The Phyllis Schlafly Report

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High Stakes in Judicial Supremacy

The histrionics of the liberals about the impending nomination to fill the Supreme Court vacancy look overwrought, but they are heartfelt. The liberals know they've lost the legislative and executive branches of government, and their only hope of achieving their goals is from supremacist judges who claim the authority to legislate the law of the land.

The liberals know that neither Congress nor state legislatures would ever ban the Pledge of Allegiance or the Ten Commandments, or order same-sex marriage licenses, or kick the Boy Scouts off of public schools and military properties. The liberal politicians, the secularist litigators and the gay lobby know very well that only supremacist judges do those eminently unpopular things.

That's why House Minority Leader Nancy Pelosi (D-CA) described Supreme Court decisions as "almost as if God has spoken." Pelosi's elevation of judges to the level of God shows how desperate the liberals are to bamboozle the public into accepting continued liberal domination of the courts.

The Democrats admonish us that we must have an independent judiciary. But what they mean is independent of the U.S. Constitution, and we certainly should not give judges that kind of independence.

In the Second Presidential Debate in 2004, George W. Bush made an excellent statement: "I wouldn't pick a judge who said that the Pledge of Allegiance couldn't be said in a school because it had the words 'under God' in it. I think that's an example of a judge allowing personal opinion to enter into the decision-making process as opposed to a strict interpretation of the Constitution."

A *Wall Street Journal*/NBC poll released July 14 reported that 63% of Americans believe it is a step in the right direction for Bush to appoint a judge "who favors continuing to allow references to God in our public life such as allowing displays of the Ten Commandments on government property." Only 14% said that would be a step in the wrong direction.

Since Sandra Day O'Connor resigned, she has become the favorite justice of Senator Barbara Boxer (D-CA) and the Democrats. No wonder they like her: she voted repeatedly for abortion, repeatedly for the gay-rights agenda, and repeatedly against the Ten Commandments. Conservatives have been telling President Bush we can't afford to have another David Souter mistake. Likewise, we can't afford to have another O'Connor mistake. We hope President Bush will keep his promise to give us judges like Antonin Scalia and Clarence Thomas.

Isn't Turnabout Fair Play?

Hypocrisy stands at the pinnacle of the sins that the liberals most disdain. So it's fair game to compare the free ride they gave to Ruth Bader Ginsburg with their searching the archives to pillory every word ever written by Supreme Court nominee John Roberts.

The liberal commentators and Senators never asked Ginsburg about her extremist views spelled out in her lengthy paper trail. The Senators didn't have to do much research; I made it easy for them by publishing her words in my July 1993 *Phyllis Schlafly Report*.

I quoted extensively from her 230-page book called *Sex Bias in the U.S. Code,* published in 1977 at taxpayers' expense by the U.S. Commission on Civil Rights. The purpose of this book was to show how the proposed Equal Rights Amendment (for which she was an aggressive advocate) would change federal laws to make them sex-neutral and "eliminate sex-discriminatory provisions."

Ginsburg called for the sex-integration of prisons and reformatories so that conditions of imprisonment, security and housing could be equal. She explained, "If the grand design of such institutions is to prepare inmates for return to the community as persons equipped to benefit from and contribute to civil society, then perpetuation of single-sex institutions should be rejected." (p.101)

She called for the sex-integration of Boy Scouts and Girl Scouts because they "perpetuate stereotyped sex roles." (p.145) She insisted on sex-integrating "college fraternity and sorority chapters" and replacing them with "college social societies." (p.169) She even cast constitutional doubt on the legality of "Mother's Day and Father's Day as separate holidays." (p.146)

Ginsburg called for reducing the age of consent for sexual

acts to persons who are "less than 12 years old." (p.102) She asserted that laws against "bigamists, persons cohabiting with more than one woman, and women cohabiting with a bigamist" are unconstitutional. (p.195) She objected to laws against prostitution because "prostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions." (p.97) Ginsburg wrote that the Mann Act (which punishes those who engage in interstate sex traffic of women and girls) is "offensive." Such acts should be considered "within the zone of privacy." (p.98)

