Written by **William F. Jasper** on January 6, 1997

Judicial Usurpation

A federal judge's order overturns the U.S. military's ban on homosexuals, including the Clinton Administration's liberal "don't ask, don't tell" policy, and orders the reinstatement of homosexual service members.

The U.S. Ninth Circuit Court strikes down as unconstitutional the official English Language Amendment to Arizona's state constitution.

A U.S. district judge orders the Kansas City School District to spend $740 million to meet educational standards set by his dictates.

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Since the Supreme Court's 1973 *Roe v. Wade* decision, over 30 million babies have been "legally" murdered through abortion in "the land of the free and the home of the brave."

A federal judge overturns a law passed by California voters through the initiative process barring certain welfare benefits to illegal aliens.

The U.S. Supreme Court strikes down an amendment to Colorado's state constitution which had been passed by that state's voters to prohibit special legal privileges for homosexuals.

The list goes on and on — interminably. The omniscient potentates of the federal judiciary find no difficulty in conjuring up absurd pretexts from nonexistent "penumbras formed by emanations" from the Constitution to free murderers, overturn the death penalty, condone flag burning, order jails and prisons to release thousands of dangerous felons, ban school prayer and voluntary school Bible studies, banish Christian symbols from the public square, rewrite congressional district boundaries according to racial formulas, order millions of school children to be bused to distant districts to meet racial quotas, strike down laws aimed at dangerous subversives, order tens of thousands of patients in mental institutions released onto the streets, etc., etc., *ad nauseam*. Clearly, if the 105th Congress does not deal with the issue of judicial tyranny as a top priority, any conservative victories or accomplishments which may be claimed will have little, if any, lasting value.

Despotic Potential

Surveying the social carnage that has been wrought over the past five decades by tyrannical activists on the bench, the views of some of our most illustrious Founding Fathers concerning the judicial magistracy may seem hopelessly short sighted and naive. In *The Federalist,* No. 78, Alexander Hamilton opined that of the three branches of the national government established by the Constitution, "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, 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 de- pend upon the aid of the executive arm even for the efficacy of its judgments."

However, reading on in the same essay, it becomes apparent that Hamilton was very much aware of the potential for judicial despotism if constitutional vigilance were not maintained. He wrote:

> Though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree [with Montesquieu] that "there is no libe1ty if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, [it] would have everything to fear from its union with either of the other departments.

Quite obviously, Hamilton recognized that maintaining the separation of powers is one of the most important checks and balances against judicial oppression. It is just as obvious, though, that the separation has already been breached and that wide spread usurpation and oppression are longstanding *faits accomplis.* This has come about, says constitutional scholar and Oklahoma state legislator William Graves, "by the Court's own fiat and by the cowardly acquiescence of Congress and the People. As a result, the Supreme Court operates *de facto* as virtually a sitting constitutional convention and a superlegislature. It sees itself as a 'steward' or 'overseer' as to the other branches of government — and particularly the states."

How can we remedy this desperate predicament? Unfortunately, most of the leaders of the "conservative" movement in Congress and the Beltway seem to favor amending the Constitution to deal with each and every judicial excess. Testifying be fore the Senate Judiciary Committee in 1981, Professor Jules B. Gerard of Washington University cogently explained why this is an unacceptable course:

> The claim that amending the Constitution is the proper remedy for bad decisions is not a legitimate response. That requires super-majorities at every stage of the process. But why should society have to shoulder the burden of mustering super-majorities to overturn decisions like the abortion and death penalty cases, decisions without even a semblance of an anchor in the language, structure, or history of the Constitution? Amending the Constitution was designed to provide for unanticipated changes in our society, not to be a corrective for abuses of judicial power. Furthermore, resorting to the amendment process lends an aura of respectability to such decisions that they on no account deserve. It implies that the problems are created by the Constitution instead of by the judicial usurpations of legislative power, and regular resort to the amending process is bound to encourage rather than discourage misbehavior by the courts.

Judicial Checks

But the designers of our Constitution did not leave us bereft of means to deal with the crisis. They provided four important powers with which to keep the courts in check:

1. **Appointment.** The Constitution provides for the President to appoint federal judges "by and with the advice and consent of the Senate." President Clinton will likely be appointing at least three Supreme Court justices and a great many judges to the lower federal courts. If even further destruction to our society is to be averted, the Senate *must* exercise its responsibility to screen out judicial activists. It must inquire into the judicial philosophy of appointees with a view to obtaining judges who will derive "legitimate meaning," as Madison said, "from the text itself," rather than from trendy sociological dogma and imperial whim.
2. **Impeachment.** The Constitution provides Congress with the power of impeachment over the judiciary, whose members "shall hold their offices during good behavior." It is true, as Jefferson lamented long ago, that the impeachment power is so infrequently exercised as to be "not even a scarecrow." But a Congress galvanized by an insistent public could enliven that scarecrow.
3. **Abolition.** Article III furnishes Congress with the authority to actually abolish those lower federal courts (but not the Supreme Court) involved in judicial usurpation. There is precedent for this in Congress' abolition of the federal circuit courts after President Adams' "midnight appointments" of circuit judges. And the Supreme Court *(Stuart v. Laird, 1803)* upheld Congress' action.
4. **Limitation.** This avenue offers the most positive prospect of redress against judicial absolutism. The first part of Article III, Section 2 sets out the types of cases over which the federal judicial powers shall extend. It then goes on to specify: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the supreme Court shall have original jurisdiction. In all the other cases before mentioned, 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."* (Emphasis added.)

Congress has the plenary power to dictate which, if any, classes of cases may be heard by the lower federal courts and, other than those types of cases specifically mentioned in the Constitution, it can also limit the types of cases the Supreme Court may review. Which means that Congress may pass a law depriving the federal courts of jurisdiction in cases involving flag burning, school prayer, abortion, homosexual "rights," prison "reform," etc.

In its 1868 landmark decision, *Ex Parte Mccardle*, the Supreme Court fully affirmed Congress' exception power. In this case, a private citizen, William McCardle, was arrested by the military under the authority of the Reconstruction Acts. When denied *habeas corpus*, McCardle made use of an 1867 law allowing appeal to the Supreme Court. Fearing the Court might declare the Reconstruction Acts unconstitutional, Congress repealed the provision in the 1867 law concerning *habeas corpus* appeal. Although it had already heard arguments in the case, the Supreme Court recognized Congress' constitutional authority and dismissed McCardle's appeal. Chief Justice Samuel Chase, writing for a unanimous Supreme Court, explained the decision: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of the court is given by express words." Moreover, wrote Chase, "with out jurisdiction the court cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." Chief Justice John Marshall, the father of judicial review, affirmed congressional exception power and wrote that for the Court to usurp jurisdiction "would be treason to the Constitution."

Why, then, has such intolerable judicial usurpation been tolerated for so long? Certainly a great many legal authorities, as well as *The New American* and other publications, have repeatedly apprised Congress of its power and obligation to rein in judicial absolutism. It is obvious that many members of

Congress are comfortable with the status quo. They can score points with conservatives by declaiming against court decisions and proposing constitutional amendments which they know are fraudulent hopes. That is much safer than getting roughed up by the "liberal" media for endangering judicial "independence" and the "progressive" social revolution the imperial courts have wrought. Other members of Congress, of course, are unaware of their constitutional prerogatives. Unless and until a sufficient portion of the American people face up to *their* civic responsibility to *command* Congress to act, judicial excesses and oppressions will multiply, leading surely to tyranny.