Ginsburg's Judicial Activism Goes International

by Phyllis Schlafly April 24, 2009

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Supreme Court Justice Ruth Bader Ginsburg wasn't dozing off when she appeared recently at a symposium at Ohio State University's School of Law. Credited with writing several feminist precepts into U.S. constitutional law based on the spurious notion that our Constitution is a "living" (i.e., re-interpretable) document, she now wants to expand that process to welcome foreign law.

Taking a gratuitous swipe at her Supreme Court colleagues who have spoken out against citing foreign law (which, as gentlemen, they will graciously pretend they didn't hear), Ginsburg said, "Why shouldn't we look to the wisdom of a judge from abroad?" Any first-year law student should be able to answer that question: because all judges, before donning their black robes, raised their right hands and swore "to support this Constitution."

The Court's four conservatives all oppose citing foreign laws or decisions in rulings on U.S. cases. Chief Justice John G. Roberts Jr. was explicit during his confirmation hearings, explaining that no foreign judge was appointed by or confirmed by anyone accountable to the American people.

Ginsburg even deplored U.S. failure to cite the Canadian Supreme Court. She failed to mention its judicial activism in legalizing same-sex marriage.

Ginsburg claimed that our failure to cite foreign decisions has resulted in diminished influence for the U.S. Supreme Court. Most of us can think of many other reasons why judicial activism is deplored by Americans.

Ginsburg's views may not seem so far-out when we are confronted with Barack Obama's appointments. His choice of Harold Koh, former dean of the Yale Law School, to be the State Department's legal adviser may be a harbinger of things to come.

Koh has been quoted by other lawyers as telling a 2007 audience that "in an appropriate case, he didn't see any reason why Sharia law would not be applied to govern a case in the United States." Sharia is the Muslim law which, among other extreme punishments, allows stoning women to death for the "crime" of being raped.

Although much of American law was copied from the British, I wonder if Ruth Bader Ginsburg would agree with Archbishop of Canterbury Rowan Williams when he said that use of Islamic law is now "unavoidable" in Britain. He wants to allow the United Kingdom's large and growing Muslim population to bypass British law in Muslim neighborhoods and use Sharia for marital disputes and inheritance.

Sharia courts in the UK have already been permitted to decide cases of domestic violence, rather than referring them to British criminal courts. Under Sharia, which Muslims consider the unalterable law of Allah, men have the right to beat disobedient wives.

One feminist who got the message about the mistreatment of women was former Rep. Pat Schroeder. Her final legislative achievement was to get Congress to pass a law making the practice of female genital mutilation a U.S. federal crime.

In a Fordham Law Review article, Harold Koh revealed himself as a thoroughgoing globalist, or in his term, a transnationalist. Transnationalists believe the "living" Constitution allows us to import the fiction of what is called

international law into U.S. law (i.e., "domesticate" it), thereby putting the United States under a global legal system.

Since Barack Obama called himself a "citizen of the world," pledged to "rejoin the world community," and declared in his inauguration speech that U.S. power "does [not] entitle us to do as we please," we can assume that his appointments will reflect those views. One test of his commitment to globalism will be his relationship with the International Criminal Court (ICC).

President Bush withdrew the U.S. from the ICC on May 6, 2002. Standing up for American sovereignty, he rejected the jurisdiction of a foreign court that is not bound by the U.S. Constitution, our laws, or our due process protections.

Shortly after Obama was sworn in as President, U.S. Permanent Representative to the United Nations Susan Rice praised the ICC as "an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda and Darfur." This olive branch extended to the ICC raised foreign "expectations" that the U.S. will accept the authority of the ICC.

Some even argue that the ICC can grab and try U.S. political and military leaders even though the United States is not a party to the treaty. Just this year, an impudent Spanish court tried to assert jurisdiction over six Bush Administration officials.

It should be the Senate's duty to require all judicial nominees to proclaim their fealty to the U.S. Constitution as written, and their rejection of the use of any foreign laws or courts.