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How to Stop Judges' Mischief about Marriage

STATEMENT OF PHYLLIS SCHLAFLY
to the Subcommittee on the Constitution
House Committee on the Judiciary
June 24, 2004

The assault on the Defense of Marriage Act (DOMA) has already begun. A lawsuit claiming that the federal DOMA violates the U.S. Constitution was filed last month in federal district court in Miami, Florida. A similar case claiming that a state DOMA violates the U.S. Constitution is pending in federal district court in Nebraska, where a Clinton-appointed federal judge ruled on November 12, 2003 that the case has legal sufficiency to proceed to trial.

The very idea that unelected, unaccountable judges could nullify both other branches of government and the will of the American people is an offense against our right of self-government that must not be tolerated.

The federal Defense of Marriage Act (DOMA) was adopted eight years ago by an overwhelming majority of both Houses of Congress and signed by President Clinton. DOMA provides that whenever the word "marriage" or "spouse" is used in federal law, "marriage means only a legal union between one man and one woman as husband and wife," and "spouse refers only to a person of the opposite sex who is a husband or a wife."

DOMA also protects each state's right to adopt the same traditional definition of marriage. In response to the shelter offered by the federal DOMA, at least 39 states passed state DOMAs, which refuse recognition to same-sex marriages performed elsewhere. Four state DOMAs have been put in state constitutions; proposals to do likewise are on the ballot in several other states this year.

DOMA is a splendid, well-written law that fully comports with our great U.S. Constitution. So, what's the problem? You said at the last hearing on May 13, Mr. Chairman, that it is "increasingly clear" that activist judges will probably declare federal and state DOMAs unconstitutional. When you polled the witnesses at last month's hearing, all agreed that DOMA would not be given its intended effect by the federal courts.

President Bush says repeatedly in his speeches around the country: "We will not stand for judges who undermine democracy by legislating from the bench and try to remake the culture of America by court order." He's right — we won't stand for such judicial arrogance.

Congress must back up this rhetoric with action! The American people expect Congress to use every constitutional weapon at its disposal to protect marriage from attack.

Congress cannot stand by and let activist judges cause havoc in our system of marriage law. The General Accounting Office has compiled a 58-page list of 1,049 (since revised to 1,138) federal rights and responsibilities that are contingent on DOMA's definition of marriage. The GAO report states that the man-woman marital relationship is "integral" to the Social Security system and "pervasive" to our system of taxation. The widespread social and familial consequences of DOMA also impact on adoption, child custody, veterans benefits, and the tax-free inheritance of a spouse's estate.

We know that Congress has the unquestioned power to prevent an activist judge from doing what all your previous witnesses have predicted. For example, in 2002, Congress passed a law at Senator Tom Daschle's urging to prohibit all federal courts from hearing lawsuits challenging brush clearing in the Black Hills of South Dakota. Surely the definition of marriage is as important as brush fires in South Dakota!

The long list of federal statutes in which Congress successfully restricted the jurisdiction of the federal courts (restrictions upheld by the federal courts) includes the Norris-LaGuardia Act of 1932, the Emergency Price Control Act of 1942, the Portal-to-Portal Pay Act of 1947, the 1965 Medicare Act, the Voting Rights Act of 1965, and the 1996 Immigration Amendments. The Voting Rights Act of 1965 is a dramatic manifestation of what Congress can constitutionally do when it wants to limit court jurisdiction. This law denied jurisdiction to southern federal district courts,

requiring the southern states to bring their cases in the District Court for the District of Columbia.

Isn't the protection of marriage just as important as any of the issues on which Congress effectively withdrew jurisdiction from the federal courts? The American people think so.

I urge Congress to protect us from the judicial outrage that your previous witnesses have predicted by passing legislation providing that no court of the United States shall have jurisdiction to hear or determine any question pertaining to the interpretation or validity of the Defense of Marriage Act or any state law that limits the definition or recognition of marriage to the union of one man and one woman.

It is urgent that this legislation be passed now. This is Congress's proper way to dismiss the pending lawsuits challenging marriage exactly as the Daschle law terminated pending lawsuits about brush clearing.

The Founding Fathers in their wisdom put into the United States Constitution the power for Congress to curb the power of the judicial supremacists by deciding what cases they can or cannot hear. The argument will be made that such legislation means we don't trust the federal courts or the Supreme Court, and that's exactly right — we don't trust the courts to respect the wishes of Congress or of the American people on the matter of marriage. Instead of basing their rulings on the U.S. Constitution, activist judges are more likely to use unconstitutional criteria such as "emerging awareness" (as in *Lawrence v. Texas*) or "evolving paradigm" (as in *Goodridge v. Department of Public Health*).

My written testimony recites the long historical record which conclusively proves that Congress has the power to regulate and limit court jurisdiction, that Congress has used this power repeatedly, and that the courts have consistently accepted Congress's exercise of this power. The record is impressive, authoritative, and unquestioned.

