

‘Don’t trash the Supreme Court’

By Khalid Anwer

THE headline above has been borrowed from a direction issued by then Vice President Al Gore on the eve of one of the most notorious judgments delivered by the US Supreme Court. This was the case by means of which the conservative judges, by a bare majority of five to four, handed over the presidency of the US to fellow conservative George W. Bush.

In the election of 2000, Gore had a comfortable majority of the popular vote. But by a quirk of American electoral law the election was to be decided on the basis of electoral college votes and whoever won in Florida would be the next US president. The electoral results in Florida showed Bush as leading but there was a dispute on the under-votes (i.e. votes not recorded in the voting machines). When Gore demanded a recount, Bush went to court. His case was weak. He wanted that there should be no recounting at all.

Obviously the correct view would be that recounting should be allowed to go on and if either party was dissatisfied with the result that could have been challenged. The Florida State Supreme Court decided in Gore’s favour. One of Bush’s basic objections was that the under votes in only four counties were being checked and that there were different standards of voting in different counties — he contended that this denied him the equal protection of the laws.

The Florida State Supreme Court however decided that the under votes in all the counties in Florida should be recounted. Ironically it was this judgment which was then challenged successfully in the US Supreme Court by Bush. In fact the case was taken twice to the Supreme Court, with Bush winning both times.

The most extreme of the Supreme Court judges was Justice Scalia — a hard line judge who is a great favourite of neo-conservatives. His response to the Florida court judgment was scarcely believable. In its internal deliberations in the US Supreme Court, as soon as the decision came on Friday, he demanded that the US Supreme Court should pass an immediate order of stay, grant permission to Bush to appeal to the Supreme Court and then reverse the decision of the Florida Supreme Court — all by Saturday morning and without hearing any oral arguments at all.

The proposal was simply outrageous in its sweep. The conservative majority in the court eventually ordered that a stay would be granted immediately, the parties would file their written arguments on Sunday with arguments scheduled for Monday. Never before in the history of the Supreme Court was a case scheduled for such a swift disposal. When this order was announced on Saturday it was obvious what the final result would be; the court had advertised its intentions in clear language.

At that point of time Al Gore sent a message to his spokesman, “Please make sure that no one trashes the supreme court.” There could be no better display of grace in the face of adversity. His political career was on the verge of being destroyed by a biased court but he accepted the coming decision with dignity. For him, the institution of the supreme court was more important than his personal career.

When the majority decided in favour of Bush a powerful dissent was penned by Justice Stevens: “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.”

Is there a lesson to be learnt here by military or civil politicians, past, present or future, in Pakistan? Let us now turn to events here. The Supreme Court was yet to render a verdict regarding General Musharraf's eligibility on Nov 3 when the emergency, which had been looming on the horizon, was imposed. Ominous warnings were being given by government representatives that martial law, in pristine, hybrid or attenuated form, was in the offing.

How were the judges supposed to respond? Obviously they could only observe that they would not be cowed by these scarcely veiled threats. Were they supposed to say, "Yes, we're scared!"?

An outsider to their counsels cannot say with certainty what they were planning to do. Certain it is that the government inferred the worst. That the judges were operating under the surveillance of the agencies is not open to doubt — the ISI's right to spy is the only permanently operating fundamental right in the country.

The president has made his war on terror the frontispiece of his assault on the judicial system. It is worth pausing for a moment to explore who exactly is a 'terrorist'. The word 'terrorist' is commonly used these days to refer to a person who uses methods of terrorism to dislodge, damage or destroy an established government — an art in which the CIA has specialised. The historical provenance of the word is, however, the exact opposite.

Its etymology is traced out in the Compact Oxford English Dictionary (Vol. II) which defines 'terrorism' as "government by intimidation as directed and carried out by the party in power in France during the reign of terror, the system of the terror." (The word is derived from the French terroriste).

Who were the original terrorists? The Jacobins, the ruling faction during the French Revolution. In other words, the original connotation of the word 'terrorist'

or 'terrorism' relates to a ruling party which controls the apparatus of the state and relies on methods of coercion i.e. terrorism in order to rule the country.

A little reflection will indicate why this meaning is not merely lexical but reflects an underlying reality. The worst type of coercive or terrorist activities are those which are employed by misusing the full power of a modern state apparatus against the people of that state.

It is emblematic of governments which seek to suspend basic human rights, ostensibly to combat what they term as terrorist activities, that they, in fact, employ those very methods which they condemn in individual terrorists.

The US government has refused to accept, in blatant violation of public international law, that the Geneva Conventions are binding on it and has also refused to allow terrorists imprisoned by it in Guantanamo the right to defend themselves in courts of law.

The good news is that the US has stopped torturing suspected terrorists; the bad news is that it has done so by redefining torture.

Pakistan's armed forces are currently waging a war in the tribal areas and Swat. It is said that the declaration of an emergency was necessitated because of judicial impediments in fighting terrorism. But we have still to be informed as to what court order prevented the Pakistan army from carrying out military operations either in Swat or the tribal areas. We have not been informed about this for the simple reason that no such order was passed.

The phrase 'war against terror' even otherwise is a semantic monstrosity. The word 'terror' is an abstract noun. How can war be conducted against an abstract noun? Yet this meaningless phrase is repeated ad nauseam to justify repeated

violations of basic human rights.

Any resident of a major city in Pakistan knows that violent crime is a lucrative and risk-free endeavour. Every day scores of mobile phones, wallets, etc. are snatched at gunpoint. The assailants are neither arrested nor prosecuted.

Why? Because the police have other priorities — such as arresting superior court judges and beating up lawyers and journalists. Judges are also citizens. If they, or any of them, have committed a crime they should be charged with it. If they have not, they should be released forthwith and paid substantial damages as compensation.

The fact is that in the past few years the Supreme Court has made an enormous contribution to enforcement of basic human rights. The change has been paradigmatic and not merely incremental. The rule of law is but a theory but praxis is something different. In a country where the unwritten assumption has always been that the most vulnerable members of society have no enforceable rights whatsoever this represents a huge step forward.

The judicial battle against police atrocities is something which will remain to the eternal credit of the former Chief Justice. A balanced assessment, no doubt, requires notice to be taken of the fact that there has also been a marked decline in the intellectual trajectory of judicial pronouncements. It seems that hermeneutical skills have been trumped by the emphasis on speed of disposal of cases.

For a court of ultimate jurisdiction to emphasise quantity over quality is not a wise choice; a plethora of hurried judgments, which are sometimes self-contradictory and often rooted in shifting theoretical postulates have not enhanced the court's prestige.

But, in the final analysis, nothing is more important than the enforcement of the basic rights enshrined in all the great statements of human rights relating back to the Prophet's (PBUH) last sermon.