A Draft Resolution of Congressional Censure Against United States Supreme Court Justices Kennedy, O'Connor, Rehnquist, Scalia, and Thomas for Their Betrayal of the American People and the United States Constitution Displayed in the Decisions of Bush v. Gore

The Counts of Censure

(1) Willful Nullification of the Rule of Law

(Anthony M. Kennedy, Sandra Day O'Connor, William H. Rehnquist, Antonin Scalia, Clarence Thomas)

In failing to remand Bush v. Gore to the Supreme Court of Florida for a new recount consonant with the U.S. Supreme Court majority's enunciated Equal Protection ruling, these five justices willfully nullified the rule of law for a partisan political purpose, forcing a premature end to the counting of presidential election votes in the state of Florida on December 12, 2000.

(2) Dereliction of Ethical Duty

(Sandra Day O'Connor, William H. Rehnquist, Antonin Scalia, Clarence Thomas)

In light of public and demonstrable conflicts of interest arising from their political affiliations and familial ties, by failing to recuse themselves from participation in Bush v. Gore, these four justices violated set and certain ethical guidelines universally adhered to by judges at all levels of jurisdiction which guard against judicial decisions being tainted by bias and partiality, or the appearance of such impropriety; and

(3) Abuse of Federal Judicial Power

(Anthony M. Kennedy, Sandra Day O'Connor, William H. Rehnquist, Antonin Scalia, Clarence Thomas)

In holding Bush v. Gore to be justiciable in federal court, abjuring numerous factors compelling its classification as a non-justiciable political question and otherwise dictating prudential abstention, these five justices usurped the

powers lawfully belonging to a coordinate branch of the federal government (Congress), and to the state of Florida.

I. Applicable Laws and Principles.

Whereas the United States Constitution establishes a tripartite form of federal government featuring Executive, Legislative, and Judicial branches and provides for a separation of powers to exist between and among the same;

Whereas the United States Constitution preserves the individual states as sovereign units of republican government within the United States of America and ascribes to them a wide range of autonomous and concurrent powers coexistent with federal governmental powers;

Whereas the separation of powers provisions contained in the United States Constitution are bedrock principles of our nation's checked-and-balanced, republican form of government—created from revolution, redeemed through civil war, and sustained so long thereafter by fervent devotion to the rule of law;

Whereas, pursuant to the separation of powers, the Constitution establishes independent, particularized provisions for selecting officers of the three branches of the federal government and the head officers of said branches of government, including the President of the United States as head of the Executive branch;

Whereas the President of the United States serves as Commander in Chief of the armed forces and wields enormous influence over the foreign and domestic policies of the nation, including the power to propose treaties and legislation; appoint federal department heads, ambassadors, and federal judges; administrate and execute the laws; annually report to Congress and the American people on the State of the Union; and to represent the United States as head of state in all substantive and ceremonial dealings with foreign nationals;

Whereas all American citizens registered to vote are eligible to cast a ballot in the quadrennial election to fill the office of President of the United States, and said officeholder is acknowledged to be among the most preeminent personages of the nation and in the world;

Whereas the United States Constitution determines the manner of electing the President and Vice President of the United States and prescribes a role for two (and only two)

institutions: state legislatures before Election Day and Congress thereafter, as follows:

> Article II, Section 1 of the U.S. Constitution declares: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [for President and Vice President of the United States] . . . . The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."
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> Amendment XII to the U.S. Constitution states: "The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; . . . ; —The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; —The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; . . . ; — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, . . . ";

Whereas, for the presidential election of 2000, Congress determined "the Time of chusing [sic] the Electors" to have been November 7, 2000, pursuant to 3 U.S.C. Sec. 1; and Congress determined "the Day on which they shall give their Votes" to have been December 18, 2000, pursuant to 3 U.S.C. Sec. 7;

Whereas, resulting from the disputed presidential contest of 1876 between Democratic candidate Samuel J. Tilden and Republican candidate Rutherford B. Hayes, Congress passed the Electoral Count Act of 1887 in order to provide a detailed blueprint for resolving—through political means—future disputes concerning the bona fides of state presidential electors, the provisions of which are codified in 3 USC, Secs. 5, 6, and 15 et seq.;

