

# **COURTS ALL THE LEFT HAS LEFT**

## **By Don Feder**

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If the president keeps his word (repeatedly given) to pick a strict constructionist of the Scalia/Thomas mold to replace retiring Supreme Court Justice Sandra Day O'Connor, the left will come after said nominee with broken bottles, nail-studded clubs, brass-knuckles – everything up to and including theater nuclear weapons.

Consider the following declarations of unconditional warfare:

- MoveOn.org predicted Bush will choose “an extremist who will undermine the rights of individuals and families” to replace O'Connor – unlike its patron, George Soros, who would support individuals and families by legalizing drugs.
- Deep in the throes of alcohol dementia, Ted Kennedy raved: “If the president abuses his power and nominates someone who threatens to roll back the rights and freedoms of the American people, then the American people will insist that we oppose that nominee, and we intend to do so.” The Au Bar Party Boy is almost as in touch with Middle America as Teresa Heinz.
- Karen Pearl (lord high executioner of the Planned Parenthood Federation of America) warned, “This may be one of the most critical and dangerous moments for the future of women’s reproductive freedom that any of us have seen in our lifetimes.” By “reproductive freedom,” PPFA means a 14-year-old having a taxpayer-funded, partial-birth abortion without her parents’ knowledge or consent.
- Kim Grandy of the National Organization for Women told a feminist Nuremberg rally: “This is our time. This is our challenge. Hell no, we won’t go. We won’t go back.” Would that be back to the rock they crawled out from under?
- People for the American Way avowed, “Our very national identity hangs in the balance and progressives must be loud and clear.”

Why the shrillness bordering on hysteria? Could it be because the judiciary is all the left has left?

Since 1964, it has won only 3 of 10 presidential elections (and then by running a Southerner who hid his views). It has been out of power in the House of Representatives for more than a decade. The Senate has been in GOP hands for most of the last 20 years. The left loses ballot questions so reliably (on everything from immigration and English to marriage) that it will do almost anything to avoid them. Opinion polls show most Americans rejecting the left's agenda by convincing majorities (from conduct of the war on terrorism to flag-burning).

The courts are the remnants of a once-mighty empire. However, given what the courts have become, they're all the left needs. They have turned the judiciary into the most powerful branch of government, a super-legislature – overturning acts of Congress (the ban on partial-birth abortion), nullifying state referenda (California's Prop. 187, aimed at discouraging illegal immigration, Nebraska's defense of marriage amendment) and creating pseudo-rights out of thin air.

Celebrated as the quintessential centrist by the establishment media, O'Connor herself is the classic example of judicial activism. (This so-called swing vote swung with the court's Stalinist bloc at least two-thirds of the time.)

In 1986, the Supreme Court said there was no right to sodomy guaranteed by the Constitution (in *Bowers v. Hardwick*). In 2003, in *Lawrence v. Texas*, the court discovered a right which it said didn't exist just 17 years earlier. O'Connor was in the majority in both cases.

What changed in the intervening years wasn't the Constitution, or O'Connor's understanding of the First Amendment, but her social views, which she preceded to read into the Constitution. The left would be thrilled if Bush nominated another O'Connor that the Georgetown set could go about socializing and turning into a pet Republican (as they did with Justice Anthony Kennedy, and Harry Blackmun before him).

The Supreme Court has reconstituted itself as a permanent constitutional convention, amending the Constitution at will to suit the ideology of the majority.

If that weren't enough, the left is convinced that it has a divine right to determine the philosophical composition of the high court, regardless of the outcome of elections. When the Democrats win at the polls, they can put whomever they damn well please on the bench. When the right emerges victorious, the time has come for compromise, negotiations and a consensus candidate.

Clinton's Supreme Court nominees (Ruth Bader Ginsburg and Stephen Breyer) both are doctrinaire judicial Jacobins who view the Constitution as a mechanism for re-shaping society, not unlike the guillotine.

In 1993, Clinton would have been hard-pressed to find a credible nominee to the left of Ginsburg – American Civil Liberties Union general counsel from 1972 to 1980, a member of the ACLU's National Board of Directors from 1974 to 1980.

