that, in a context of deep and



continuing uncertainty, the matter simply had to be resolved. In blocking the Florida recounts, the Supreme Court was acting to bring an end to a damaging period of political insecurity. The exceptional nature of the case was acknowledged in the ruling itself, which stipulated that it should not be used as a precedent for future cases.

However, the Supreme Court has been accused of 'judicial misbehaviour' on at least three grounds. First, many have argued that the Court simply overreached itself. Not only has its interpretation of the equal protection clause of the Fourteenth Amendment been questioned, but a belief in states' rights, embodied in the Tenth Amendment, would suggest that the matter should have been settled not by the US Supreme Court, but by the Florida Supreme Court. Second, given the profound implications of the judgement and the deep controversy surrounding it, the Court demonstrated worrying divisions, the split decision, 5–4, meaning that the outcome was determined by a single vote. Previous landmark judgements have usually been decided unanimously. Third, and most seriously, it has been claimed that the ruling was motivated by considerations of partisan political advantage. Each of the five Justices who supported it had been appointed by Republican presidents and were judicial conservatives, who usually supported states' rights and, above all, judicial restraint. Critics have therefore suggested that these Justices had either acted to promote the advantage of a particular political party, or that, by installing a Republican rather than a Democrat in the White House, they were increasing the chances of further conservative appointments to the Court in the future.