Politics et Cetera
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In this Issue

THEY SAID IT

Politics, Aristotle teaches, is free persons deliberating the question, How ought we to order our life together? Democratic politics means that "the people" deliberate and decide that question. In the American constitutional order the people do that through debate, elections, and representative political institutions. But is that true today? Has it been true for, say, the last fifty years? Is it not in fact the judiciary that deliberates and answers the really important questions entailed in the question, How ought we to order our life together? Again and again, questions that are properly political are legalized, and even speciously constitutionalized.

--Fr. Richard John Neuhaus and the editors of *First Things*, "The End of Democracy? The Judicial Usurpation of Politics," *First Things*, November, 1996.

THE JUDICIAL POWER GRAB.

One of the most enduring and widespread criticisms of George W. Bush is that his is an "imperial" presidency, in that he has repeatedly and consciously expanded the power of the executive, appropriating authority from Congress and using the "war on terror" as an excuse for his power-grab. In addition to the usual cast of Bush critics on the left, the list of those who have accused him of executive overreach includes privacy advocates, libertarian-leaning conservatives, paleo-conservatives, and various and sundry members of other conservative persuasions, factions, and cliques.

Typical of the charges against Bush were those leveled against him by proto-conservative George Will, who, in December and again last month, argued that by authorizing the National Security Agency to intercept electronic transmissions between possible terrorists, Bush "contravened a statute's clear language" and, in so doing, proposed a "monarchical doctrine" stipulating "that whenever the nation is at war, the other two branches of government have a radically diminished pertinence to governance, and the president determines what that pertinence shall be."

While the specific charges leveled by Will have been rather thoroughly discredited, the belief that the President and his advisors – Cheney and Rumsfeld, chief among them – have usurped power that rightly belongs to the other two branches of government is virtually endemic among the nation's political elite. And most critics are hardly as delicate and diplomatic as Will. In fact, many of his detractors on the left earnestly and aggressively propagate the idea that President Bush has undermined the constitution, violated heretofore inviolable

covenants between government and the governed, and generally appropriated to himself powers that rival those of any of history's worst totalitarian dictators, including Adolf Hitler.

The more hysterical of the President's critics are, as always, easily dismissed, their charges amounting to little more than wild exaggerations of the Bush record and paranoid fantasies of the embittered and enfeebled former ruling class. But in this case, even the more responsible and sober criticisms of the President's actions can be rejected out of hand, at least in part. For one thing, the nation is at war and, almost by definition, war requires the president to take actions and make decisions that might otherwise be better left undone and unmade. If anything, President Bush has shown practical restraint, particularly when his actions are compared with those of previous wartime leaders – including Nixon, Johnson, FDR, and Lincoln, to name just a few who went far beyond but Bush has done.

More to the point, even if President Bush is indeed aggressively expanding the power of the executive, it could be argued that such an expansion is merely a counterbalancing of the relationships between the three branches of government that is necessary because of the infringement on presidential prerogative by Congress that took place in the wake of the Vietnam War and the Watergate scandal.

While considering this, it should be kept in mind that when George Will writes that President Bush has "contravened a statute's clear language," his concern is whether the President has violated Congress's express wishes. The question he leaves unasked is whether in passing the law in question, 1978's Foreign Intelligence Surveillance Act, Congress violated the express wishes of the Founders and forced the President eventually to "violate the law," by unconstitutionally appropriating presidential powers to itself and the judiciary.

The fact is, and George Will of all people should know it, that if there is an extant threat to the constitutional order as established by the Founding Fathers, it is not coming from the Executive Branch. It is the continuing encroachment into all aspects of political and social life by an unelected and therefore unaccountable judicial branch of government, an encroachment which, it should be noted, has taken place with both the knowledge and the tacit consent of the legislative branch. This dangerous expansion has been going on for some time, and it has distorted the entire political culture of the nation as well as the constitutional order, thereby creating and contributing to a host of political and social problems.

This is, of course, no big secret. For many years now, the right has publicly bemoaned the fact that the takeover of the judiciary by the left poses a threat not only to conservative governance but to the constitutional order as well. In fact, this controversy has routinely played a critical part in conservatives' pitch to voters and has played more than an incidental role in a number of elections, most notably the defeat of then-sitting Senate Minority Leader, Tom Daschle.

Indeed, it's been nearly a decade now since *First Things,* the journal published by Father Richard John Neuhaus, launched a significant, acclaimed, and highly controversial symposium on the courts and judicial usurpation of power.

What is interesting, in our opinion, is that a number of political observers seem to have come to the conclusion that this battle for the soul of the judiciary, and therefore for the soul of the nation, is now a thing of the past. A great many conservatives appear to have placed the issue in the "job done" file after five years of Republican nominations and since the ascension of two strong conservatives, John Roberts and Samuel Alito, to the Supreme Court. It's easy to see how and why these folks have come to believe that this particular battle is, if not over, then certainly nearing a conclusion, and a positive one at that. But we doubt seriously that this will prove to be the case, at least in the foreseeable future. In fact, recent events suggest that a new front in the fight for the judiciary has been opened and will bear close watching in the future.