On the other hand, her view of the traditional family was radical feminist. She said that the concept of husband-breadwinner and wife-homemaker "must be eliminated from the code if it is to reflect the equality principle" (p.206), and she called for "a comprehensive program of government supported child care." (p.214)

She demanded that we "firmly reject draft or combat exemption for women," stating that "women must be subject to the draft if men are." And, she added, "the need for affirmative action and for transition measures is particularly strong in the uniformed services." (p.218)

An indefatigable censor, Ginsburg listed hundreds of "sexist" words that must be eliminated from all statutes. Among words she found offensive were: man, woman, manmade, mankind, husband, wife, mother, father, sister, brother, son, daughter, serviceman, longshoreman, postmaster, watchman, seamanship, and "to man" (a vessel). (pp.15-16) She even wanted he, she, him, her, his, and hers to be dropped down the Memory Hole. They must be replaced by he/she, her/him, and hers/his, and federal statutes must use the bad grammar of "plural constructions to avoid third person singular pronouns." (p.52-53)

Not only did Ginsburg pass Clinton's litmus test of being pro-abortion, but she was on record as opposing what was then settled law that the Constitution does *not* compel taxpayers to pay for abortions. In her chapter in a 1980 book, *Constitutional Government in America,* she condemned the Supreme Court's ruling in *Harris v. McRae* and claimed that taxpayer-funded abortions should be a constitutional right.

In a speech published by Phi Beta Kappa's *Key Reporter* in 1974, Ginsburg called for affirmative action hiring quotas for career women. Using the police as an example, she wrote, "Affirmative action is called for in this situation."

It's too bad that Americans were denied the entertainment value of a C-SPAN broadcast of a Senate Judiciary Committee interrogation of Ginsburg about her out-of-the-mainstream views. But the Republicans rolled over and Ginsburg was confirmed 97 to 3.

The liberals have tried to make a federal case out of John Roberts' membership or non-membership in the Federalist Society. But Ginsburg had been the general counsel for the American Civil Liberties Union, which (unlike the Federalist Society) litigates to bring about leftist and even radical goals.

Tim Russert posed the pertinent question on *Meet the Press,* after showing a clip of President Clinton saying he would appoint only Supreme Court justices "who believe in the constitutional right to privacy, including the right to choose." Russert asked: "Doesn't George Bush, as a Republican, have the same opportunities as Bill Clinton, the Democrat, to put people on the Court who share his philosophy?"

People often ask me whether feminists are still a threat after we defeated their goal of putting androgyny in the U.S. Constitution. The answer is certainly "yes" so long as such a radical feminist sits on the U.S. Supreme Court and most politicians are too cowardly to criticize her.

Rabid Judiciary Bites Again

The judicial supremacists have struck again. A federal judge in Nebraska repudiated 70% of Nebraskans who voted to keep marriage as the union of a man and a woman. Like a rabid dog that attacks again and again, the federal judiciary knows no restraint. Bite us once, shame on the dog; bite us repeatedly, shame on us for allowing it.

Here is the language that U.S. District Judge Joseph Bataillon said is unconstitutional: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership or other similar same-sex relationship shall not be valid or recognized in Nebraska."

Appointed by President Clinton, Judge Bataillon's salient credential was his service as the Nebraska Democratic Party State Chairman from 1993-95. As a former party activist, he understands very well that same-sex-marriage advocates cannot achieve their goal by vote of the people (all referenda have gone overwhelmingly pro-traditional marriage), so their undemocratic game plan is to use supremacist judges.

Bataillon's argument that the Nebraska law violates the First Amendment because it "chills or inhibits advocacy" of same-sex marriages is a legal embarrassment. That argument is absurd; gays can continue to advocate their agenda all they want.

Bataillon's argument that the Nebraska law unfairly prohibits people from "entering into numerous relationships or living arrangements" is just as far-fetched. Under the Nebraska law, gays can have any relationships they want, but they don't have the right to force the government or the people of Nebraska to recognize those relationships or accord them special privileges.

