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Commentary

The Biggest Loser in Tallahassee

By Patrick A. Mullin

On New Year's Eve, Chief Justice William Rehnquist delivered his 15th annual report to Congress about the state of the federal judiciary. His report focused on the need for increased compensation for federal judges and explained how they are compensated at the same level as second- or third-year associates at large firms.

Only passing reference was made to the recent presidential election that, he noted, "tested our constitutional system in ways it has never been tested before." The chief justice further stated that "the Florida state courts, the lower federal courts and the Supreme Court of the United States became involved in a way that one hopes will seldom, if ever, be necessary in the future."

Eleven days earlier, the Florida Supreme Court had delivered the official judicial blow to Al Gore's presidential bid. With its own unanimous per curiam order, the state court dismissed Gore's request, on appeal from the Leon County Circuit Court, for the hand tabulation of 9,000 contested Dade County ballots. The court further abandoned its prior directive that all undervotes (votes not counted by election machines due to the absence of a selection for president) throughout the state be recounted.

Florida's top court, citing the U.S. Supreme Court's determination that the Florida statutory standard for the manual examination of ballots violated the equal protection rights of its citizens and that specific constitutionally sound standards be created and implemented by Dec. 12, 2000, recognized the impossibility of this task and found that no relief could possibly be afforded to Gore.

From the editorial pages of the leading publications to the musings of academia in print and on television, there has been an outcry as to the manner in which the U.S. Supreme Court handled this matter. Especially the highest court's decision on Saturday, Dec. 9, 2000, to enter a seldom-used emergency stay that froze the court-ordered statewide tabulation of undervotes.

Barring the highest court's unprecedented emergent intervention, these undervotes would have been fully counted by Monday, Dec. 11, 2000, the date for oral argument on the Bush appeal.

But the danger to the U.S. Supreme Court does not lie solely with the opinions of the newspapers or academia or politicians or even litigators like myself. Over the years, many of us have criticized the Court for opinions that we did not like or petitions for certiorari that were rejected.

Nor have I always been thrilled with the Court's methods. In 1996, I argued a criminal matter before the Supreme Court. For 30 minutes, I was grilled by some of the sharpest legal minds this country. The opinion written against my client was penned, however, by a man who never said a word during oral argument — Justice Clarence Thomas. I felt as if the integrity of the Court's opinion was cheapened by the author's unwillingness to join the fray at oral argument.

But ultimately, most of us have come to respect and even honor this Court as the titular head of and most powerful force in our judicial system. We may grumble about a given majority's philosophical leanings or the impact of its rulings on our favorite constituency. Yet, the bottom line is that the nerves and sinews of our system of law and order are interwoven with the unquestioned acceptance of Supreme Court pronouncements.

The U.S. Supreme Court must understand that it can maintain effective power for only so long as the citizenry believes that the Court is acting for the ultimate welfare of the nation. These nonelected bureaucrats, holding ultimate decision-making authority over issues that greatly impact our way of life, cannot allow themselves to be perceived as deciding cases for partisan reasons. Otherwise, they will become like the Queen of England, who looks splendid at official ceremonies but lacks even a smidgeon of real power.

A hostile Congress or state Legislature, fed and united by public distrust, may one day decide to consistently overrule the Court on important issues. For example, Congress passed legislation negating *Miranda* in reaction to the Court's original decision. Fortunately, this statue was seldom implemented and last year was made

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useless by Supreme Court pronouncement.

The Supreme Court's use of its emergent powers to halt the Florida recount, followed by its facially disingenuous return of the matter to the Florida Supreme Court with an impossible-to-meet deadline, has sent the wrong signals.

In this most important of cases, the Court needlessly squandered a good deal of its credibility. The cable television pundits have become alive with speculation that Rehnquist and Sandra Day O'Connor ordered the stay of balloting, and then ultimately decided the matter for Bush, due to their desire to retire and leave their seats to fellow Republicans. Jay Leno and David Letterman have made the Supreme Court a part of their late-night routine. A cynical culture has now turned its attention toward the Court, formerly viewed with a significant measure of deference, if not outright respect.

It is this reality that the chief justice and associate justices must keep in mind when addressing the true state of the U.S. Supreme Court during the forthcoming year. ■