The Phyllis Schlafly Report

Travel Ban Thwarted by Judicial Supremacy

By John and Andy Schlafly

May 30, 2017

Now we know why the Fourth Circuit took the unusual step of going “en banc” on its initial hearing of the appeal of President Trump’s second so-called travel ban. The Fourth Circuit of the U.S. Court of Appeals is stacked 10-5 with liberal Democratic nominees among its active judges, and by convening en banc it ensured a lopsided ruling against President Trump on his Executive Order limiting travel from certain Middle Eastern countries.

On appeal was Executive Order No. 13,780, which was issued by President Donald Trump on March 6, 2017, to protect our national security against hostile visitors from other countries. The Executive Order suspended temporarily, while vetting procedures could be reviewed, the entry into our country of non-Americans from six countries that are hotbeds of terrorism.

On Thursday, all 10 Democratic nominees voted against the Executive Order by Republican President Donald Trump, and all 3 Republican nominees voted in favor of it, with 2 Republican nominees absent due to recusal. With such a uniformly partisan outcome, one wonders what all the legal briefs were for.

The reasoning used by the Democratic super-majority of judges was even more alarming. Following a similar ruling from the Ninth Circuit, which also has an 18 to 7 supermajority of Democrat-appointed active judges, the Fourth Circuit dug deep into campaign statements made by candidate Trump, a campaign spokeswoman and one of his surrogates, in order to declare past and future actions by Trump as President to be unconstitutional and void.

One might wonder why a statement by a campaign spokeswoman would even be admissible in a court proceeding to consider the constitutionality of an Executive Order. Katrina Pierson, a Trump spokeswoman, once told CNN that “we’ve allowed this propaganda to spread all through the country that [Islam] is a religion of peace,” and the Fourth Circuit relied on that statement and others as the basis for striking down an Executive Order limiting travel from certain countries.

The Fourth Circuit also quoted Rudy Giuliani, the former popular mayor of New York City, who was described as an “advisor” to the candidate, which means that he did not speak for Trump but offered advice to him. Despite that relationship lacking in authority, the Fourth Circuit relied on a statement by Giuliani that President Trump wanted to enact a “Muslim ban.”

A trial judge would not ordinarily allow such hearsay to be admitted in an everyday trial, so why is a Court of Appeals basing its review of a presidential action on what talking heads say on CNN? Those statements were not under oath, were not subject to cross-examination, and lack the reliability and credibility usually required by a court of law before relying on it.

The Court even reached back to December 7, 2015, nearly a year before Trump was elected president, to cite a “Statement on Preventing Muslim Immigration” that was posted on Trump’s campaign website by someone unknown. No court has ever relied so heavily on campaign rhetoric by a presidential candidate in order to invalidate actions he took after he became president.

Trump was, after all, ultimately elected president, based largely on his strong opposition to uncontrolled immigration and his promise to stop it. Under the logic of the Fourth Circuit, President Trump could be acting unconstitutionally just by sitting in the White House.

As pointed out by the Republican-appointed judges who dissented, the Fourth Circuit decision was wrong for at least three different reasons.

First, the Fourth Circuit ignored the clear precedent in favor of deferring to the president's authority to exclude aliens from the United States. Few matters are as clearly within the exclusive authority of the legislative and executive branches as immigration is.

Second, the Court invented out of thin air a new rule that allows mere campaign statements to be used against a president as he exercises his authority in the White House. Judges thereby inject themselves into the political process in a way never contemplated by the Founders.

Third, the Fourth Circuit vastly expanded the misuse of the Establishment Clause to sacrifice even national security on the altar of the phony "separation of church and state." As the dissenters pointed out, this expanded view of the Establishment Clause is "totally unworkable and inappropriate under any standard of analysis."

There are no vacancies on the Fourth Circuit for President Trump to fill. For now, the White House seems content to climb the ladder one more time, hoping for a 5-4 win before the Supreme Court.

But what if the Supreme Court rules against President Trump and the will of the People as the Fourth Circuit did? The Trump Administration needs to develop a "Plan B" that prevents the will of the People from continuing to be thwarted by judicial supremacy.

John and Andy Schlafly are sons of Phyllis Schlafly (1924-2016) whose 27th book, The Conservative Case for Trump, was published posthumously on September 6.