Congress Can Curb the Courts

Two recent federal appeals court decisions raise important issues of principle for citizens attempting to exercise responsible control of their government:

> "The federal appeals court in Boston [on May 31] struck down the heart of the [1996] Defense of Marriage Act, declaring it was unconstitutional to deny a host of federal benefits to gay couples even if they are legally married." — Congressional Quarterly Roll Call Daily Briefing, 5-31-12

And less than a week later:

> "The divisive issue of same-sex marriage in California may become another landmark case taken up by the U.S. Supreme Court after federal appeals court judges refused Tuesday to revisit an earlier ruling.... In February, a three-judge panel of [the 9th Circuit U.S. Court of Appeals in San Francisco] ruled the measure unconstitutional. In its split decision, the panel found that Proposition 8 'works a meaningful harm to gays and lesbians' by denying their right to civil marriage in violation of the 14th Amendment.... The parties now have 90 days to ask the U.S. Supreme Court to intervene." — "Judges open door for Supreme Court showdown over same-sex marriage," CNN, June 5, 2012.

Both cases are likely headed for the U.S. Supreme Court. As a result of the adverse appeals court ruling on Prop. 8, in particular, supporters of Prop. 8 will likely question the wisdom of introducing a resolution that would remove the Supreme Court's opportunity to review Prop 8.

In our opinion, many lower court rulings deserve to be struck down by a Supreme Court made up of judges committed to the original intent of the Constitution. We nevertheless maintain that removing the appellate jurisdiction of the *current* Supreme Court to rule on marriage issues is the proper course to preserve the long-established definition of marriage, regardless of the Prop. 8 timing. Let's explain.

Restore Federalism

In our federal system, marriage and family law are entirely the concerns of the individual states. There is no role for the federal government. In Federalist No. 45, James Madison argued:

> "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."

In his 1991 book, *Family Questions: Reflections on the American Social Crisis*, Dr. Alan Carlson of the Howard Center on the Family provided some pertinent background:

> "Family policy has historically been regarded as a Tenth Amendment issue, one that's within the purview of the states. When the U.S. Constitution was written, one of the powers specifically not delegated by the states to the federal government was control of family law and governance. In contrast to most European constitutions, our foundational document makes no direct mention of children, families, parenthood, marriage, or the family's relationship to the state. This omission reflected the keen interest in the family held by local communities and an unwillingness to subject such sensitive questions to uniform, national answers."

In 1996, Christopher Check, a family policy analyst at the Rockford Institute, strongly defended the separation of the federal government from family issues:

> "It would be a terrible mistake to federalize [the homosexual marriage] issue through legislation at the national level. The defining oxymoron of our time is 'pro-family legislation.' What is really needed is less government entanglement in the home, not more. Since the central state has assumed the power to interfere in family life, it has become militantly hostile to the values of the traditional family."

Check further concludes: "[T]he state is always looking for an opportunity to expand, and it can't do that unless the family is disrupted in some fashion. So inviting the central state into the home always provides incentives for the state to subvert the family."

Social revolutionaries, with powerful support, will continue their strategy of using the federal government to attack marriage and the family. As just one indication, consider this activism promised by the Executive Branch:

> "[On June 15th] President Barack Obama promised a roomful of gay, lesbian, bisexual, transgender (LGBT) activists on Friday that he would be their 'fellow advocate' as long as he is in the White House.... 'We still have a long way to go, but we will get there. We'll get there because of all of you,' Obama predicted." — "Obama hosts LGBT Pride reception, vows to be 'advocate'" Yahoo! News, 6-15-12.

In that climate, we regard the need to remove the federal government from where it does not belong and block an ongoing revolutionary judicial agenda as more compelling than the "possibility" of an immediate favorable ruling on Prop 8. Consider also this February 8th analysis by the *Los Angeles Times*:

> "When an appeal [on Prop 8] reaches the high court, the four most conservative justices will face a tough choice: Vote to have the court hear the case and run the risk that [Judge Anthony] Kennedy would side with the more liberal justices to go beyond the 9th Circuit decision and establish a nationwide right to same-sex marriage [an unconstitutional usurpation of

authority — see below]. Or turn the case aside, leaving same-sex marriage intact in California but setting no national precedent."

Many Americans do not understand that supporters of traditional marriage have other options besides hoping for a favorable Supreme Court ruling.

Rein in Lower Courts, Too!

Those wishing for Congress to curb the judicial activism of recent decades and restore constitutional good order need to target the lower federal courts as well as the Supreme Court. But the challenges for Congress are different.

