THE HERITAGE LECTURES

No. 580

Courting Disaster: Judicial Despotism in the Age of Russell Clark

By Senator John Ashcroft

The Heritage Foundation

Founded in 1973, The Heritage Foundation is a research and educational institute—a think tank—whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.

Heritage's staff pursues this mission by performing timely and accurate research addressing key policy issues and effectively marketing these findings to its primary audiences: members of Congress, key congressional staff members, policy makers in the executive branch, the nation's news media, and the academic and policy communities. Heritage's products include publications, articles, lectures, conferences, and meetings.

Governed by an independent Board of Trustees, The Heritage Foundation is a non-partisan, tax exempt institution. Heritage relies on the private financial support of the general public—individuals, foundations, and corporations—for its income, and accepts no government funds and performs no contract work. Heritage is one of the nation's largest public policy research organizations. More than 200,000 contributors make it the most broadly supported in America.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

The Heritage Foundation
214 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4999
202/546-4400
http://www.heritage.org

Courting Disaster: Judicial Despotism in the Age of Russell Clark

The Honorable John Ashcroft

Part of the mythology that has enveloped our Constitution is the idea that its adoption was inevitable. Time and distance have made it difficult to imagine that the convention Thomas Jefferson called a gathering of "demigods" could have produced a charter unacceptable to the people, with the wisdom and insight that is our founding document tossed on the ash heap of history.

Our forefathers, however, suffered no such delusions. They understood that the ratification debate was about first things, fundamental principles, ideas purchased with patriots' blood. Alexander Hamilton predicted that a "torrent of angry and malignant passions" would be awakened by the debate. He was not disappointed.

In Virginia, Patrick Henry decried the new Constitution, calling it a "resolution as radical as that which separated us from [the Crown]." In New England, opponents worried aloud about liberties lost, rights eroded, judicial power left like a "boundless ocean."

But Hamilton and his allies would not yield to these sharply expressed fears of judicial despotism. Rejecting such concerns, Hamilton proffered his now famous phrase, "Here, Sir, the people govern."

A PATTERN OF USURPATION

But "here" in America today, can it still be said that the "people govern"? Can it still be said that citizens control that which matters most? Or have people's lives and fortunes been relinquished to renegade judges—a robed, contemptuous, intellectual elite that has turned the courts into "nurser[ies] of vice and the bane of liberty"? Consider just how far the federal judiciary has strayed.

The power to tax. In 1987, the federal courts assumed the right to tax the American people. District Judge Russell Clark ordered a tax increase to "remedy vestiges of segregation" in the Kansas City, Missouri, school system. The decree—and two billion tax dollars—turned the city's school district into a gold-plated Taj Mahal, complete with editing and animation labs, vivariums and greenhouses, temperature-controlled art galleries, and a model United Nations wired for language translation.

While satiating the judge's thirst for educational intermeddling, the reforms left student achievement unchanged. And so today, the planetariums, pools, and pay increases stand only as a testament to tyranny, an appalling judicial activism that is contrary to all that the Framers held dear. As Supreme Court Justice Clarence Thomas indignantly opined, "[Clark] has trampled upon the principle of federalism" and, in turn, the Constitution itself.

John Ashcroft, a Republican, represents Missouri in the U.S. Senate.

He spoke at The Heritage Foundation on March 18, 1997.

ISSN 0272–1155

Deciding when life begins. Or consider 1992, when the Supreme Court challenged God's ability to mark when life begins and ends. Three Reagan appointees joined the majority in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* to uphold a "woman's right to choose." So much for recapturing the Court. Together, *Roe*, *Casey*, and their illegitimate progeny have occasioned the slaughter of 35 million children—35 million innocents denied standing before the law.

My friends, when the Court intervenes in such matters, debate in the public square does not end. The divide only deepens. Who among us would suggest that abortion is less divisive today than when the Court wrested control from the 50 states and the people? As Judge Robert Bork asserts, the abortion rulings represent "nothing more than the decision of a Court majority to enlist on one side of the culture war."

The right of self-determination. In 1995, the Supreme Court stole the right of self-determination from the people, throwing out Arkansas's congressional term limit law. No matter your thinking on the reform, consider only this: The Constitution is silent on limited tenure. And, as Justice Thomas recognized, "where the Constitution is silent it raises no bar to action by the states or the people."

Equality under the law. In 1996, the courts removed from the people the ability to establish equality under the law. District Court Judge Thelton Henderson prohibited the state of California from implementing Proposition 209. A Carter appointee who served on the board of directors of the American Civil Liberties Union (ACLU), Henderson held that if the California Civil Rights Initiative were implemented, minorities would "face an immediate possibility of irreparable harm." But, Judge Henderson, what of the "irreparable harm" racial preference programs are inflicting right now? What of the Asian high school students routinely rejected at Berkeley based solely on the color of their skin? And what of the "irreparable harm" activist judges have visited upon the U.S. Constitution?

Perhaps someone should remind Judge Henderson that the constituting doctrine of all truly free societies is that rights belong to individuals, not groups. This was the essence of Justice Harlan's dissent in *Plessy* v. *Ferguson* just over a century ago. "The Constitution is color-blind," wrote Harlan, "and neither knows nor tolerates classes among citizens." Tragically, the courts have turned individual rights into group rights as the aggrieved rush to our least representative branch in search of entitlement.