Whereas it is logical to conclude from a reading of said statute and its legislative history that Congress intended to commit the power to resolve such controversies over the bona fides of state presidential electors to the Congress (both houses) and to the states, rather than to the federal

courts; see H. Rep. No. 1638, 49th Cong., 1st Sess., 2 (1886), report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice-President ["The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes . . . . The power to determine rests with the two Houses, and there is no other constitutional tribunal."] Accord: Framer of the Constitution, James Madison, July 25, 1787 (reprinted in 5 Elliot's Debates on the Federal Constitution 363 (2d ed. 1876)) ["Madison . . . believed that allowing the judiciary to choose the presidential electors 'was out of the question.'"]—cited in Breyer, dissenting opinion Part B, p. 12, Bush v. Gore; No. 00-949 (U.S. Dec. 12, 2000).

Whereas, for the presidential election of 2000, Congress determined that the day for Congress to receive electoral vote reports from the fifty States and the District of Columbia, and, if necessary, to entertain, adjudicate and resolve objections thereto, was January 6, 2001;

II. The Legal Controversy in Florida.

Whereas the results of the election of 2000 were unusually close, and the outcome of the tabulation of electoral votes came to depend solely upon the determination of the rightful winner of the state of Florida's 25 electoral votes;

Whereas the legislature of the state of Florida prescribed that the electors thereof be awarded to the presidential candidate receiving the highest number of votes on November 7, 2000 pursuant to Section 103.011 of Florida Statutes (2000), which states:

> Electors of President and Vice-President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. Votes cast for the actual candidates for President and Vice-President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected the presidential electors of the candidates for President and Vice-President who receive the highest number of votes.

Whereas, following Election Day, certain interpretations of the initial machine tabulations of votes in Florida suggested a possible narrow victory for the Republican Party

candidates for President and Vice President over the Democratic Party candidates for President and Vice President;

Whereas, a complex legal controversy arose between these candidates concerning the procedures, standards, and time frames established by applicable law pertaining to the recounting of ballots in that state—a controversy that eventually resulted in a hearing before the Florida Supreme Court on December 6, 2000 and in a ruling by that body on December 8, 2000, which dispute implicated, in the words of the Florida Supreme Court justices' ensuing opinion, "the essence of the structure of our democratic society" and "the will of the people of Florida as the guiding principle for the selection of . . . presidential electors"; viz.:

> We are dealing with the essence of the structure of our democratic society; with the interrelationship within that framework, between the United States Constitution and the statutory scheme established pursuant to that authority by the Florida Legislature. Pursuant to that authority extended by the United States Constitution, in section 103.011, Florida Statutes (2000), the Legislature has expressly vested in the citizens of the state of Florida the right to select the electors for President and Vice President of the United States:
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> [Section 103.011 of Florida Statutes (2000) text cited above].
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> In so doing, the Legislature has placed the election of presidential electors squarely in the hands of Florida's voters under the general election laws of Florida. Hence, the Legislature has expressly recognized the will of the people of Florida as the guiding principle for the selection of all elected officials in the state of Florida, whether they be county commissioners or presidential electors.
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> [Per Curiam, Florida Supreme Court Case No. SC00-2431 (pp. 17-18) Albert Gore, Jr. and Joseph L. Lieberman, Appellants vs. Katherine Harris as Secretary etc., et al., Appellees, (December 8, 2000) Corrected Opinion.]

Whereas, after duly considering extensive briefs and holding a hearing and oral argument on December 6, 2000, the Supreme Court of Florida on December 8, 2000 issued a reasonable

ruling applying Florida statutes and effecting the Florida Legislature's intent, ordering the Florida Secretary of State to include certain (previously excluded) manually recounted vote totals from certain Florida counties in the official tabulation; said ruling further mandated that a manual recount be conducted forthwith, under judicial supervision, of all machine-counted ballots in Florida that did not record a vote for any candidate for President (known as "undervotes") and further directed state judges to serve as adjudicators of all disputed undervote ballots under the superintendence of a single trial court judge in Leon County. Per Curiam, Florida Supreme Court Case No. SC00-2431 (pp. 39-40);