Those who assert that any outrageous judicial decision becomes the law of the land will now claim that Bataillon's decision is the new law. They will claim that despite the overwhelming rejection of same-sex marriage licenses by voters nationwide, we must respect this new rule invented by this Democratic-Party-Chairman-turned-judge.

How long will Congress sit idly by, watching representative government disintegrate in the face of judges determined to rewrite our laws and remake our culture? Senator Bill Frist (R-TN) has declared his support for traditional marriage and Senator Rick Santorum (R-PA) has chimed in that "the future of our country hangs in the balance," but they have given us only words without action.

Last year, Senators avoided action by pleading that no federal court had yet ruled against state marriage laws or the federal Defense of Marriage Act. That excuse no longer holds; Congress is now faced with judicial supremacy *in flagrante delicto.*

Congress should not wait for a higher federal court to act on Judge Bataillon's impudence, a process that might take years. Congress should immediately take this issue away from the federal courts by denying jurisdiction over any claim that the definition of marriage in federal or state law violates the U.S. Constitution.

Congress should use its Fourteenth Amendment, Section 5 power to clarify the meaning of "equal protection of the laws" in Section 1. It certainly does not mean, for example, that everybody must pay the same taxes or receive the same welfare benefits.

We have no assurance that higher federal courts will overturn Bataillon's obnoxious ruling. It will be argued (wrongly I believe) that his decision is the logical progeny of two Supreme Court decisions, *Romer v. Evans* and *Lawrence v. Texas,* which are striking examples of the Supreme Court's willingness to twist the Constitution to attack Judeo-Christian values.

Both those decisions were written by Justice Anthony Kennedy, who is fond of citing foreign sources. The mischief of those decisions is becoming increasingly apparent and should stimulate renewed calls to consider impeachment.

In the latest incident of judicial mischief, a federal judge ruled that the Pentagon can no longer spend money to prepare a Virginia military base for use by a national quadrennial Boy Scout jamboree that attracts 40,000 Scouts and leaders, plus 300,000 parents and spectators. Although the jamboree is a 25-year-old institution, the ACLU persuaded an activist judge to ban it in the future because the Boy Scouts pledge to do their duty to God and country.

Will Congress just grumble but do nothing to stop out-of-control judges from replacing self-government with the Imperial Judiciary?

If Congress fails to act, we can expect similar atrocities to continue as supremacist judges remake America into a society that rejects traditional marriage and even banishes the Pledge of Allegiance, the Ten Commandments, and the Boy Scouts. It is Congress's duty to withdraw jurisdiction from the federal courts over these issues where we don't trust the judges.

Judges Order Tax Increases

Congress and state legislatures are, for the most part, wisely unwilling to raise taxes. So what are tax-and-spend liberals to do? Run to supremacist judges, of course.

Lawsuits are pending in 24 states asking judges to order the state legislature to pour lots more money into the public schools which, obviously, will require tax increases. If any issues should be solely legislative prerogatives, they are raising taxes and spending the taxpayers' money. Courts are micromanaging schools, telling them how much money to spend and on what, right down to making decisions about computers and textbooks.

Ground zero in this battle turns out to be Republican Kansas, where the state supreme court has ordered the state legislature to put nearly a billion dollars more money into the public schools, even though Kansas already spends nearly ten grand per pupil, pays teachers more than most Kansas workers, and graduates students who score well in national tests. The judges seized on a single word in the state constitution and ruled that the definition of "suitable" means a specific amount of money knowable only by judges.

The New York Court of Appeals, after ten years of litigation, ruled that the state must spend much more money to provide schoolchildren a "sound, basic education." A court-appointed panel then ordered the state to spend an additional $5.6 billion, plus $9 billion on new classrooms, laboratories, libraries and other facilities, making tax increases inevitable.

