EIR Feature

Attack on Judiciary Takes Aim at U.S. Constitution

by Edward Spannaus

Listening to House Majority Leader Rep. Tom DeLay (R-Tex.) and his "faith-based fascist" friends, one would think that the Federal courts are on a crusade to persecute Christians and "people of faith," and that only by banishing the filibuster from the U.S. Senate can true Christian government be restored in the United States. The prohibition of the "filibuster" (the Senate's tradition of extended debate) for judicial nominees, is generally referred to as the "nuclear option," although its proponents piously prefer to call it the "constitutional option."

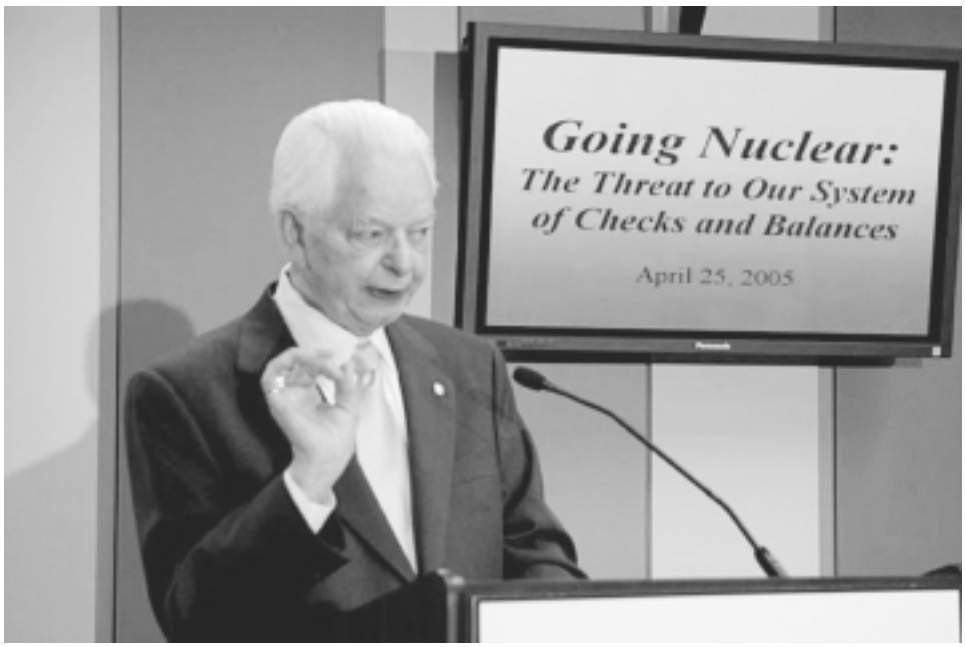
"Constitutional"? Nothing could be further from the truth—unless perhaps it's not the Federal Constitution, but the Confederate Constitution of 1861, to which they allude. This we shall explore, in due course.

'Enemies of Our Republic'

On Sunday TV talk shows in recent weeks, Sen. Joseph Biden (D-Del.) has been emphasizing that the fight over Bush's judicial nominees has nothing to do with religion or abortion, but that the issue is doing away with the New Deal. The most controversial of those nominees who have been re-submitted by Bush, have a "radical view relative to the role of the states," Biden said on Fox News on April 17. "This is a states' rights argument going back to 1860."

EIR's founder Lyndon LaRouche had some stronger words on April 24, in referring to those pushing the "nuclear option" and the "Constitution-in-Exile" notion—as we will describe it below.

"This is the Confederacy plain and simple," LaRouche charged. "They not only hate the Constitution; they hate the Declaration of Independence as well. These people are traitors to the U.S. and if they prevail, then the U.S. will be destroyed. They are traitors by intent, and traitors in fact. They are enemies of our Republic from within. If the 'nuclear option' and these judicial appointees are rammed through by some fraud, this will call into question the credibility of



Sen. Robert Byrd blasted the "nuclear option" at an April 25 forum sponsored by the Center for American Progress. Eliminating the filibuster is the first step to eliminating all our liberties, he said.

the entire Federal court system. What is being done here by Cheney, Addington, and Frist is clearly unconstitutional by intent and effect, and if the courts put up with this in any way, they lose all credibility."

Target: The New Deal

Earlier on April 24, Senator Biden was on ABC's "This Week," and had pointed out that 205 of the 215 nominees that President Bush sent to the Senate, have been confirmed. "Seven of the ten that were stopped are justices like Justice Janice Brown of the Supreme Court of the State of California, who calls the Supreme Court decisions in 1937, the decisions of a 'socialist revolution' in 1937. She talks about needing to do away with the New Deal. She raises questions, as does the leading architect, the leading supporter at the American Enterprise Institute [AEI], of the constitutionality of the Social Security system."