The catch here is that this battle is not exclusively one being waged between liberals and conservatives, meaning that victory cannot be guaranteed simply by the appointment of judges of a more conservative political predisposition. At its heart, the battle over the judiciary is one that focuses less on ideology and more on beliefs about the role of the judicial branch in modern governance. One side suggests that the expansion of power on the part of the judicial branch is a constitutional abomination and destructively anti-democratic. The other insists that the expansion of the judiciary's powers is both constitutionally justifiable and necessary given the complications of modern society. Participants in this debate are, as a general rule divided along ideological lines, with conservatives embracing the former position and liberals the latter. But this rule is hardly perfect, and a belief in the value of an activist judiciary of some sort tends to permeate the discussion.

All of this is reflectd to some extent in the opening shots on this new front in the larger conflict over the judiciary. These shots were fired by two Supreme Court Justices, current Justice and avowed liberal Ruth Bader Ginsberg and recently retired Justice and nominal Republican Sandra Day O'Connor, each of whom recently gave a speech in which she detailed threats purportedly made against her and explained how and why these threats were related to the aforementioned conservative effort to "take back" the judiciary. Tony Mauro of *Legal Times* reported Ginsberg's speech thusly:

> Supreme Court Justice Ruth Bader Ginsburg says she and now-retired colleague Sandra Day O'Connor were the targets of an Internet death threat last year because of their citation of foreign law in decisions. In a speech last month at the Constitutional Court of South Africa, Ginsburg suggested the threat was prompted by bills introduced by Republicans in Congress that would prohibit federal courts from referring to foreign laws or rulings in interpreting the U.S. Constitution.
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> "Although I doubt the current measures will garner sufficient votes to pass, it is disquieting that they have attracted sizable support," said Ginsburg. "And one not-so-small concern – they fuel the irrational fringe." She then revealed the online threat.

Justice O'Connor, for her part, kept the issue of threats hypothetical, but nonetheless delivered the same message as her former colleague. According to *The Guardian* of London:

> Sandra Day O'Connor, a Republican-appointed judge who retired last month after 24 years on the Supreme Court, has said the US is in danger of edging towards dictatorship if the party's rightwingers continue to attack the judiciary.
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> In a strongly worded speech at Georgetown University, reported by National Public Radio and the Chicago Daily Law Bulletin, Ms O'Connor took aim at Republican leaders whose repeated denunciations of the courts for alleged liberal bias could, she said, be contributing to a climate of violence against judges.
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> Ms O'Connor, nominated by Ronald Reagan as the first woman Supreme Court Justice, declared: "We must be ever-vigilant against those who would strong-arm the judiciary." She pointed to autocracies in the developing world and former Communist countries as lessons on where interference with the judiciary might lead. "It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings."

What these two have done with their respective speeches is both ingenious and insidious. For all the fussing and moaning from the left about how the Bush administration and others on the right are always and everywhere "crushing dissent," it is Ginsberg and

O'Connor who have actually gone about trying to shut their critics up. According to Ginsberg, the "threat" to her and O'Connor was one posting in one internet "chat" that consisted of the following:

> Okay commandoes, here is your first patriotic assignment . . . an easy one. Supreme Court Justices Ginsburg and O'Connor have publicly stated that they use [foreign] laws and rulings to decide how to rule on American cases. This is a huge threat to our Republic and Constitutional freedom. . . . If you are what you say you are, and NOT armchair patriots, then those two justices will not live another week.

She offered no information about other threats, about the site at which the offending post appeared, about the seriousness with which law enforcement was treating the incident, or, most importantly, about how the threat was in any way, shape, or form related to the Congressional criticism she and O'Connor have received.

It's unfortunate that Ginsberg and O'Connor were threatened. But for anyone to believe that one posting on one web "chat" constitutes a grave and serious danger is a stretch, to say the very least. President Bush and leaders of Congress almost certainly are targets of similar "threats" on a routine basis. But only Ginsberg and O'Connor have chosen to exploit the threats against them and to use them as a club to beat their political opponents. As *National Review Online's* Ed Whelan notes, "Ginsburg offers not an iota of evidence to establish the linkage that she asserts. Even if one were to assume that the idiot who posted the comment on the chat site had been motivated to do so by the congressional resolutions, what fair basis is there to impute responsibility for that idiot's actions to the supporters of the resolutions?"

Both Ginsberg and O'Connor want the mere insinuation of violence against them to serve as justification for the silencing of dissent against the courts. Even if the threats against the two justices and against others were more serious, more credible, and more widespread; even if there were documented cases of people being motivated by conservative criticism to threaten judges, the idea that those threats would justify the silencing of critics is preposterous, particularly since all the critics have done is question the constitutional underpinnings of the rationale the justices have developed for resolving cases before the court. Yet Ginsberg and O'Connor appear to be under the misimpression that because they are (or, in O'Connor's case, were) Supreme Court justices, their actions, their decision-making, and the precedents they cite in their rulings should be off limits and unquestioned by anyone other than their fellow members of the Court.