Whereas, on December 9, 2000, said manual recount of Florida's statewide undervotes had commenced in an orderly manner under judicial supervision in Leon County, Florida and in other counties throughout the state, the object of which was to ascertain which slate of presidential electors had been chosen by the voters of Florida;

Whereas said duly authorized state process mandated by the U.S. Constitution was underway to implement the intent of the legislature of Florida to determine the rightful recipient of that state's electoral votes according to the will of the people of Florida;

Whereas by December 9, 2000 it was reasonably certain that the results of said statewide manual recount of undervotes in Florida, if completed by December 12, 2000, would likely decide the outcome of the 2000 presidential election and thus determine the head of the executive branch of the federal government for the next four years;

III. The U.S. Supreme Court's Intervention and Per Curiam Rulings on the Merits, and the Negative Effect Thereof.

Whereas on December 9, 2000, five justices of the United States Supreme Court improvidently and with unfathomable contempt for the framework of separated powers undergirding the system of constitutional governance upon which the United States of America was founded (as explained further in Part IV below), sought to and did influence—wholly illegitimately and, it can be reasonably inferred, out of intemperate partisan passion—the outcome of the 2000 presidential election by granting a writ of certiorari and a temporary restraining order peremptorily staying the ongoing manual recount of the undervotes in the state of Florida by a per curiam edict;

Whereas on December 12, 2000, after receiving extensive briefs and hearing oral argument and having ample time to reconsider and correct their grievous error, five justices of the United States Supreme Court compounded the same by issuing a per curiam ruling purporting to deem unconstitutional (on equal protection grounds) the procedures and standards governing the recounting of ballots employed by Florida under its December 8, 2000 Florida Supreme Court ruling (Bush v. Gore, No. 00-949, U.S. Dec. 12, 2000);

Whereas said December 12, 2000 United States Supreme Court per curiam ruling further pivotally asserted—falsely—that the Florida Supreme Court had determined that the Florida Legislature intended that manual recounts be completed by December 12, 2000 (even if that meant certifying an inaccurate count) so as to enable the state to be protected under "safe harbor" provisions of 3 USC, Sec. 5 (provisions insulating a state's slate of electors from Congressional objection if the selection process was regularly completed by December 12, 2000); viz.:

> The Supreme Court of Florida has said that the legislature intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U. S. C. §5. [cites omitted.] That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court' s order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed. (Per Curiam, Bush v. Gore, No. 00-949 U.S., Dec. 12, 2000, p. 12)

The falsity of this pivotal assertion was subsequently attested to by a distinguished member of the Florida Supreme Court, Justice Leander J. Shaw, Jr., whose rebuke to the U.S. Supreme Court majority is especially noteworthy in that Justice Shaw was one of the 3 Florida Supreme Court justices who dissented in the Florida Supreme Court's 4-3 ruling in favor of Albert Gore on December 8, 2000; viz.

> [December 12th] certainly was not a <u>mandatory</u> contest deadline under the plain language of the Florida Election Code (i.e., it is not mentioned

> there) or this Court's prior rulings. [FN 12:] Contrary to the ruling of the United States Supreme Court in Bush v. Gore No. 00-949 (U.S. Dec. 12, 2000) our prior opinions discussed Title III vis-a-vis the Florida Secretary of State's authority to reject late returns arising from a pre-certification protest action, not vis-a-vis a court's obligation to stop a recount in a post-certification contest action [cites omitted]. To mix these two actions is to confuse apples and oranges. (J. Shaw, concurring opinion, pp. 7–10 @ p. 10, Gore v. Harris, Supreme Court of Florida (on remand from Bush v. Gore), December 22, 2000.)