The record supports Congress's power to limit court jurisdiction

In *Turner v. Bank of North America* (1799), Justice Chase commented: "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal."

Even Chief Justice John Marshall, who defined the power of judicial review in *Marbury v. Madison*, made similar assertions. For example, in *Ex parte Bollman* (1807), Marshall said that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

Early decisions of the Supreme Court were sprinkled with the assumption that the power of Congress to create inferior federal courts necessarily implied, as stated in *U.S. v. Hudson & Goodwin* (1812), "the power to limit jurisdiction of those Courts to particular objects." The Court stated, "All other Courts [except the Supreme Court] created by the general Government possess no jurisdiction but what is given them by the power that creates them."

The Supreme Court held unanimously in *Sheldon v. Sill* (1850) that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the enumerated cases and controversies. This case has been cited and reaffirmed numerous times. It was applied in the Voting Rights Act of 1965, in which Congress required covered states that wished to be relieved of coverage to bring their actions in the District Court for the District of Columbia.

The Supreme Court broadly upheld Congress's constitutional power to define the limitations of the Supreme Court "with such Exceptions, and under such Regulations as the Congress shall make" in *Ex parte McCardle* (1869). Congress had enacted a provision repealing the act that authorized the appeal McCardle had taken. Although the Court had already heard argument on the merits, it dismissed the case for want of jurisdiction: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

McCardle grew out of the stresses of Reconstruction, but the principle there applied has been affirmed and applied in later cases. For example, in 1948 Justice Frankfurter commented: "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice* [already before the court]."

In *The Francis Wright* (1882), the Court said: "While the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. . . . Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not."

Numerous restrictions on the exercise of appellate jurisdiction have been upheld. For example, Congress for a hundred years did not allow a right of appeal to the Supreme Court in criminal cases except upon a certification of divided circuit courts.

In the 1930s, liberals in Congress thought the federal courts were too pro-business to fairly handle cases involving labor strikes. In 1932 Congress passed the Norris-LaGuardia Act removing jurisdiction in this field from the federal courts, and the Supreme Court had no difficulty in upholding it in *Lauf v. E. G. Shinner & Co.* (1938). The Supreme Court declared, "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

Liberals followed the same procedure when they passed the Hiram Johnson Acts in order to remove jurisdiction from the federal courts over public utility rates and state tax rates. These laws worked well and no one has suggested they be repealed.

Another celebrated example was the Emergency Price Control Act of 1942, in which Congress removed from federal courts the jurisdiction to consider the validity of any price-control regulation. In the test case upholding this law in *Lockerty v. Phillips* (1943),the Supreme Court held that Congress has the power of "withholding jurisdiction from them [the federal courts] in the exact degrees and character which to Congress may seem proper for the public good."

After the Supreme Court ruled in *Tennessee Coal v Muscoda* (1944) that employers had to pay retroactive wages for coal miners' underground travel to and from their work station, Congress passed the Portal-to-Portal Act of 1947 prohibiting any court from enforcing such liability.

Even one of the leading judicial activists, Justice William Brennan, acknowledged Congress's constitutional power to limit the jurisdiction of the federal courts. In 1982 he wrote for the Court in *Northern Pipeline Construction Co. v Marathon Pipe Line Co.*: "Of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts . . . [and] the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges."

In 1999 the Supreme Court upheld Congress's power to restrict the jurisdiction of the federal courts to interfere in certain immigration disputes (*Reno v. American-Arab Anti-Discrimination Committee*). In 2003 the Supreme Court upheld a 1996 law signed by President Clinton that gave exclusive authority to the U.S. Attorney General to deport certain illegal aliens and specified that federal courts have no jurisdiction to review such removal orders (*Hatami v. Ridge*).

Another statute that prohibits judicial review is the Medicare law, on which nearly everyone over age 65 relies for health care. Congress mandated that "there shall be no administrative or judicial review" of administrative decisions about many aspects of the Medicare payment system. When someone sued in federal court anyway, the court dismissed the lawsuit based on this prohibition of judicial review (*American Society of Dermatology v. Shalala*, 1996).

Article I, Section 8 of the Constitution states: "The Congress shall have power . . . to constitute tribunals inferior to the Supreme Court." **Article III, Section 1** states: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." These two sections mean that all federal courts except the Supreme Court were created by Congress, which defined their powers and prescribed what kind of cases they can hear. Whatever Congress created it can uncreate, abolish, limit or regulate.

The Supreme Court explained this in *Lockerty v. Phillips* (1943): "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. . . . The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'"

Article III, Section 2 of the Constitution states: "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." This section means that Congress can make "exceptions" to the types of cases that the Supreme Court can decide. This is the most important way that Congress can and should bring an end to the reign of judges legislating from the bench.

The American people expect Congress to use its constitutional power so clearly available, and the voters are currently alienated because of Congress's failure to put down the attacks on marriage. We believe it is Congress's constitutional duty to protect the American people from judicial supremacists who might commit the outrage of overruling the federal and all state laws about marriage. Do we have self-government by our elected representatives, or don't we?