Biden's reference was to AEI's Michael Greve, who has declared: "I think what is needed here is a fundamental intellectual assault on the entire New Deal edifice. We want to withdraw judicial support for the entire modern welfare state."

What Biden was apparently drawing upon, was a major article which had appeared in the Sunday *New York Times Magazine* on April 17, written by George Washington University law professor Jeffrey Rosen. The subject was "an increasingly active conservative judicial movement," which sometimes refers to itself as the "Constitution in Exile" movement—so-called, because it claims that the Constitution has been "in exile" since 1937, the year when the Supreme Court reversed itself and began to uphold legislation enacting the New Deal programs of the Franklin D. Roosevelt Administration.

This movement bases itself on a radical, Lockean ideology of states' rights and contract law. To many in this grouping, the "Golden Age" is the era from 1896 through the 1920s, when the courts routinely struck down laws which were claimed to restrict economic competition and "freedom of contract" (that is, laws which were intended to promote the general welfare).

The most famous Constitutional battle of that period, prior to the fight over New Deal legislation, was in the 1905 case *Lochner v. New York,* in which the U.S. Supreme Court struck down a New York State law limiting bakers' hours of work to 10 hours a day, or 60 hours a week. The Supreme Court called this an interference in the "liberty of contract."

(It is notable that, on April 22, 2005, AEI held a forum on "*Lochner* at 100," at which Rosen and Greve both spoke. Greve and another panelist tried their hardest to defend the indefensible, and to salvage something out of the now-universally-discredited *Lochner* decision.)

To Coin a Phrase

It was Douglas Ginsburg, a judge on the D.C. Circuit Court of Appeals (and a Supreme Court nominee withdrawn by President Reagan after Ginsburg's marijuana-smoking was disclosed), who apparently first used the term "Constitution in Exile." Writing for a journal of the right-libertarian Cato Institute, Ginsburg was hammering on the Supreme Court's retreat from the "non-delegation doctrine"—the idea that Congress cannot delegate its law-making power to any other body or agency. Ginsburg seems to regard the high

point of the non-delegation doctrine as the Supreme Court's striking down of the National Industrial Recovery Act in 1935, and he considers the Supreme Court to have been in retreat since then. Ginsburg's summary statement is as follows:

"So for 60 years the non-delegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes."

The Court's 'Wrong Turn'

The current guru of the movement is University of Chicago law professor Richard Epstein, notorious for arguing that many of the laws underpinning the modern "welfare state" are unconstitutional. Rosen describes Epstein as peddling a legal theory far more radical than that of Justice Antonin Scalia; on the Supreme Court, Clarence Thomas is its closest adherent.

Biden had questioned Thomas about his interest in Epstein during Thomas's contentious 1991 confirmation hearings. In 1995, Thomas wrote an opinion which echoed the "Exile" movement's and Epstein's bizarre theories (and which caught our attention at the time).[1] The case was *U.S. v. Lopez,* which invalidated a 1990 law making it a Federal crime for anyone to possess a firearm within 1,000 feet of a school. The Court said that Congress, in enacting the statute, had exceeded its authority under the interstate commerce clause of the Constitution. Thomas went further than the others, suggesting that current law regarding the Commerce Clause is "an innovation of the 20th Century," that everything was fine up through 1935, for which proposition Thomas cited Supreme Court rulings invalidating New Deal regulations of commerce, on the grounds that such regulations invaded the province of the states. The "wrong turn," Thomas declared, "was the Court's dramatic departure in the 1930s from a century and a half of precedent."

In Epstein's view, any government that interferes with unrestrained economic liberties is repressive, and that includes the United States government. "When Epstein gazes across America, he sees a nation in the chains of minimum-wage laws and zoning regulations," Rosen wrote. "His theory calls for the country to be deregulated in a manner not seen since before Franklin D. Roosevelt's New Deal."

Epstein's favorite hobby-horse, about which he has written extensively, is the "Takings Clause" of the Constitution—referring to the provision of the Fifth Amendment which states that "nor shall private property be taken for public use, without just compensation." Epstein argues that the Takings Clause bars *any* redistribution of wealth, and that it calls into question zoning laws, workmen's compensation laws, transfer payments, and progressive taxation; this is what he calls "the recipe for striking down the New Deal."

Rosen's article cited a former Bush Administration official as saying that many people in the White House believe in the principles of the "Constitution-in-Exile" movement, without necessarily using the name. The one White House official mentioned, is David Addington, Vice President Dick Cheney's legal counsel, who is reported to have pressed the Justice Department to object to laws and regulations which the Constitution-in-Exile movement finds objectionable.