In the 1970s, activist judges were ordering schools to spend more money to achieve racial balance. The apogee of those cases was the famous Kansas City, Missouri decision, which ordered taxes levied on the people of Missouri to build the world's most expensive school. Two decades and billions of dollars later, this extravagantly equipped school is just as segregated as ever and test scores are just as low.

When the lawyers and judges began to see that desegregation was an academic failure and minorities began filing suits to return to neighborhood schools, the rationale for judicial supremacy changed to "*equity.*" Dozens of suits were filed in the 1980s under equal-protection clauses in state constitutions to get activist judges to order state taxes to be levied to equalize spending on schools in rich and poor districts. "Equity" has been a spectacular failure, too. Spending disparity was narrowed in some cases, but in half the states the funding gap between rich and poor districts actually widened.

In the 1990s, the litigating lawyers changed their take over rationale again. They abandoned the argument of "equity" and substituted "*adequacy.*" The lawyers seek out subjective words in state constitutions such as "thorough and efficient," "sound basic," "adequate," or "suitable." Activist judges have accepted these adequacy arguments in almost two-thirds of major school finance decisions since 1989.

Supreme Court Strikes Again

The Supreme Court recently wrapped up one of its most disappointing terms in years. Chief Justice Rehnquist's leadership was handicapped by his illness, and the other justices behaved like the gang that cannot shoot straight.

In one 5-4 decision, the Court banished the Ten Commandments from a courthouse in Kentucky (*McCreary County v. ACLU*), and in another 5-4 decision the Court allowed the Ten Commandments to be displayed on the grounds of the Texas State Capitol (*Van Orden v. Perry*). The Court said the Ten Commandments inside a building violates the First Amendment, but outside is okay. The minority who voted against the Ten Commandments in Texas included justices appointed by Republican Presidents Ford, Reagan and the first Bush.

There's another way of looking at these inconsistent decisions. Most of the hundreds of Ten Commandments monuments in the open air were placed as a promotion for Cecil B. DeMille's wonderful movie *The Ten Commandments,* so that's acceptable because it had a secular motive. But the Ten Commandments display in the Kentucky courthouse was suspected of being installed with a religious motive, and the Supreme Court won't tolerate that.

The nonsense of these two decisions is indicated by the way the Court explained why the Ten Commandments must be removed from courthouses all over the country, but not from the walls of the Supreme Court building itself. The difference, according to the Court, is that in the Supreme Court's depiction of the Ten Commandments, the tablets that Moses is carrying do not have all the words spelled out in English. The justices must think Americans are too dumb to figure out what is really on Moses' tablets.

Justice Souter made another silly argument. He said that "suing a state over religion puts nothing in a plaintiff's pocket." On the contrary, the lawsuits against religion that now clutter our courts are fueled by a federal law allowing enormous attorney's fees to the winners. When groups such as the ACLU win their case, they receive extravagant fees at the expense of local taxpayers.

Not only religion but private property was the target of the Supreme Court's disdain. A 5-4 Court rewrote the Fifth Amendment phrase "public use" to be "public purpose," and defined it to include enabling government to take anyone's property to give to a large corporation if taxes can thereby be increased. The decision in *Kelo v. City of New London* took Wilhelmina Dery's home that she has lived in since her birth in 1918 and is giving it to a corporate development. Always reliable Justice Thomas wrote: "Something has gone seriously awry with this Court's interpretation of the Constitution."

We are told that federal judges are overworked and underpaid. Congress can address this problem by removing jurisdiction from federal courts over the continuing attempt by the secularists to purge all religious symbols from our public life.

The only good news is that the Court rendered only 76 full decisions in the past year, far fewer than its average of two decades ago. Just imagine the damage that could have been done had it worked harder!

We hope President Bush will fulfill his promise to nominate more Scalias and Thomases. But it's Congress's duty to deal with the problem of the supremacist federal judges who are locked in with life tenure. Congress has promised to pass laws curbing judicial abuse, so when will it honor its pledge?

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http://www.eagleforum.org **eagle@eagleforum.org**