It's not hard to see how Ginsberg and O'Connor have come to believe this, since the infallibility of the judiciary has been a tenet of liberalism in this country for the past four decades. Last fall, after the Supreme Court had decided the controversial *Kelo* case dealing with eminent domain, House Minority Leader Nancy Pelosi declared the matter closed, saying, "It is a decision of the Supreme Court. If Congress wants to change it, it will require legislation of a level of a constitutional amendment. *So this is almost as if God has spoken*. It's an elementary discussion now. They have made the decision." Though she was more forthcoming in her fawning over the justices than most of her fellow liberals would be, at least in public, Pelosi's "love note' to the judiciary was all too typical of sentiments harbored on the modern left.

Historically, the Supreme Court has been viewed as a bulwark against radicalism, the ultimate protector and guarantor of individual constitutional rights. But over the last half- century or so, the Court has taken on a more active part in the political conversation and, in so doing, has come to serve exactly the opposite role, becoming more of a vanguard than a bulwark. From "privacy" to abortion to gay rights and a host of other issues, the Supreme Court has purported to lead rather than to follow public sentiment. And since the outcomes of the Court's activism have tended to affirm liberal positions that were otherwise unfeasible or politically toxic, the left has encouraged the idea that this leadership is not only constitutionally validated

but is necessary to the functioning of a modern, progressive society. The implication, of course, is that the Supreme Court specifically and the judiciary in general is fairer, more balanced, more appropriate, and more tempered than the electorate and thus produces outcomes that are fairer, more balanced, more appropriate, and more tempered than does the electoral process.

Back in January, just after the confirmation hearings for now-Justice Alito, we noted the left's fascination with extra-democratic institutions and its long history of attempting to use such institutions to subvert the will of people. Specifically, we wrote:

> Among the foundations of modern liberalism is the belief that "the people" cannot necessarily be trusted and that they must therefore be "shepherded" somewhat in order to do the right thing. Now, to note this is not necessarily to denounce modern liberalism outright, since, of course, the Founding Fathers themselves understood that plebiscitary democracy has significant flaws and that the passions of the masses must be tempered by republican institutions. But modern liberalism has an impatience and arrogance about it that have, over the course of the last hundred years or so, gone beyond what the Founders envisioned and served essentially to subvert the will of people in the name of "progress" . . .
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> Over the second half of 20th Century, then, the liberals turned their attention to control of the courts and the establishment of a judiciary that could act in the shepherd's role, directing American society toward progressive ends, even in the face of popular opposition. And that's precisely what they got . . .
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> Beginning roughly in the 1930s, the Supreme Court and the courts in general, began taking a more aggressive role in the application of judicial review. And by the advent of the Warren Court in 1954, the courts had fully adopted the role of aggressive arbiters of the validity of majoritarian legislation.
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> This expanded role of the judiciary was, of course, hardly neutral. Like the greatly expanded administrative state before it, the newly emboldened judiciary sought to rectify the inadequacies of the legislative process, this time with an eye on the concept of "social justice." Social justice that simply could not be achieved through democratic action had, in the eyes of the activist judiciary, to be achieved through the aggressive application of judicial review.

What Ginsberg and O'Connor appear to have in mind now is the informal ratification of this relationship by the further emasculation of the other branches and the consequent silencing of dissent. In his own speech last week, Justice Antonin Scalia used the term "judicial hegemony" to describe the relationship between the people, their representatives, and the judiciary. He's right, of course, but he might have been more precise if he had called it a "judicial oligarchy." O'Connor seems intent on twisting the language to suggest that those who dare to question the judiciary's supremacy are proto-dictators who would trample the rule of law. What she seems not to grasp is that by suggesting that it is illegitimate for the people's representatives to question the judiciary, she merely confirms that the descent into dictatorship has already begun, only under the direction of a handful of judges who believe themselves to be beyond reproach.

The battle over the courts that has played out in the political arena over the last couple of years is not going to disappear any time soon. Even if the abortion issue were settled tomorrow, the battle over the courts would rage on. Abortion is an important, concrete issue. But it is also an important symbolic issue. In addition to the obvious questions about life

and death, there are subtler but equally important questions about who gets to make the laws and whether the will of the people carries any weight in the era of judicial supremacy.

The law that President Bush allegedly broke and that has George Will and Senator Russ Feingold all upset is a law that took the president's inherent powers to provide for the national defense and subjected them to scrutiny by a judiciary that is neither qualified to assess national security nor has any responsibility in the matter if its decisions turn out to compromise the nation's defenses. That is a great deal of power to turn over to anyone, but particularly to someone who is unelected and unaccountable. But it's just a fraction of the power that's been turned over to the same crowd over the last four decades.

The censure resolution that Feingold has introduced and which is based on Bush's purported violation of FISA has almost no Congressional support and even less popular support. American's aren't keen on turning responsibility over to judges or on punishing those who resist the judiciary's attempts to prevent them from exercising their constitutional rights and responsibilities. Those who expect that the political battle over the courts will fade away are wrong. Just as wrong as Justices Ginsberg and O'Connor who appear not only to believe that the battle should fade but that those who have fought it should be punished for having done so.