1. See "The Rehnquist Court Joins the Conservative Revolution," *EIR,* May 12, 1995.

Which Constitution Are They Defending?

When the "Constitution in Exile" grouping complains that the U.S. Supreme Court, from its 1937 ratification of FDR's New Deal measures forward, is trashing the "real" Constitution, whose paramount purpose was to protect property rights, they inadvertently raise the question: Which Constitution are they talking about? The only Constitution which did what they claim, is the 1861 Constitution of the Confederate States of America (C.S.A.).

Let's take a look at how the two Constitutions compare:

At first glance, the Constitution of the Confederate States of America is not all that different from the Constitution of the United States. For reasons of expediency, the framers of the C.S.A. Constitution took the text of the U.S. Constitution as the template from which they cut out their own version. Thus, the differences are illuminating—not only as to the nature of the Confederacy, but also as to the nature of the republic they were fighting against. The reality is, that the C.S.A. framers took the U.S. Constitution. and gutted it of its best and noblest features.

One need go no further than the Preamble to know exactly what the issues were between the U.S.A. and the C.S.A. Simply compare the two:

U.S.A.: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense,

"People like Addington hate the Federal government, hate Congress," said the former official. "They're in a deregulatory mood," and they believe that the second term of the Bush-Cheney Administration "is the time to really do this stuff."

Which Constitution?

This gang talks about "restoring" the exiled Constitution, but the Constitution that they want to restore, bears no resemblance to the Constitution of the United States, as it was enacted in 1787-89, and as was implemented in the first decades of the 19th Century, and again under Abraham Lincoln.

Rather, the Constitution for which they seem to yearn, is actually the 1861 Constitution of the Confederate States of America, which stripped out all the provisions relating to the obligation of the central government to promote the general welfare, or to regulate economic activity for the common good.

This came up at an April 25, 2005 forum at the Cato Institute in Washington, during a panel discussion called "In Defense of an Independent Judiciary." The panel was organized and chaired by Roger Pilon, Cato's constitutional expert.

The focus of discussion was judicial review (whereby the courts review the constitutionality of legislation and Executive actions); at the outset, Pilon said that the panel would not be on the filibuster or the "nuclear option." But he then proceeded to discuss, in rather unfavorable terms, recent actions by Tom DeLay, and other inflammatory statements about religion and the filibuster—all the while making it clear that he does support the "nuclear option" itself.

promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

C.S.A.: "We the people of the Confederate States, each state acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this Constitution for the Confederate States of America."

Here is the essence of the battles which wracked American politics and law in the early 19th Century. Was the union a compact among sovereign states, or was it formed by the people, acting in their sovereign capacity? Was the purpose to form "a more perfect Union," and to "promote the general Welfare" for posterity, or was the purpose simply to enter a social contract to form a Federal government?

These issues were definitively, but not irreversibly, resolved in the Supreme Court under John Marshall (Chief Justice from 1801 to 1835), and his closest ally, Joseph Story. Over intense opposition, Marshall and Story enshrined the Hamiltonian system into U.S. constitutional law—national banking, promotion of internal improvements ("infrastructure"), and promotion of manufactures through protective tariffs.

The Core of the American System

Thus, the C.S.A. Constitution threw out everything identified with the "American System." The C.S.A. Constitution:

- prohibited any measures (bounties, duties or taxes on importations) which would be used "to promote or foster any branch of industry";
- prohibited appropriation of funds "for any internal improvement intended to facilitate commerce," (except for lights, beacons, and buoys on waterways);
- removed the power of taxation to provide for the general welfare;
- gave the Congress the power to establish a post office and postal *routes* rather than post *roads* and required that the post office's expenses be paid out of its own revenues.

There were other changes, some primarily administrative with respect to the appropriation process, and others of more substance, such as explicit acknowledgement of slavery (which was never expressly mentioned in the U.S. Constitution).

In form, the judiciary system stayed the same. But, states could impeach Federal judges or other officers who operated solely within that state. Provision was made for a Supreme Court, but it was never established. So despite the formal inclusion of a "supremacy" clause, the states retained judicial supremacy.

Thus, it is easy to see why the C.S.A. Constitution of 1861 is much more compatible with the views of the Constitution-in-Exile movement, than the U.S. Constitution of 1787. With its weak Federal government, and the prohibition of "American System" economics—government promotion of the general welfare through the fostering of infrastructure, industry, and agriculture—the New Deal would have been forbidden. Fortunately, the C.S.A. Constitution *has* been in exile, for 140 years, and thus shall it remain.—*Edward Spannaus*

Pilon and others then proceeded to discuss judicial review, citing Alexander Hamilton writing about it in *Federalist* No. 78, and how Chief Justice John Marshall implemented it in the early 19th Century.