Whereas *the Constitution* established the Supreme Court and provides a congressional check in Article III, Section 2 on the Court's appellate jurisdiction, the lower federal courts are *purely the creation of acts of Congress*. Lower courts can be abolished or instructed differently through a new statute. Such a statute requires a simple majority of both Houses. However, it involves a more complicated route through Congress and is subject to a presidential veto, requiring a two-thirds majority to override.

Even though the political will to pass such a statute does not currently exist, the mere support by a few members of Congress for such a course would fire a useful shot across the bow of activist courts.

In 1979, Congress passed legislation creating 152 new judgeships. Seizing this opportunity plus the vacancies from normal judicial retirement, in just four years President Jimmy Carter nominated an unprecedented 258 federal judges. He was thus able to fill some forty-two percent of the federal bench with activist judges.

By statute, Congress can similarly abolish courts and/or positions. Or it can expressly limit the jurisdiction of the lower courts, leaving state matters in state courts where they properly belong, just as Congress can limit the appellate jurisdiction of the Supreme Court by a concurrent resolution.

There are other options for Congress to control the courts. Impeachment of judges for "bad behavior" is one. Even one judge impeached would put the entire judicial community on notice.

Another possibility: A couple of decades ago, some support developed in the House for having its Judiciary Committee review the conduct of each federal judge every eight years. Where violations of judicial good behavior were indicated, the Committee would conduct hearings. The hearings could either clear the judge or provide the basis for impeachment by the full House.

Clearly the Constitution gives the Congress powerful tools for curbing judicial activism. Few Americans understand these options and therefore fail to demand accountability from their representatives for allowing gross judicial misbehavior.

In addition, misunderstanding is widespread regarding the nature of court decisions.

Not Law of the Land

Americans, including many congressmen, have been misled to regard Supreme Court decisions as the "law of the land," binding on the entire nation. They are not. Court decisions at all levels are binding only on the litigants to the case. The decisions also establish non-binding precedents useful in guiding other courts to achieve uniformity in interpreting the law. But precedents are in no way superior to the law itself and certainly not superior to the Constitution.

In his1963 book, *Your American Yardstick*, noted constitutional authority Hamilton A. Long explains:

> "Supreme Court decisions do not constitute the 'supreme Law of the Land.' Its decision in a case is limited by the facts involved and constitutes only 'the law of the case,' binding merely the parties to the case. This is true as to all cases and all courts, including the Supreme Court. Even in a case involving consideration of the Constitution, therefore, the Supreme Court's decision — involving a mixture of legal rules and principles as applied to the facts involved — cannot and does not constitute a part of the 'supreme Law of the Land'; which the Constitution (Article VI) defines as including only this fundamental law itself, as well as Federal Laws, meaning Acts of Congress, and treaties (which conform to the Constitution)."

President Abraham Lincoln also addressed this point during his first inaugural address:

> "[I]f the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of the eminent tribunal."

In 1983, a federal court upheld the constitutionality of an Alabama law permitting voluntary school prayer in public school classrooms. In *Jaffree vs. Board of Commissioners of Mobile County*, the chief judge, William Brevard Hand, stated:

> "Amendment through judicial fiat is both unconstitutional and illegal.... It is not what we, the judiciary, want, it is what the people want translated into law pursuant to the plan established in the Constitution as the framers intended. This is the bedrock and genius of our republic. The mantle of office gives us no power to fix the moral direction that this nation will take."

The “Hand” court rejected the incorporation doctrine stemming from a prevalent misinterpretation of the 14th amendment. Unfortunately, the court’s principled decision was later overturned by a federal appeals court supported by the Supreme Court.

Since judicial decisions are merely the “law of the case,” legislators do not have to throw in the towel at the first rejection of a sound law by an activist court. As Alexander Hamilton argued in Federalist No. 81, “A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; *though it may prescribe a new rule for future cases*.” [Emphasis added.]

Several successive efforts will be needed to overcome and reverse revolutionary judicial activism. Once Congress use its authority to curb future judicial activism, state legislatures may need to pass new laws to overcome previous court objections.

An Independent Judiciary

Americans have little to fear from a truly independent judiciary. In the Federalist No. 78, Alexander Hamilton observed:

> “The judiciary [in contrast to the executive and legislative branches] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

However, Hamilton also stressed that the people would “have everything to fear from [the judiciary’s] union with either of the other departments....” And that points to the overriding problem that explains why so many are frustrated by the results of court decisions — the Conspiracy.

Rather than a mere corruption of, or union of, one or more departments, our nation suffers from the pervasive influence of a Conspiracy. That Conspiracy has sought and gained control over our top law schools, our major media of communications, and has dominating influence in the executive and legislative branches of our federal government. The Supreme Court and the federal courts are not independent of this influence.