Written by **Selwyn Duke** on July 3, 2015

Pound Sand, Your Honor! More Americans Want States to Ignore Federal Courts

While dissenting from the recent Supreme Court decision rubber-stamping same-sex "marriage," Justice Antonin Scalia warned his colleagues that with "each decision … unabashedly based not on law" the Court moves "one step closer to being reminded of [its] impotence." And a new poll shows that another such step has in fact been taken, with more Americans supporting the idea that states should have the right to ignore federal court rulings. Writes *Rasmussen Reports*, "A new *Rasmussen Reports* national telephone survey finds that 33% of Likely U.S. Voters now believe that states should have the right to ignore federal court rulings if their elected officials [dis]agree with them. That's up nine points from 24% when we first asked this question in February. Just over half (52%) disagree, down from 58% in the earlier survey. Fifteen percent (15%) are undecided."

This shift is clearly influenced not just by *Obergefell v. Hodges* (the marriage ruling), but also a late June ObamaCare decision so contrary to the "Affordable Care Act's" text that Justice Scalia lamented to the Court, "Words no longer have meaning." Not surprisingly, there was an ideological divide among poll respondents. As *Rasmussen* also tells us, "Fifty percent (50%) of GOP voters now believe states should have the right to ignore federal court rulings, compared to just 22% of Democrats and 30% of voters not affiliated with either major party. Interestingly, this represents a noticeable rise in support among all three groups. Fifty percent (50%) of conservative voters share this view, but just 27% of moderates and 15% of liberals agree."

Also not surprisingly, this pattern basically reverses itself when voters are asked if Barack Obama should be able to ignore the courts when he wants to. As *Rasmussen* wrote in February after surveying voters on that question, "43% of Democrats believe the president should have the right to ignore the courts. Only 35% of voters in President Obama's party disagree, compared to 81% of Republicans and 67% of voters not affiliated with either major party."

As to the recent poll, *Rasmussen* writes that Republicans and conservatives being most likely to support state defiance of federal courts is perhaps "disturbing" because those groups "traditionally have been the most supportive of the Constitution and separation of powers." But the reality is that these responses — conservatives advocating defiance of liberal courts, liberals advocating defiance for a liberal man, and *Rasmussen* indicating that the judiciary should have ultimate-arbiter power — reflect

emotional reactions more than constitutional analysis.

First note that this gratuitous judicial-review power — where courts' rulings on law are considered to constrain all three branches of government — is *not found in the Constitution*. Rather, it was *unilaterally declared* by the Court itself in the 1803 *Marbury v. Madison* decision. In other words, *Rasmussen's* supposition about the courts' role does not align with constitutionalism.

But critics would say that this is putting it lightly. Justice Scalia wrote in his *Obergefell* dissent that the Court has actually become "a threat to American democracy." And this just reflects what founder Thomas Jefferson warned when he said that if the Court was not reminded of its impotence, if it comes to be viewed as having ultimate-arbiter (judicial review) power, our Constitution will have become "a suicide pact." As I wrote just last week:

> Jefferson explained the problem with judicial review, writing, "For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this [judicial review] opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation.… The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please."
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> Jefferson also pointed out, correctly, that "Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps." …Judicial review is "a very dangerous doctrine indeed," Jefferson warned in 1820, "and one which would place us under the despotism of an oligarchy."

Jefferson also wrote that nullification — states' ignoring of federal dictates — is the "rightful remedy" for all central-government usurpation of states' powers. Of course, this includes plainly unconstitutional rulings by oligarchic federal courts.

Thus, the 50 percent of GOP voters polled this week are right — although perhaps without realizing that their position is constitutionally sound. States have recourse to the "rightful remedy" of nullification because the Constitution reserves most powers to the states, and the states are not bound to follow unconstitutional federal edicts. In fact, in order to adhere to the Constitution, states are duty bound not to enforce such edicts, but to declare them null and void at the state border.

Of course, this balance of power ensures a tug of war and some gridlock in government, but that's how the state is kept small and freedoms big. If we want issues settled cleanly and quickly with the stroke of a pen, we can appoint a dictator.

Or an oligarchy — sort of like the Supreme Court has become.

If the Court is not frequently reminded of its impotence, the people will ever be reminded of theirs.

Related article:

Supreme Court Rubber Stamps Same-sex "Marriage" — Time for Nullification