

## Once Upon a Time, There Was Clarity

By Paul A. Sracic

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The late U.S. Supreme Court justice Hugo Black's daughter told me recently that, when she was 12 or 13 years old, her father would sometimes read sentences from his judicial opinions to her to see if they were clear and whether she understood them. I've been thinking about her story as I have watched legal commentators struggle to decipher the Supreme Court's cryptic decision in *Bush v. Gore*.

The confusion was immediately evident Tuesday evening, as the news anchors for the major networks asked their legal reporters--who were hurriedly paging through the court's ruling--whether George W. Bush or Al Gore had "won" the case. Repeatedly, the experts prefaced their remarks with phrases such as "It looks like. ..." and "as far as I can tell. ..." At first, it was easy to dismiss their fumbling as the product of overly cautious news organizations seeking to avoid a replay of Election Night miscues. As the days have passed, however--and with the winner no longer in doubt--the fog surrounding the court's exact reasoning has not lifted. Even the final vote on this most historic case was not clear. Was it 5 to 4, as most newspaper headlines stated? Or was it 7 to 2, as some experts contend? Why are we still guessing?

Having read the court's decision, I can understand why everyone is so perplexed. Though the per curiam (which means "for the court") opinion is only 13 pages long, the reasoning moves so haphazardly between discussions of safe harbor laws, hanging chads and various provisions of the 14th Amendment that no layman has much chance of following it. The fact that Chief Justice William Rehnquist and two of his brethren felt compelled to file a separate, concurring opinion only added to the problem.

This is not to say that the justices' task was easy. The federal constitutional provisions relating to disputed presidential votes were in conflict, and the court had to cobble together an opinion quickly. Still, with so much at stake, the American public has a right to demand more clarity from these nine men and women.

This brings me back to the story about Justice Black and his daughter. Frankly, when I read many of Black's decisions, I doubt that a young teenager could make heads or tails of the underlying legal arguments. But Black's efforts to make his conclusions clear and understandable were consistent with his notion that it was the role of the courts to "explain and expound" on the Constitution. Toward this end, as Black biographer Roger K. Newman has written, Black "recited the facts, sharply defined the issue, stated his argument, and marched straight to its goal."

There has been much talk about the "legitimacy" of the Supreme Court in the wake of its decision in the Florida election case. Some have argued that the court divided along blatantly political lines, and so has sacrificed its esteem. The truth is, despite the court's constitutionally established role, its legitimacy is always easily questioned in our democratic system. After all, one could argue that there is no good reason for a free people to listen to nine unelected guardians. The court derives its authority from its ability to "explain and expound." That is why, whether the vote is 9 to 0, 7 to 2 or 5 to 4, the court must be clear.

This lack of clarity is a problem that runs through the jurisprudence of the Rehnquist

Court and illustrates, I would argue, its profound misunderstanding of its fundamental responsibility. More than the result of any particular case, it is the multiple concurring opinions and murky language that damage the confidence that the people should have in this court's decisions.

Some of our greatest and most influential justices--including the former Alabama senator, Hugo Black--were successful politicians who had a common-sense understanding of what the public expects. Now that the Supreme Court has given Bush a lift, the new president may have the opportunity to return the favor. There are governors and senators who might make excellent justices and fulfill the court's responsibility to speak its mind clearly.

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