At the time of her nomination, Ginsburg was on record expressing sympathy for the position that there is a constitutional right to prostitution, supporting polygamy, condemning the Boy Scouts and Girl Scouts for perpetuating "stereotyped sex roles," urging that Mother's Day and Father's Day be replaced by a politically correct Parent's Day, pushing uni-sex prisons, and favoring judicially mandated racial quotas.

Clinton, who was never elected by a majority of the American people, put Hillary-clones on the high court. In fact, Hill probably picked them as part of her deal to overlook Bill's philandering.

George W. Bush has been elected president twice. (In both campaigns, he promised to appoint judges who would read the Constitution as it was written.) Last year, he became the first president since FDR to both win re-election and have his party pick up seats in Congress.

In defiance of this mandate, Kennedy et al aren't just insisting that the president negotiate a Supreme Court nomination with the Senate (which itself would be unconstitutional), but that he transfer executive authority to a minority of Senators.

If conservatives lose the coming war, we will be well on the way to losing representative government once and for all. (In this regard, the left is

correct: The outcome of the coming nomination battle will be momentous.)  
With this in mind, I would like to propose the following rules of engagement for the right:

- Make sure the American people know what's at stake -- that the courts aren't "balanced and fair" as Senator Bill Frist said in a fit of media pandering. They are completely out of control -- legislating from the bench and denying the Constitution's clear meaning to force their will on a cringing public. (As Barry Goldwater famously quipped, the Supreme Court reads the Constitution the way he read Playboy, with his wife turning the pages.)
- To translate this into concrete terms, we need to constantly ask the public: Do you want God to be taken out of the Pledge of Allegiance? (The Supreme Court used a technicality to avoid ruling on that in an election year.) Do you want abortion deluxe -- no limitations at all? (The court is moving in this direction.) Do you want cable TV, a jacuzzi and an ACLU lawyer for every Gitmo suspect? Do you like the idea of local government being able to seize your home for a strip mall? Do you want gay marriage? (In that the court found a First Amendment right to sodomy in Lawrence, what are the chances the federal Defense of Marriage Act would survive its activism?) Do you want an America where it's practically unconstitutional to say "God bless you" in public?
- Emphasize the process. The left will try to delay, delay, delay. They'll want interminable hearings. They'll demand to see everything from the nominee's third-grade report card to his dental records. Insist on timely and limited confirmation hearings and an up-or-down vote after a reasonable debate. Don't let them drag it out so long that the public loses interest, the administration loses its courage, and they win by default.
- Patiently explain the historical meaning of advise and consent. It does not mean Senators applying an ideological litmus test. Unless there are serious ethics allegations, or the nominee's clearly unqualified (But William O. Douglas had never held judicial office prior to his appointment. O'Connor spent a whole 18 months on the Arizona court of appeals, before Regan tapped her), the Senate must confirm in a speedy fashion.

- Insist that the administration and Senate leadership enforce party discipline. That means letting the squishes like Arlen Specter and John McCain know in no uncertain terms that if they don't support the president here (including voting for the constitutional option to derail a filibuster), they will get nothing for the next 3 ½ years – including validation of their parking tickets.
- Make it clear that the term arrogant doesn't even begin to describe the left's attitude. Once again, their elitist worldview was rejected in 2004. They managed to lose both the presidency and congressional seats. Still, they demand a consultative role in picking the next Supreme Court justice. Thus, a nominee who doesn't agree with their radical social agenda is a threat to civil liberties. A nominee who's loyal to the intent of the Founding Fathers is an extremist, while Anthony Kennedy (who believes European decrees are the supreme law of the land) is the very model of moderation.
- Finally, in preparing for a bare-knuckles brawl unlike any we've seen before, conservatives should follow the advice the old Irish cop (played by Sean Connery) gives to Eliot Ness in the movie "The Untouchables." Says Connery's character: "You want to beat Capone's mob? When they come after you with a knife, you come after them with a gun. When they send one of yours to the hospital, you send one of theirs to the morgue. That's the Chicago way!"

Thus ensuring that the blood on the floor isn't all our own.

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