Congress Must Put the Brakes

on the Imperial Judiciary

by Phyllis Schlafly January 15, 1997

The most important duty of the 105th Congress is to protect America from judicial usurpation. This goal should take priority over everything else because the judiciary poses the number-one threat to our democratic process and because the Congress has the power to take constructive steps that cannot be vetoed by Bill Clinton.

When a case is presented to the courts, judges make their decisions in one of two ways. They can look to the United States Constitution and see whether it authorizes or forbids the disputed action, or the judges can impose their own social views on us, dressed up with self-serving jargon.

In United States v. Virginia, seven Justices ordered women admitted to Virginia Military Institute, an institution that had been constitutionally all-male for 150 years. Without any authority from the Constitution, the Court wrote Ruth Bader Ginsburg's radical feminism into the law and even smeared as "close-minded" those who believe there are inherent differences between men and women.

In Romer v. Evans, the Court overturned the majority of the people of Colorado who, by statewide referendum (Amendment 2), precluded localities from granting special status to homosexuals. Without any authority from the Constitution, the Court ruled that Colorado's Amendment 2 was totally without a rational basis and was "born of animosity" toward homosexuals.

It would be more accurate to say that the Court's decision was without a constitutional basis and was born of animosity toward traditional moral standards and the people who hold them sacred. Will the Court's own animosity prevail when it considers the Hawaii Supreme Court's invention of the new "right" of same-sex marriages?

Also in the last term, the Court struck down a federal statute that required cable television operators to put their "patently offensive" pictures of sexual activities or organs on a separate channel that could be accessed only on a subscriber's written request. Without any authority from the Constitution, the Court again perverted the First Amendment in order to protect pornography.

The arrogance of the Supreme Court justices reached its apogee in Planned Parenthood v. Casey (1992), when the Court linked its own legitimacy with abortion in a circular, macabre argument. Roe v. Wade (1973) was handed down without any authority from the Constitution, yet the Court in Casey urged that Roe be cast in stone lest "the Court's legitimacy be undermined." In other words, to maintain the Court's legitimacy, we are told not to criticize an illegitimate decision!

Taking their lead from the Supreme Court, lower federal courts have manifested their disdain for the popular will by arrogantly overturning the wishes of the majority of the voters expressed in statewide referenda. A single federal judge overturned California Proposition 187, which received five million votes in 1994 and would have prohibited giving taxpayer benefits to illegal aliens.

Another single federal judge overturned Proposition 209, the California Civil Rights Initiative to end affirmative action, which overwhelmingly passed in 1996. Prop 209's text reads like it was copied from the 1964 Civil Rights Act.

Judge Thelton Henderson, the Carter appointee and a former ACLU board member and civil rights litigator who rendered this decision, didn't merely use his judicial power to overturn the wishes of 4.7 million Californians. In a highly suspect procedure, he grabbed jurisdiction over this case away from another judge.

In a statewide referendum in 1991, the voters in the state of Washington reaffirmed a state statute that prohibited anyone from "knowingly causing or aiding other persons in ending their lives." In Compassion in Dying v. Washington in 1996, a federal appeals court overturned the vote of the people, invented a right to assisted suicide, and smeared those who oppose this as "cruel."

Another federal appeals court threw out the state of New York's prohibition against assisted suicide. The Supreme Court will hear arguments on these cases this week.

What are our remedies? The U.S. Senate should refuse to confirm any judge or justice nominated by President Clinton unless he is committed to deciding cases solely on the basis of the United States Constitution. The House Judiciary Committee should hold hearings on proposals to stop the usurpation of power by the federal courts.

Judge Robert Bork has suggested making court decisions subject to modification or reversal by a majority vote of Congress. Others suggest limiting the terms of all federal judges.

Since Article III of the U.S. Constitution gives Congress the power to make "exceptions" and "regulations," Congress should withdraw jurisdiction from the federal courts on selected subjects. At least, Congress should take away their power to issue injunctions against state laws or decrees to micromanage schools and prisons.

Article III also specifies that all federal judges, including Supreme Court justices, "shall hold their offices during good behavior." Making outrageous rulings that have no basis in the Constitution should be grounds for impeachment.

Clinton has already appointed 202 activist judges, more than 25 percent of the entire federal bench. If this continues, by the end of his term Clinton will have named a majority of judges. If the Republican Congress allows this to happen, it doesn't deserve to be reelected next time around.