These cases are but a page of snapshots in an album of liberties lost. Over the past half century, the federal courts have usurped from school boards the power to determine what a child can learn, removed from the people the ability to establish equality under the law, and challenged God's ability to mark when life begins and ends. The courts have made liars of Hamilton, Madison, and Morris, and confirmed the worst fears of the Anti-Federalists. For what the Framers intended to be the weakest branch of government has become the most powerful.

What, then, can we do to put an end to judicial tyranny? We can begin by asking ourselves why modern judicial activism exists in the first place. Could it be that we have been lax in demanding that judges place our constitutional rights before their policy objectives? Could it be we have failed to reject judges who are willing to place their private preferences above the people's will? Could it be that we have populated the courts with judges who believe their intellect to be superior to that of the Framers? Could it be all of the above?

It is time to heed the counsel of former Attorney General Edwin Meese by scrutinizing fully the nominees who come before the Senate for "advice and consent." Ed Meese is right: There must be a dialogue between the President and the Senate regarding judicial nominees. And if the White House fails to solicit our "advice," perhaps we should withhold our "consent."

"IMMEDIATE AND IRREPARABLE HARM"

What of the current crop of would-be judges? Consider William Fletcher, nominated by the President to the Ninth Circuit Court of Appeals. What has Mr. Fletcher done with himself since his Rhodes Scholar days with the President? Tenure at Berkeley's Boalt Hall School of Law has provided Fletcher a forum to outline a judicial vision as bold as it is misguided.

It seems Mr. Fletcher feels judges should be able to use what he calls "discretionary" powers to achieve desired policy goals. In other words, Mr. Fletcher wants to use a court appointment as a license to legislate.

Americans have always believed efforts by the judiciary to legislate from the bench are illegitimate. To which Fletcher responds, "The presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default." Judge Russell Clark, meet William Fletcher; you two are sure to be fast friends. Frankly, the only thing "seriously and chronically in default," Mr. Fletcher, is your thinking on the United States Constitution.

And then there is Margaret McKeown, another nominee for the Ninth Circuit Court of Appeals. It was McKeown, her ACLU marching orders in hand, who led the fight to disallow a Washington state ballot initiative denying special rights to homosexuals.

Now, if McKeown's opposition had been confined to lobbying against the measure, so be it. That is her constitutionally protected right. But her efforts were far more sinister: She attempted to keep Washington voters from deciding on the measure at all. McKeown argued that the initiative process itself was unconstitutional and represented an "immediate and irreparable harm." The mere act of collecting signatures, it seems, would cause suffering, suicides, and substance abuse. Please! It's time to expose Mrs. McKeown and her ACLU friends for the liberal elitists that they are.

RECLAIMING A LEGACY

Let me be clear: This is not about personality, and it's not about ideology. It is about preserving our rights as they were indelibly inscribed in the Constitution itself. It is about not wanting more Russell Clarks on the federal bench. It is about a judicial legacy that will live well beyond the year 2000.

We need nominees who care more about preserving and restoring the Constitution than running schools, parks, and prisons.

That is the essence of the pledge my friend Paul Weyrich is circulating in the Senate. Paul's pledge simply and clearly offers the words of Senate Judiciary Committee Chairman Orrin Hatch. It says, "Those nominees who are or will be judicial activists should not be nominated by the President or confirmed by the Senate, and I personally will do my best to see to it that they are not."

What a tragic state of affairs when conservatives feel compelled to circulate a pledge to safeguard a Constitution that every Senator was sworn to "preserve, protect, and defend."

Nonetheless, let me talk to this issue, speaking for no man save myself. When I laid my hand on the Bible to take the oath of office, I made my pledge to our Constitution. And as long as I have a voice and a vote in the U.S. Senate, I will fight the judicial despotism that stands like a behemoth over this great land.

At its best, the Court is the guardian of the Constitution, a body to which all Americans look for the ultimate protection of their rights. At its worst, it is home to a "let-them-eat-cake elite" that holds the people in the deepest disdain. By guiding the judicial selection process, we can begin to reestablish the constitutional balance envisioned by the Framers.

It is also time for us to take a broader, more comprehensive look at the alarming increase in activism on the Court. As I announced earlier in March, the Constitution Subcommittee that I chair will be holding hearings to examine this disturbing trend in greater detail. Americans should not sit idly by as our individual rights are surrendered. We should enlist the American people in an effort to rein in an out-of-control Court.

I am also pleased to announce today that Ed Meese has agreed to convene a special task force to look at the history of the judiciary. His group has been charged with the production of a comprehensive report complete with instances of judicial activism as well as recommendations on how the Senate might better fulfill its constitutional prerogative of "advice and consent." I look forward to working with Ed's task force in the weeks and months ahead.

Our forefathers were right when they warned against allowing judicial power to become like a "boundless ocean." A half-century of unbridled judicial activism has made that danger clear to all but the intentionally ignorant. Experience is both the best and most expensive teacher. So now that the costly lesson has been learned, "why stand we here idle" while the precious jewel of liberty is lost? Let us lend our voice to this cause so that one day, in the not-so-distant future, we might once again say, "Here, Sir, the people govern."