Whereas, on the basis of said false assertion (that the Florida Supreme Court found that the legislature of Florida intended any manual recount be completed by December 12, 2000 so as to enable the state to claim the benefit of the "safe harbor" provisions of 3 USC, Sec. 5 even if that meant certifying an inaccurate count), said United States Supreme Court per curiam ruling mischaracterized—and intentionally spurned as legally impermissible—the reasonable proposal of dissenting Justice Breyer that the state of Florida be given the opportunity to cure the federal constitutional defects purportedly present in Florida's procedures and standards governing the recounting of ballots by December 18; viz.:

> JUSTICE BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida election code, and hence could not be part of an appropriate' order authorized by Fla. Stat., Section 102.168(8)(2000). (Per Curiam, Bush v. Gore, No. 00-949 U.S. Dec. 12, 2000, p. 12.);

Whereas the willful inclusion of said false assertion (that the Florida Supreme Court found that the legislature of Florida intended any manual recount be completed by December 12, 2000 so as to enable the state to claim the benefit of the "safe harbor" provisions of 3 USC, Sec. 5 even if that meant certifying an inaccurate count) and mischaracterization (that Justice Breyer's proposed remedy of ordering a constitutionally proper recount contest until December 18 contemplated action in violation of the Florida Election Code) in the United States Supreme Court's per curiam ruling appeared to signal the Court's resolve to settle the 2000 presidential election in favor of the Republican candidates for President and Vice President in any event, sooner or later;

Whereas, since it was reasonably foreseeable that including said false assertion and said mischaracterization in the United States Supreme Court's per curiam ruling would effectively deny the Democratic Party's candidates for President and Vice President all remaining avenues of action save for concession (and in view of the other anomalous factors further detailed below in Part V), we are forced to conclude that the Supreme Court's ruling was consciously and explicitly willed to overturn the hallowed process wherein the American people, mediated by the Electoral College on a state-by-state basis, choose the head of the Executive branch of government by a free and fair democratic election;

Whereas the inclusion of said false assertion and said mischaracterization in the United States Supreme Court's per curiam ruling did, for all intents and purposes, force the Democratic Party's candidates for President and Vice President to concede the 2000 presidential election;

Whereas the Supreme Court's per curiam ruling thwarted the accurate ascertainment of the will of the voters of the state of Florida as to which candidate for President of the United States (and his electors) a majority of Florida voters supported, pursuant to the procedures and standards governing the recounting of ballots mandated by the Supreme Court of Florida, the highest authoritative judicial body therein;

Whereas the Supreme Court's per curiam ruling, in so thwarting the ascertainment of the will of the voters in the state of Florida, decided the outcome of the presidential election in favor of the Republican Party candidate for president, a candidate who lost the popular vote by 543,895 votes nationwide and is virtually certain to have also lost the deciding popular vote in the state of Florida based on the published conclusions of numerous careful, unbiased, and responsible inspectors of disputed ballots since made available for individual review under the state of Florida's "sunshine" laws (e.g., Palm Beach Post, 27 January 2001; Washington Post, 27 January 2001; Orlando Sentinel, 28 January 2001);

IV. The U.S. Supreme Court's Decision to Accept Jurisdiction and Rule on the Merits, and the Dangers Posed Thereby.

Whereas said Supreme Court's anomalous per curiam ruling on the merits of December 12, 2000 derived from a preceding legal impropriety, namely, that of daring to assert—against the dictates of both precedent and prudence—federal judicial jurisdiction over the Bush v. Gore case in the first place;

any fair reading of the controlling and persuasive legal authority regarding federal justiciability (summarized in this section), we submit, compels the conclusion that the Supreme Court herein committed an improvident, reckless, derelict, and intolerable act of usurpation and subversion of the lawful powers rightfully belonging to the states and to another branch of the federal government coequal with the court (Congress)—constituting an assault on the citadel of checked-and-balanced, separated powers and ordered liberty indispensable to our longevity as a nation of laws; viz.:

Although John Marshall wrote in Marbury v. Madison that the United States Supreme Court had authority to "say what the law is" (adjudicate an arguable federal Constitutional question), the doctrine of judicial review simply cannot—consistent with the separation of powers—validly empower the Supreme Court of the United States to rule unconstitutional a state Supreme Court's interpretation and enforcement of state statutes governing the manual recounting of votes in a presidential election (i.e., the election that decides the head of another entire branch of the federal government), especially where, as here:

