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Restoring a Radical View: Government of the People

By U.S. Rep. John Hostettler Sept. 29, 2004

It began with three simple words that would radically alter the course of human history. “We the People” embodied the ideals and principles expressed in the U.S. Constitution, adopted and signed by the Constitutional Convention 217 years ago this month.

Though this short phrase seems familiar and unremarkable today, at that time it represented a revolutionary and subversive idea. Our Founders believed governance and authority could be entrusted to the governed. The concentration of power in the hands of a few, they knew, was dangerous, leading to tyranny. So the government they devised consisted of three branches each with separate and distinct powers designed to diffuse authority and secure the rule of the people.

Their efforts were an unparalleled success. The United States grew in size, wealth and stature for over two centuries. The Constitution served as the model for free people around the world.

But in recent years there has been a concerted effort to distort the Constitution and the Founders’ intent. If you listen to the claims of many academicians, editors and politicians, the Constitution really begins with the words “We the Federal Judges.” Employing skewed logic they’ve transformed a government of the people into a government of the courts.

They tell us that when a federal court offers an opinion it is the immutable law of the land. The President is bound by it. The Congress must obey it. The states are powerless against the dictates of these robed masters. The will of the people is a fine notion as long as it comports with the will of the judges.

This was the repeated theme last July when the House of Representatives chose to exercise a constitutional check on the courts to prevent them from trying to impose homosexual marriages on the nation. Opponents loudly denounced efforts by Congress to check the courts as a violation of the separation of powers. (Why they believe the courts can exercise checks while the other branches cannot they never make clear.)

The bill that created the furor was the Marriage Protection Act, legislation I introduced to prevent the courts from overturning an existing law that protects states' rights to define and recognize marriages between men and women alone. One of the checks that the Constitution explicitly gives Congress over the courts is the ability to establish their jurisdiction. With a very few, specific exceptions, Congress can determine what cases the inferior and Supreme courts can hear.

Exercising this check, however, brought howls from those who oppose judicial accountability. In writing about the Marriage Protection Act one columnist referred to a government of the people as a "mobacracy." An editorial in another newspaper charged that using this constitutional check "would upend the balance of powers." The Center for American Progress - a group that apparently sees the usurpation of the people's governance as "progress" - said the bill was a "dangerous end-run around our constitutional system of separation of powers."

The people who make these claims must not have read the Constitution - and they're probably hoping you won't either. Because if you take a look at Article III of the Constitution, which enumerates the powers of the federal courts, you'll find a long list of Congressional checks on the judicial branch.

In Section 1 you'll discover that the Constitution only creates one court - the Supreme Court. All other courts are left to *Congress* to ordain and establish. It also declares that judges "shall hold their offices during good behavior." If their behavior is not good then the judges may be impeached and removed by *Congress*.

In Section 2, the Supreme Court is granted very narrow jurisdiction over cases involving ambassadors, other public ministers and consuls, and in cases in where a state is a party. All other cases heard by the Supreme Court are defined by *Congress*. The parameters for criminal trials are also outlined in this section, with the location of certain trials left to the discretion of *Congress*.

In Section 3, which addresses treason against the United States, the power to declare the punishment for treason is given to *Congress*.

Altogether, in the three short sections that establish the courts, Congress is directly mentioned four times and referred to another. Compare that to Article I, which establishes the role and powers of Congress. In that much lengthier section you'll find *no* mention of judicial checks on the Legislative branch.

As with most things they did, the Founders were intentional in limiting the power of the courts and granting Congress several specific checks over them. Federal judges are appointed for life. They are unaccountable to the people. So the power to check the courts was given to Congress, with the ultimate check over Congress - by means of the ballot - reserved to the people.

Those who believe that judges can legislate from the bench with impunity are either ill-informed or have an agenda that they wish to advance counter to the will of the people. They claim the courts can check the other branches, but any effort to use constitutional tools to check the courts are met with cries of "separation of powers."

Both branches have a distinct, specific role to play in our form of government. The Constitution grants explicit and exclusive powers to the Legislative branch that are not reciprocated in the Judicial branch. But one fundamental truth is too often forgotten. In the words of Alexander Hamilton, "the power of the people is superior to both."

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