

# **IN JUDGE WARS – LEFT RESORTS TO FAMILIAR TACTIC**

**By Don Feder**

In their frenzied attempts to preserve government by judges, liberals are resorting to a familiar tactic -- accusing conservatives of inciting violence. It's a ploy worthy of the hysterics and intellectual frauds who populate American left.

When they can't win a debate (can they ever?), liberals deploy what the late novelist/philosopher Ayn Rand called "the argument from intimidation." Instead of trying to refute the other side, you label their position evil, attribute sinister motives to its adherents, and charge that its proponents are encouraging violence.

Thus, the left stridently maintains that proponents of immigration reform are inciting violence against illegal aliens. Opponents of racial quotas are "creating a climate of contempt" where hate crimes are more common. Right-to-lifers are to blame for attacks on abortionists. The majority of the American people who are unwilling to allow a runaway judiciary to impose same-sex marriage on the nation were responsible for the death of Matthew Shepard and every other act of violence against gays (including those committed by other homosexuals).

In 1995, William Jefferson Clinton (never one to shy away from an absurdity) suggested that the Oklahoma City bombing was in part the product of conservative talk show hosts complaining about high taxes and excessive regulation -- thereby promoting disdain for Washington.

Not surprisingly, the left applies its incitement standard selectively. Army Sgt. Hassan Akbar is now on trial for murder. Prosecutors charge that in March, 2003, Akbar used grenades and a gun to kill Army Capt. Christopher Seifert and Air Force Maj. Gregory Stone, and wound 14 others at an encampment in Kuwait.

In his journal, Akbar said he had to act to keep Americans from harming his fellow Muslims in Iraq. Was Akbar egged on by the anti-war movement? There was a protest early in the war where demonstrators carried a banner calling on GIs to "frag" their officers. Did Akbar act on that homicidal rhetoric?

When Bill Maher said the 9/11 killers were brave, and Americans who dropped bombs from 20,000 feet were cowards, did that encourage al-Qaeda to keep being courageous?

I don't recall one Democratic Congressman decrying any of these ravings. But a group of them now are up in arms over conservative criticism of judicial activism and efforts to rein-in a runaway judiciary?

The war over judges is getting white hot. Instead of debating the issue on the merits, liberal politicians, editorialists and activists are crying wolf.

On April 14, Democratic Senators Charles Schumer, Harry Reid, Dick Durbin and Debbie Stabenow released a letter demanding that the president, House Speaker Dennis Hastert and Senate Majority Leader Bill Frist “denounce” a conference the week before which discussed withdrawal of jurisdiction (under Article III of the Constitution), impeachment and other last-ditch efforts to prevent the judiciary from destroying representative government.

According to Schumer et al., conservatives at the conference (“Confronting the Judicial War on Faith”), which I helped to organize, made “inflammatory comments” which “openly threatened sitting judges.” Such verbal outrages are “unacceptable,” “dangerous,” a threat to judicial independence and “might encourage violence against judges,” the New York Senator squeaked.

Recently, there have been two well-publicized cases of violence directed at judges. In one, a man who was mentally disturbed killed the husband and mother of Federal Judge Joan Lefkow, who dismissed his malpractice suit. In the other, Brian Nichols – a former college football player on trial for raping his ex-girl-friend -- wrested a gun away from a 5’2” female deputy who was guarding him and shot and killed Atlanta Judge Rowland Barnes, a court stenographer and another deputy.

I doubt that either of the killers followed the judicial reform debate – or could even spell judicial reform.

Speaking of violence, what about the violence judges are doing to the Constitution, democracy and the rule of law? Democrats solemnly intone that we must preserve an independent judiciary. Too many judges are operating independently -- of both the Constitution and reality.

We speak of judges “legislating from the bench.” Actually, almost every time it sits, the Supreme Court amends the Constitution from the bench.

On March 18, the Court struck down the laws of 18 states, enacted by elected legislatures, allowing for the execution of minors. By a one-vote majority, the Court determined that the execution of a juvenile killer is cruel and unusual punishment. Among the other beneficiaries of this bizarre ruling is John Lee Malvo, the Beltway sniper, who killed 10 innocents.

The decision was in complete disregard of the Constitution’s clear and manifest meaning, and the intent of the Founding Fathers. Incredibly, Justice Anthony Kennedy (a prime candidate for impeachment) said that in “interpreting” the Constitution, “It is proper that we acknowledge the overwhelming weight of international opinion against the death penalty.”

Does anyone who hasn't been honored at an ABA annual dinner really believe that when the Founding Fathers wrote the Constitution they intended public opinion in Sweden and France to be a factor in understanding their words?