> (i) the state Supreme Court had prescribed a reasonable, judicially supervised statewide recount of previously uncounted ballots (undervotes);
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> (ii) state judges conducted the adjudication of disputed ballots under the superintendence of a single trial court judge; and
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> (iii) explicit recourse was available to political dispute resolution procedures prescribed by federal statutes (3 USC, sections 5, 6, and 15) that committed the mediation of ongoing controversies concerning the bona fides of any state's slate of presidential electors to the Congress and to the states;

Whereas, from the beginning of our Republic, the United States Supreme Court has taken care not to frivolously or rapaciously invade the province of state Supreme Courts, and where it has intervened, not to overturn the rulings of state Supreme Courts; see, e.g., Herb v. Pitcairn, 324 U.S. 117 (1945), which held that state Supreme Courts have the final authority over all state court decisions that rest on adequate and independent state grounds and that the United States Supreme Court is without jurisdiction to even take such a case for review, much less reverse it; and McPherson v. Blacker, 146 U.S. 1 (1892), wherein the U.S. Supreme

Court asserted jurisdiction and upheld the state Supreme Court's decision that a state could constitutionally select its presidential electors via a district-by-district vote rather than a statewide vote; see Justice Frankfurter's discussion in Baker v. Carr emphasizing this ratification of the state Supreme Court on the merits as a key factor rendering the McPherson case justiciable in the first place, 369 U.S. 186 (1962) Frankfurter dissent at p. 285 ["To read with literalness the abstracted jurisdictional discussion in the McPherson opinion reveals the danger of conceptions of' justiciability' derived from talk and not from the effective decision in a case. In probing beneath the surface of cases in which the Court has declined to interfere with the actions of political organs of government, of decisive significance is whether in each situation the ultimate decision has been to intervene or not to intervene."]; compare, Bush v. Gore, where the U.S. Supreme Court overturned the reasonable decision of the Florida Supreme Court;

Whereas, in any event, from the beginning of our Republic, the United States Supreme Court has prudentially abstained from ruling upon "political questions"—disputes the resolution of which appropriately belonged in their entirety to either or both of the other two federal branches of government or the states—where resolution by the Supreme Court would intolerably strain the framework of separated powers; see, e.g., Taylor v. Beckham, 178 U.S. 548, 571; No. 603, (May 1, 1900) [the disputed outcome of a contested state gubernatorial election held non-justiciable]; Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569 (1916) [the constitutionality of using a referendum to override a Congressional districting plan enacted by the state legislature held non-justiciable]; and Luther v. Borden, 7 How. 1 (1849) [a trespass case that pivoted on the question of whether a state government constituted by limited or universal male suffrage was the duly constituted state government held non-justiciable; the latter case arose out of the Dorr Rebellion in Rhode Island in 1841–1842; see Woodbury opinion, at 7 How. 1, 51–53 (dissenting in part but agreeing with the Court regarding the inappropriateness of judicial inquiry into the issues)]; see generally Baker v. Carr, 369 U.S. 186 (1962) Brennan majority opinion, Part IV, Justiciability, pp. 208–237, and Frankfurter dissent at pp. 266–330. The "political question" doctrine is summarized in Bickel, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 42 et seq., 1961), and further discussed in Bickel, The Least Dangerous Branch, p. 184;

Whereas, but for the Supreme Court's unilateral intervention that sealed the outcome of the 2000 presidential election,

the legal case and controversy between the candidates should and would have otherwise been appropriately resolved in the first instance by the results of the completed manual recount recorded in the final disposition of the Florida Supreme Court case, and ultimately, in all probability, in a political manner by Congress and the state of Florida as set forth by Congress in the Electoral Count Act of 1887, 3 USC, Secs. 5, 6, and 15;

Whereas the case and controversy presented to the U.S. Supreme Court in Bush v. Gore thus met—if not exceeded—the criteria defining a classic non-justiciable "political question," as set forth in Davis v. Bandemer, 478 U.S. 109 (1986), citing Baker v. Carr, 369 U.S. 186 (1962), in that:

