FROM THE CHAIR

The following piece was submitted and rejected for publication on the New York Times *op-ed page. The bracketed sections have been added for this column:*

George Freeman

I went to the U.S. Supreme Court [to hear oral argument in the *Bartnicki* case in December.] It was in connection with a case in which I had a minor involvement.

I couldn't help but feel awe as I [along with many of my Forum colleagues] strode up the steps to the venerable High Court on a brilliant late fall day. The building was imposing, with its huge marble columns and elegant lines. It seemed even loftier and weightier than the larger Capitol building across the street.

Inside one felt a sense of elegance and respect. The chamber, too, is majestic, not only the regal columns within the room, but also the long bench with its nine Justices looming above the beleaguered attorneys.

The questioning was intellectually rigorous, but just. It exemplified a professionalism of the highest order, a mutual respect between jurists and lawyers, and between adversaries. Political ideology appeared trumped by the search for the proper answer. It was a media case, and Justice Kennedy, one of the Court's conservative members, appeared to be most sympathetic to the media position. In contrast, Justice Breyer, a Clinton appointee and one of the Court's liberals, appeared to be most critical of the media's conduct.

I left not knowing which way the Court would come out, but feeling that our side [persuasively argued by our colleague Lee Levine] had a true opportunity to be heard. Whatever the result, justice had been done.

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All that is gone now.

The reverence in which we lawyers have held the Supreme Court will not soon be regained. For the actions of the Court [during the very same week] in *Bush v. Gore* have clearly shown that the Court's lofty perch is but an illusion, and that the Court is little more than the political and personal feelings of its nine members.

First came its only 9–0 decision when, after taking a case it shouldn't have, it desperately sought and found unanimity, but only in its criticism and rebuke of the Florida Supreme Court.

Then came the Saturday stay in which the Court's majority found irreparable harm in the counting of votes. Even conservatives could not make out how a continued recount, which by all accounts had gone smoothly, could irreparably harm either the parties or the people, especially where its validity still could have been judicially tested.

Moreover, it showed the hypocrisy of a majority that had steadfastly taken the side of states' rights, interceding in Florida's own election procedures, an approach they never would have taken but as a vehicle to reach their desired result.

Then on Tuesday night came a decision, two hours before their deadline, which could only be called Nixonesque. Time had apparently run out, the majority crowed, somehow ignoring the fact that the reason it ran out was the very stay they had ordered three days earlier.

Moreover, to get even five votes, they relied on the Equal Protection Clause of the Constitution, notwithstanding that they, in effect, were disenfranchising, not protecting, many Floridians in so doing. At bottom, the presidential election hinged on the majority's surprising justification that the different manual recount standards of the different counties was violative of the Constitution, despite the obvious fact that in states across the country, different types of voting apparati are used, routinely and necessarily implicating different standards.

While we all certainly would like to have been flies on the wall during the Court's deliberations, I fear they were little different than a bunch of folks posturing about the election at a bar, or, more appropriately, a group of pols arguing in a smoke-filled back room.

Despite the Court's longstanding attempts to stand above the fray, to appear in their reclusiveness and inaccessibility to be truly different, if not above, the other branches and all of the rest of us, we now know that in every sense, they, like us, put their pants on one leg at a time. And we now can't help but perceive that, as so many of us, they'll decide what result they want and then, going backwards, try to justify it by whatever means they can. [Or as Linda Greenhouse wrote in a brilliant *New York Times* article, "The majority had a conclusion in search of a rationale."]

What a shame—but even more, for us lawyers, what a disappointment.

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[When I think back on the Bartnicki argument—waiting for a decision which may have been announced prior to your receiving this issue—I can't help, in the light of the election case, but see more significance in the personal questions of some of the justices: what if my diary was stolen from my bedroom and given to the media to publish? Since I don't use cordless phones for court business, would anyone reasonably expect privacy on such phones?

For the lasting pain of *Bush v. Gore* may be less in its result than in its perception of the bar and public of a Supreme Court unabashedly engaged in personal value judgments and ideological choices. And for us, when we read the *Bartnicki* decision, whatever it is, will it have the legitimacy which we expected on that glorious but exacting December day—or will the result be tarnished by our perception of the Court's machinations in those subsequent days?]

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