Pity Kennedy doesn't believe in weighing the overwhelming weight of American opinion in reaching his decisions. According to a March CNN/USA Today, Gallup poll, by a 3-to-1 margin, the people of this country favor public display of The Ten Commandments. It's unlikely that this will even enter into the deliberations of the Supreme Court when it decides a pair of Ten Commandments cases later this year.

The urge to usurp the legislative function isn't confined to the Supreme Court. On March 14, Richard Kramer, a Superior Court Judge in San Francisco, threw out California's marriage law limiting the matrimonial state to a man and a woman. In so doing, he nullified the will of 61.4% of the state's voters, who passed the Prop-22 ban on same-sex marriage by referendum in 2000. Voters in 11 states followed suit last year.

Kramer's excuse, "It appears that no rational purpose exists for limiting marriage in this state to opposite sex partners." That's a constitutional argument -- I don't think there's any valid reason for an enactment of the voters, so I'll overturn it?

As Supreme Court Associate Justice Antonin Scalia said of the Court's juvenile death sentence case, "So, it is literally true ... that the Court has essentially liberated itself from the text of the Constitution, from the text and even from the traditions of the American people." Is Scalia urging violence against his fellow justices in the majority here?

All too often, judicial reasoning comes down to the justice's or judge's whims, prejudices, ideology or personal philosophy of life and the universe. The Constitution becomes mere window dressing for forcing their values on a cringing public.

The classic example of this is Justice Sandra Day O'Connor's shifting position in the two Supreme Court sodomy cases. In 1986, in *Bowers v. Hardwick*, O'Connor sided with the majority in holding that there was nothing in the Constitution prohibiting a state from making homosexual sodomy a crime. In 2003, in *Lawrence v. Texas*, she again sided with the majority -- this time, determining that the Constitution most certainly did preclude anti-sodomy measures.

What was it about the Constitution that O'Connor did not understand in 1986 that she suddenly comprehended in 2003? It wasn't the Constitution that changed in those 17 years, or even O'Connor's understanding of the Constitution. What changed were O'Connor's social views, which she then read into the Constitution.

That's how Constitutional law is unmade by activist judges.

If excoriating judges and condemning judicial decisions is inflammatory -- then some celebrated Americans stand guilty of the same.

Speaking of Federalist judges, in 1823, Jefferson charged: “At the establishment of our Constitution, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous...” Our third president also spoke of judicial “despotism” and said judges had become “an oligarchy.”

Abraham Lincoln savaged Chief Justice Roger Taney for his decision in the Dred Scott case (holding that a black man was not a person, and thus could never claim the rights of citizenship). Following Lincoln’s lead, the Republican press of the 1860s was equally blunt. In May, 1861, the New York Tribune said the Chief Justice, “takes sides with *traitors*,” and that Taney would “go through history as the judge who dragged his official robes in the pollutions of *treason*.” The Chicago Tribune called the Supreme Court “the last entrenchment behind which *despotism* is sheltered.” While the National Independent said the Court was “regarded as a *diseased member* of the body politic,” and ran the risk of “*amputation*.”

In a 1937 radio address, Franklin Delano Roosevelt (upset with the Supreme Court’s treatment of his New Deal) declared, “We must save the Constitution from the Court and the Court from itself.” Was FDR inciting violence against sitting judges?

It’s only under modern liberalism that criticism of the courts has become tantamount to sacrilege and reform proposals treated as calls for armed insurrection.

That the left is desperate to preserve and protect its judicial con game is understandable. It regularly loses at the ballot box (including 7 of the last 10 presidential elections). Opinion polls show the public adamantly against it – especially on social issues.

Appeals to the bench are the last refuge of liberal elitists. What the electorate won’t give them, what legislatures would never dare to give them, judicial activists regularly hand them all wrapped up with a silver bow.

The American Civil Liberties Union has been particularly successful in litigating for social upheaval. Other avid litigators include People for the American Way, American United for Separation of Church and State, the National Abortion Rights Action League/Pro-Choice America, the National Organization for Women, the NAACP, the Sierra Club and the Southern Poverty Law Center.

The way the ACLU got the 9<sup>th</sup>. Circuit Appeals Court to declare “one nation under God” (Lincoln’s words, by the way) in the Pledge of Allegiance in violation of the First Amendment’s mythical wall of separation is a case in point. No legislature, no governor, no officeholder in the land would have taken this radical, anti-historical position. It could only come from the twisted thinking of federal judges.

That's why the left invests so much time and energy in propping up the myth that the voice of the judge is the voice of God. They live in dread of the public catching a glimpse of the little man behind the curtain, frantically pulling the levers to create the illusion of omniscience.

That's why it's willing – once again – to resort to smear tactics and a campaign of intimidation to avoid a long overdue debate.