The question period opened with *EIR* raising the question of the Constitution-in-Exile movement, and its view of the "Golden Age" of the judiciary as from 1896 throught the 1920s. *EIR* pointed out that John Marshall's conception of judicial review was very different from that of the "Golden Age"; Marshall was using judicial review to enforce the Hamiltonian system of the national bank, protective tariffs, and internal improvements. "When people talk about the Constitution being exiled," this author said, "my question is, 'Which Constitution?' It's not the Constitution of John Marshall. But if you look at the Confederate Constitution of 1861, it stripped out the general welfare, internal improvements, etc., and it also stripped out any concept of judicial review."

An obviously uncomfortable Pilon answered: "As one who has been in the 'Constitution-in-Exile' movement from the beginning—insofar as it is a 'movement'—the idea of returning to a 'Golden Era' of the Court could not be further from what we who are a part of this movement, want. The jurisprudence of that era had its own problems; certainly they pale in comparison with the jurisprudence which followed the court-packing scheme [1937]. But those of us who are part of this movement would like to see the Constitution of liberty secured, which is different from the Constitution which has been applied in any era of our history."

That is a remarkable statement, which confirms that Pilon is absolutely not talking about the U.S. Constitution as it has ever existed; most notably is he *not* talking about the Constitution of Benjamin Franklin, George Washington, and Alexander Hamilton.

The 'Nuclear Option'

In the *New York Times* article, AEI's Greve is portrayed as not very optimistic about the movement's prospects with the current Supreme Court. Rather, he says, "Judicial appointments are what matters most of all." Greve cites Bush's renomination of the rejected judicial nominees "as a way of saying, 'Let's cram the same judges back in their faces.' That's intended as a sign they mean business."

Of those who have been renominated, Greve particularly praises William Pryor of Alabama, gushing that "he's sensational," and "gets almost all of it." Two others regarded as especially in tune with the "Exile" movement, are William Myers, formerly of the Interior Department; and Janice Rogers Brown of California.

Myers, a former lobbyist whose nomination was voted out on March 17, is an extreme property-rights advocate, who despises almost all government regulation. He calls Federal land regulation "tyrannical," which could lead to a "modern-day revolution" in the western states.

Brown's nomination was one of those voted out of the Senate Judiciary Committee on April 21, on a straight party-line vote. She is notorious for her scathing characterization of 1937, when the Supreme Court started to uphold FDR's New Deal progams, as "the triumph of our socialist revolution." She claims that the New Deal "cut away the very ground on which the Constitution rests," and she praises the Supreme Court's invalidation of laws setting maximum hours of work and minimum wage levels, in the "Golden Age."

What Senate Majority Leader Bill Frist (R-Tenn.), working hand-in-glove with Dick Cheney, are now planning, is to ram through a rule-change which would ban the filibuster for judicial nominees. The only reason this hasn't been done so far, in the view of most observers, is that they don't think they have the 50 Republican votes that they need. Fifty is the minimum, in which case Cheney, as presiding officer of the Senate, would cast the 51st, tie-breaking vote.

To do this, Frist & Co. would have to, in fact, break their own rules. The Senate Parliamentarian has already let it be known that he will rule that any effort to ram through such a rule change by a simple majority vote, would violate the Senate's own rules and procedures. And as Senate Democratic Leader Harry Reid (Utah) said on April 28, any such proposed change, should be referred to the Senate Rules Committee.

Heading Toward Dictatorship

The dean of the Senate, Robert Byrd (D-W.Va.) is warning that the "nuclear option" could result in the loss of liberty and, in effect, a one-party dictatorship.

"Once the nuclear option is launched, there is no stopping it," Byrd said, in a speech delivered at the Center for American Progress on April 25. "At the bottom of the rubble will lie freedom of speech: dead, dead, dead."

Byrd warned that we are "on the edge of destroying the checks and balances of our Constitution." He emphasized the constitutional role of the Senate, as the body in which minority rights are protected, and asked, what happens if the President's party controls the Senate? Where's the check on the raw exercise of power? The answer is that it's the filibuster: The requirement of 60 votes provides an effective check on the abuse of power. Byrd repeatedly stated that we don't have a king, with unlimited power.

"The filibuster is the final bulwark to prevent a President from stacking the courts," Byrd said, adding that if this happened, "other liberties enumerated in the Bill of Rights could be washed away. Freedom of speech, freedom of religion, all could be gone, wiped out by a partisan court beholden to no one but the President of the United States."

"This is scary," Byrd declared. He surmised that of lot of what is now going on, can be explained in terms of the advanced age of several of the justices of the Supreme Court, and rumors about the Chief Justice's health. "The White House does not want a filibuster in the Senate to derail a future choice for the Supreme Court," Byrd stated.