An End to Judicial Tyranny?

by Thomas R. Eddlem

The passage of the Pledge Protection Act of 2004 (H.R. 2028) by the U.S. House of Representatives on September 21 by a vote of 247-173 has highlighted some very encouraging signs in Congress. And I do not simply mean that the Pledge of Allegiance would be protected, though that is a good thing as well.

H.R. 2028 states: "No court created by Act of Congress shall have jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide" cases pertaining to the Pledge of Allegiance. This bill, along with a related, earlier House-passed measure known as the Marriage Protection Act of 2004 (H.R. 3313), has prompted a few congressmen to dust off and read their copy of the U.S. Constitution.

It's always a good thing when you can get congressmen to look at the Constitution, especially when so many of them routinely vote for unconstitutional legislation.

The Pledge Protection Act was introduced after the U.S. Supreme Court struck down on a technicality the case of *Newdow v. U.S. Congress*, a suit charging that the phrase "under God" in the Pledge of Allegiance is unconstitutional. Like the Marriage Protection Act, which the House passed on July 22, the Pledge Protection Act would invoke the power of Congress to limit the appellate jurisdiction of the Supreme Court — and, by extension, the jurisdiction of all other federal courts — under Article III, Section 2 of the U.S. Constitution.

Twice this year, the House has passed bills to curb judicial activism by limiting federal court jurisdiction.

Ordinarily, congressional committee reports are the perfect antidote for insomnia. But in the case of the House Judiciary Committee Report on the Marriage Protection Act, the repartee recorded in the report is both instructive and encouraging.

Ranking Democrat of the House Judiciary Committee John Conyers (D-Mich.), a radical leftist fixture in Congress for decades, railed against the legislation, claiming that "this statute is itself unconstitutional." Rep. John Hostettler (R-Ind.) countered that it "is obvious to anyone who actually reads the Constitution that Congress can do this." Article III, Section 2 of the U.S. Constitution reads, in part: "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Conyers asked if Hostettler had seen any "research brought to his attention that we would limit any application for appellate review." Hostettler's reply was simple and direct: "The main body of research I have done is to read the Constitution of the United States."

Liberals are incensed over the prospect that they may no longer be able to legislate through the courts. During the debate on the Pledge Protection Act, Rep. Barney Frank (D-Mass.) complained, "Once my colleagues start down this road, this is the second time the majority has done this, telling us that the Supreme Court cannot decide, they are going to create a precedent, if this ever succeeds, that will be followed in other issues." What other issues? Over the years activist federal courts have issued rulings on a whole host of issues ranging from abortion to anti-sodomy laws to school prayer. By limiting the jurisdiction of the federal judiciary on these issues, they could be returned to the states — where they belong!

Liberal Democrats who worry about excessive use of this provision of the Constitution do have a point. A totally activist court could in theory be prohibited from deciding on all but a few matters that the Constitution guarantees to the Supreme Court.

But that's not a reason to stop encouraging this form of legislation to limit the jurisdiction of activist judges. Invoking Article III, Section 2 is a relatively mild check on the federal judiciary provided to the legislature by the U.S. Constitution. Congress also possesses the power to impeach judges. In fact, Congress could even abolish any and all federal courts except for the Supreme Court.

And Congress does appear to be, finally, showing some vigilance. Rep. Lamar Smith (R-Texas) told his colleagues on the Judiciary Committee that judicial activism "seems to have reached a crisis. Judges routinely overrule the will of the people and invent new rights and ignore traditional morality. Judges have redefined marriage, deemed the pledge of allegiance unconstitutional, outlawed religious practices and imposed their personal views on Americans." Smith correctly observed: "They seem to be legislators, not judges, promoters of a partisan agenda, not wise teachers relying on established law."

In that, Smith sounded impressively like President Jefferson, whom Judiciary Committee members found had written the following to a friend in 1821: "You seem ... to consider the [federal] judges as the ultimate arbiters of all constitutional questions, a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy.... The constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party its members would become despots."

Fortunately, the U.S. Congress appears to be awakening to the judicial oligarchy in America. Congressmen and their constituents need to unite under the Constitution to put activist judges in their place, or find new judges who will judge the law without trying to rewrite the law. ■