> (i) the appellant was asking the Supreme Court to overturn (on grounds of an alleged violation of the U.S. Constitution) a reasonable ruling of the Florida Supreme Court regarding the manner of Florida's selection of presidential electors, which selection process is "to be decided by a political branch of the government coequal with [the U.S. Supreme] Court," Davis v. Bandemer, 478 U.S. 109, 122, citing 369 U.S. 186, 226 (Brennan majority opinion); here, the manner of Florida's selection of presidential electors was jointly ascribed by law to not one but two "political branch[es] of the government coequal with [the U.S. Supreme] Court"—the states in the first instance pursuant to U.S. Constitution Art. II, Sec. 1 and Amendment XII (according to Florida law, the Florida Supreme Court had plenary authority to reasonably construe and enforce Florida statutes governing the selection of presidential electors to effect the Florida Legislature's intent), and ultimately Congress (in its role as arbiter of the bona fides of all states' slates of presidential electors) pursuant to 3 USC, Secs. 5, 6, and 15; and
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> (ii) if decided by the Supreme Court, the decision in the case or controversy "risk[ed] embarrassment of our government abroad, [and] grave disturbance at home," Davis v. Bandemer, 478 U.S. 109, 122, citing 369 U.S. 186, 226; here, the Supreme Court decision shattered the international moral authority by which the United States has historically advocated free, fair and democratic elections abroad (see editorials "Let's boycott America," New Statesman, 25 December 2000; "Faith of Fathers," The Russia Journal, 16 December 2000;

"Beware Bush's American dream: This President is not to be trusted," The Guardian (UK), 21 January 2001; "Right-wing coup that shames America," The Observer (UK), 24 December 2000), and triggered the largest outpouring of protest against a presidential succession since the Vietnam-haunted second inauguration of Richard Nixon in January, 1973 (see "Protesters in the Thousands Sound Off in the Capital," New York Times, January 21, 2001; "Thousands mock president with cries of 'Hail to the Thief'," San Francisco Chronicle, January 21, 2001; "Fear and Furs: The Pomp and Protest of W's Stolen Inauguration," LA Weekly, January 26-February 1, 2001; and further, a February 6, 2001 Gallup poll showing George W. Bush with the "highest initial disapproval of any president since polling began" [http://www.gallup.com/Poll/releases/pr010206.asp] ;

Whereas the federal judiciary is the branch of the tripartite federal government furthest removed from the democratic process, in that the officers of said branch are judges appointed for life by the president and confirmed by the Senate, and said judges are neither elected nor subject to ratification by a vote of the people, it is therefore a form of tyranny and a dire threat to the institutional framework of liberty whenever such unelected federal judges—in this case, justices of the United States Supreme Court—abjure prudential restraint and recklessly choose to decide "political question" cases such as Bush v. Gore; in so doing they usurp the powers and sap the vitality of other democratic branches of the federal government (here, Congress) and of the states, the top officials of which, including many state Supreme Court justices, are elected or subject to periodic ratification by votes of the people therein (e.g., the justices of the Florida Supreme Court are each subject to a retention vote every six years);

Whereas the harm to liberty and democracy is especially acute when, as here, the "political question" case decided by five unelected justices of the Supreme Court imprudently and outrageously invaded the powers of the states and Congress over the selection of the democratically elected head of the Executive branch, the President of the United States—a branch of government commensurably empowered with the federal judiciary, and one which serves to check and balance the powers of the federal judiciary by way of the president's power to nominate federal judges, United States Supreme Court justices, and the Chief Justice of the United States;

V. The Anomalous Nature of the Per Curiam Rulings in View of the Five Justices' Jurisprudential Philosophy, and Other Indicia of Irregularity Surrounding Said Rulings and Said Justices.

