Reining in the Courts

By Congressman Todd Akin

It's game seven of the World Series, ninth inning, two outs. The pitcher winds, throws a curve, and the home-plate umpire yells, "Strike TWO! . . . yer out!" to which the befuddled batter responds, "Strike two?" Puffing out his chest, the ump says, "I make the rules in this game."

Silly? Only in the well-regulated, rational world of sports, where such nonsense would be recognized and banned. But in the strange world occupied by the Supreme Court, decisions are rendered that match our baseball scenario in illogic and unfairness, but with a crucial difference: They become the law of the land.

Some fiscally libertarian-leaning Republicans are concerned that GOP leaders are so preoccupied with the legal issues surrounding abortion, prayer, and homosexual marriage that they're neglecting a problem that threatens every element of our society: our runaway courts. Judicial overreach extends to all matters of public policy, from the right to life to the right to own property to the ability to run a competitive business.

Recall that in 1990, a federal judge in Kansas City, Missouri, granted himself the authority to raise taxes (*Missouri v. Jenkins*)—a power the Missouri Constitution gives only to the legislative branch of government. The U.S. Supreme Court affirmed this new power to tax, so now we're stuck with unelected officials, appointed for lifetime tenure, imposing taxes at will. So much for the Revolutionary War call-to-arms, "No Taxation Without Representation!"

More recently, some of my friends on the other side of the aisle discovered—much to their chagrin—that big business can team with big government and the Supreme Court to create an iron

triangle of coercion. In this past June's *Kelo v. the City of New London, CT*, the Supreme Court decided that a local jurisdiction was free to seize private residential property in order to hand it over to developers whose upscale projects would fatten tax revenues. Never mind the Fifth Amendment's guarantee that property may be taken only for public use; the Court has now broadened that definition to include private development that makes millions for private investors. Is this what the Founders intended?

It's also unwise to ignore the vast regulatory authority that courts have assumed over decades spent grabbing powers originally enumerated to voters via their elected legislators. In one landmark case, they told farmer Filburn he could not grow wheat on his farm for his own private consumption (*Wickard v. Filburn,* 1942); in another, a judge encouraged people to sue McDonald's for enabling its patrons' obesity by selling fatty foods (*Fettke v. McDonald's*, 2005).

Separation of Powers: A One-Way Street?

Writing in the October 2005 issue of the *ABA Journal,* American Bar Association president Michael S. Greco claimed that "Those who would tear down our courts for short-term political or other gain threaten the very fabric of our republic." I agree: Short-term political gain is never a good basis for jurisprudential change. Yet shining light on the judicial branch's abuses of power is not about transient political advantage, but the long-term health of our country and the continued enjoyment of the freedoms traditionally guaranteed by our Constitution.

To Greco and thousands of attorneys like him, separation of powers is a one-way street. It's fine for a federal court to tell Congress it has done a lousy job drafting a statute, but when Congress dares to criticize judges and justices for overstepping their authority, we're told the "fabric of our republic" is suddenly at stake. This is balderdash. The greater threat to our nation arises if the other two branches of government continue to fail at holding the courts accountable to their Constitutional mandate and its inherent restrictions.

It is indisputable that many federal jurists have used the bench to realize political objectives unsupported by the majority of their fellow citizens and nowhere countenanced in the Constitution. Understanding the difficulty in getting a majority of Americans to approve measures in support of gay rights, abortion on demand, or taking "under God" out of the Pledge of Allegiance, our judges and justices do an end-run around the electorate, telling us the Constitution implicitly dictates we take certain measures. But just where, we should ask, does our Constitution say any of these things? I'm no lawyer, but I can

read, and a "right" to homosexual marriage simply isn't there, either explicitly, by any reasonable inference of the text, or by extending the logic of any defined right to anything but the most excessive and extreme conclusion.

When one branch of government goes awry, it's the job of the other two branches to check the power of that branch and restore the balance of power our Founders created. Yet, to the detriment of our liberty, Congress and the Executive Branch have allowed the Judicial Branch to go unchallenged for far too long.

Thankfully, Constitutional tools exist to remedy this imbalance. In the last Congress, I introduced *The Pledge Protection Act* to protect the words "under God" in the Pledge of Allegiance. That bill has been most effective in educating my colleagues about Article III, section 2 of the Constitution, which gives Congress the authority to limit the jurisdiction of the federal courts. The bill passed the House with a handsome majority last Congress, but stalled in the Senate. We have reintroduced the bill this Congress, with Senate Judiciary Committee member Jon Kyl as the lead Senate sponsor.

More recently, we have developed a working group of congressmen and senators, grassroots organizations, media, and traditional legal scholars to coordinate our various projects. Our shared goal is to stymie the judicial power grab.

I was reminded of the importance of this effort when I attended one of Judge Roberts's confirmation hearings in the Hart Senate Building. It was encouraging, during his opening statement, to hear him assert these very points right down to the baseball analogy. Clearly, the Senate's responsibility to confirm the President's appointments is center stage. Yet, a systematic campaign to highlight the problem of runaway courts must accompany the judicial appointments. We must force the judiciary back into its proper role as an umpire rather than a rule maker.

Ultimately, this fight is about the future of our country — about courts that respect our freedoms rather than restrict them, that follow the Constitution rather than rewrite it, and that will honor our heritage rather than ignore it.

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