The argument will be made that we should accept any activist judge's ruling as "the law of the land" and that it is impertinent for Congress to preempt the courts. However, House Judiciary Committee Chairman Sensenbrenner made it clear in a speech to the U.S. Judicial Conference on March 16 of this year that he stands up for Congress's "constitutionally authorized" and "appropriate" powers over the judiciary. Mr. Sensenbrenner was not referring to the subject of this hearing, but it seems to me that the principle is the same. Congress must not shrink from subjecting activist judges to criticism or from Congress's use of its "constitutionally authorized" powers.

It is imperative that Congress stop federal judges from asserting judicial supremacy over our rights of self-government.

Remembering Ronald Reagan

When Ronald Reagan became President in 1980, conventional wisdom assumed that the Soviet Union's position as a fearsome superpower was permanent. Henry Kissinger had the pessimistic belief that the Soviets had attained such nuclear power that his job, as the Nixon-Ford Russian expert, was just to negotiate the best deal he could for a weaker United States.

Since Reagan's passing, many commentators have paid tribute to his optimistic view of life and how that made him such an engaging personality. In truth, Reagan's optimism was revolutionary; he optimistically believed Communism was doomed, that the Free World would triumph and it was his mission to hasten the day.

Reagan had been in the White House only a little over a year when he gave a landmark speech to the British Parliament challenging the long-held belief about the permanence of Communist rule. He said, "the march of freedom and democracy will leave Marxism-Leninism on the ash heap of history as it has left other tyrannies that stifle the freedom and muzzle the self-expression of the people."

Reagan thus flatly contradicted all the recognized experts in Soviet affairs who were touting detente and peaceful coexistence with Soviet Communism. Reagan believed that the Cold War was winnable at a time when almost nobody else did.

Reagan had no qualms about criticizing the mistaken policies of his predecessors. He said: "When I came into office, I believed there had been mistakes in our policy toward the Soviets. I wanted to do some things differently, like speaking the truth about them for a change, rather than hiding reality between the niceties of diplomacy." On June 12, 1987, Reagan spoke the words that changed history. Standing at the Brandenburg Gate in Berlin, President Reagan flung down the gauntlet to Soviet dictator, saying: "Mr. Gorbachev, tear down this Wall!"

These words were Reagan's own, not written or approved by the State Department. Those words marked the beginning of the end of the vast dictatorship that he had dared to label the "evil empire."

Ronald Reagan's words were not just empty rhetoric. In 1983 he had announced his commitment to build an anti-missile defense system to defend American lives against the Soviets' powerful and threatening nuclear weapons. Ted Kennedy dubbed Reagan's plan Star Wars, and tried to ridicule the whole idea of defending the American people against incoming nuclear missiles, but Reagan had common sense on his side.

Reagan steadfastly refused to bargain away his plans to build an anti-missile defense, despite heavy propaganda from the media plus pressure from the Soviets and even from his own State Department. The big test of Reagan's will came at his meeting with Gorbachev in Reykjavik, Iceland.

Gorbachev made all kinds of concessions in a desperate effort to get Reagan to abandon his anti-missile defense plan. But Reagan stood firm and never retreated.

We now know Reykjavik was the moment when Gorbachev realized the Soviets could not win against the United States, and the Soviet Empire began to collapse. It was Ronald Reagan's fortitude and courage that won the Cold War without firing a shot.

During most of Ronald Reagan's life, the media tried to slant public opinion to believe that he was just an actor who was a mouthpiece for the ideas of others. We now have indisputable proof that Reagan developed his own ideas and wrote most of his own speeches.

A couple of years ago, a researcher at the Reagan Library in California discovered a treasure trove of the texts of hundreds of Reagan's radio broadcasts delivered during the 1970s before he became President. Written in his own handwriting, mostly on lined yellow pads, these documents show that he expressed his thoughts clearly, concisely and logically, and needed to make very few changes and edits.

These commentaries show that Reagan was a tremendously well-educated man because he was a voracious reader whose own library was filled with books of history, economics and biography, heavily annotated in his own hand. His commentaries referred to hundreds of sources and thousands of facts and figures; he was a one-man think tank.

The commentaries show the development during the 1970s of Ronald Reagan's vision for America of a land relieved of the high-tax burdens of Big Government at home and the threat from Soviet aggression abroad. He developed his belief that Communism had to be defeated, not merely contained.

Reagan restored our faith in our country and its future with his attitude that it's morning in America. He revitalized our economy with his major tax cut that started us on an unprecedented period of economic expansion and job creation.

Referring to himself as an actor, Reagan said: "Speech delivery counts for little on the world stage unless you have convictions, and, yes, the vision to see beyond the front row seats." President Reagan had the vision to see that he could end the Cold War and "build a land that will be a shining city on a hill."

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