Whereas the five justices comprising the majority in the Bush v. Gore per curiam rulings have each long espoused unwavering allegiance to the jurisprudential principles of federalism and dual state/federal sovereignty, a central tenet of which doctrine is the sanctity of sovereign state prerogatives against encroachment by the federal government; and said tenet counsels either prudential abstention from adjudication or rejection on the merits of a constitutional challenge to a ruling of a state Supreme Court such as the one brought by the Republican Party's candidate for president, George W. Bush;

Whereas said per curiam rulings, reached and justified in the course of reduction to written opinion, required the authors to flagrantly transgress and contradict their ostensible firm allegiance to jurisprudential principles of federalism and dual sovereignty; said rulings flew directly in the face of, in Justice Ginsburg's words:

> [T]he ordinary principle that dictate[d] its proper resolution: Federal courts defer to state high courts' interpretations of their state's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." Saenz v. Roe, 26 U.S. 489, 504, n. 17 (1999) (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (KENNEDY, J. concurring)) . . . . FN 3
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> FN. 3: [B]ecause the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution . . . grants States certain powers over the times, places, and manner of federal elections (subject to Congressional revision), Art. I, §4, cl. 1 . . . , and allows States to appoint electors for the President, Art. II, §1, cl. 2. U.S. Term Limits, Inc. v. Thornton,

514 U. S. 779, 841–842 (1995) (KENNEDY, J., concurring);

Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court. (J. Ginsburg dissenting, Bush v. Gore, Part 1, concluding paragraph);

Whereas it strains credulity to assume that jurists possessing the intellect and experience of United States Supreme Court justices would, without specific extralegal motives firmly in mind:

(i) abandon suddenly their long-standing jurisprudential devotion to federalism and dual sovereignty;

(ii) misrepresent the Florida Supreme Court's position on the Florida Legislature's alleged directive to complete any recount by December 12, 2000; and (accordingly)

(iii) bar the state of Florida from correcting otherwise repairable defects in the counting of votes before the Electoral College deadlines of December 18, 2000 and January 6, 2001,

we must therefore regretfully conclude that the United States Supreme Court's per curiam rulings and opinions of December 9, 2000 and December 12, 2000 sprang from a malevolent, results-oriented scheme to ensure a victory by the Republican candidates for President and Vice President;

Whereas there are other strong reasons to believe that the Supreme Court's per curiam rulings of December 9, 2000 and December 12, 2000 were motivated by animus against or indifference to the numerical plurality of nearly 51 million American citizens nationwide who cast votes for the national candidates of the Democratic Party, and to further conclude that these rulings were compromised by partisan ties and passions favoring a victory by the Republican candidates for President and Vice President; e.g.:

(i) Justice Scalia has two sons who work for law firms that were associated with the campaign of the Republican candidate for president; as the Los Angeles Times reported on December 13, 2000, Scalia's "son Eugene is a Washington law partner of Theodore B. Olson, the attorney [now U.S. solicitor general] who twice has argued before the

Supreme Court on behalf of Texas Gov. George W. Bush. Another son, John Scalia, is an attorney in the Miami firm that has represented Bush in Florida";

(ii) Justice Thomas's wife worked for an ultra-conservative think tank, the Heritage Foundation, and she was involved directly in transition planning for George W. Bush on behalf of the Heritage Foundation, a fact reported by the Los Angeles Times on December 13, 2000;

(iii) Justice O'Connor, upon being told on the evening of Election Day that Al Gore had won Florida, became visibly upset and said "This is terrible," betraying a clear bias against the Democratic candidate for president. According to her husband John, Justice O'Connor had previously expressed her desire to retire from the bench upon the election of a Republican candidate for president (see Evan Thomas and Michael Isikoff, "The Truth Behind the Pillars," Newsweek, December 25, 2000);

(iv) Chief Justice Rehnquist's desire to suspend the manual recount of undervotes in Florida—ballots cast disproportionately by members of racial and religious minorities—appears to reflect the unrepentant continuation of a troubling pattern of voter disenfranchisement commencing early in his legal career as an operative of the Republican Party of Arizona (see the testimony of Statement of James J. Brosnahan to the United States Senate Judiciary Committee, August 1, 1986, implicating Rehnquist in the suppression of minority voting in Phoenix during the 1962 election; see also Dennis Roddy, "Just our Bill," Pittsburgh Post-Gazette, December 2, 2000, describing "Operation Eagle Eye" and quoting Charlie Stevens, the then head of the Phoenix Young Republicans, as having told Rehnquist in 1962 that he disapproved of the operation);

VI. The Tragic Impact of the Supreme Court's Rulings on the Body Politic and National Spirit.

Whereas the Supreme Court's per curiam rulings have presently obliterated the constitutionally established bedrock principle of the separation of powers and thwarted the people themselves from democratically electing the head

of the Executive branch of the federal government via prescribed state and Electoral College procedures (as duly determined, in Florida's case, by the state Supreme Court);

Whereas the five members of the United States Supreme Court who comprised the majority in the per curiam rulings of December 9, 2000 and December 12, 2000 have intentionally and with malice interrupted the continuity of the Republic and subjugated the plurality of nearly 51 million citizens casting votes for the national candidates of the Democratic Party to the whims of base partisan connivance;

Whereas said five members comprising the majority in said per curiam rulings devastated not only the rule of law but also the civic esteem in which judges are held, viz.:

> 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 perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law. (Justice Stevens' dissent, Bush v. Gore, No. 00-949 U.S. Dec. 12, 2000, p. 7); and

Whereas, according to a Newsweek poll released immediately following the ruling, "[s]ixty-five percent of those surveyed believe[d] politics or partisanship played a role in the U.S. Supreme Court justices' decision to reverse a Florida Supreme Court decision" and "[a]lmost half of those surveyed (46%) [said] the High Court's decision made them more likely to think its justices have a partisan bias";

VII. The Voice of Memory on the Need for Eternal Vigilance in Defense of Liberty.

Whereas, as Justice Woodbury sagely noted over 150 years ago: "[I]f the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them . . . they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at

least, than the worst elective oligarchy in the worst of times . . . ." Luther v. Borden, 7 How.1, at 52-53 (1849).

Therefore it is Resolved That:

We do hereby censure and condemn in the strongest terms the five justices of the United States Supreme Court issuing the per curiam rulings in the case of Bush v. Gore (No. 00-949)—namely, Anthony Kennedy, Sandra Day O'Connor, William Rehnquist, Antonin Scalia, and Clarence Thomas—for their improvident, reckless, derelict and intolerable acts of usurpation and subversion of the lawful powers rightfully belonging to the states and to another branch of the federal government (Congress) coequal with the Court, committed on December 9, 2000 and December 12, 2000;

These five justices, on said dates, terminated the orderly recount of presidential election undervotes in Florida by partisan and illegitimate federal judicial edicts, causing the votes cast by many thousands of citizens in that state to be left uncounted and the rightful winner of Florida's electoral votes to be left undetermined; this concerted act of betrayal of the American people and of the Constitution by these five justices, utterly lamentably, prevented the democratic election of the head of the Executive branch of the federal government in the year 2000 from being concluded in conformity with constitutionally prescribed state and Electoral College procedures (as duly determined, in Florida's case, by the state Supreme Court);

In launching their malevolent assault on the citadel of checked-and-balanced, separated powers and ordered liberty—the bedrock principles of constitutional governance so indispensable to the longevity of United States as a nation of laws—these five justices did grievously wound the body politic, devastate the civic esteem in which judges are held, and debase the national spirit for years to come;

By their continued presence on the bench, these five justices stain the escutcheon of the United States Supreme Court and do utterly disgrace and dishonor the once eminent judicial institution it has been their privilege to serve; and in order to spare the nation from the unprecedented ignominy of impeachment proceedings and/or investigations into violations of ethics and law committed by said justices in connection with the decisions in Bush v. Gore, we the Congress (by said Joint Resolution) do further demand the immediate resignations and retirement from public life of each and all of said five justices not already departed from

the bench at the time of the introduction of said Joint Resolution.

May God save the United States of America and soon restore to grace the honorable institution of the Supreme Court.

Dedication

This Resolution is dedicated to the memory of Hannah Fox (1926–2001) by her loving nephew Eric C. Jacobson. A German-Jewish emigrant from persecution upon her arrival on these shores in 1938, she always devoted time amidst her rich family life and career to civic causes and concerns so as to better the lives of others less fortunate and strengthen her country, so that it would forever stand as a beacon of honest government and humanitarian values. May she, and all other engaged, caring citizens who had the misfortune of witnessing this dastardly deed in their final days on this mortal coil, now rest with a greater measure of peace.

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