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PERSONAL & CONFIDENTIAL MEMORANDUM

FROM: COLONEL RONALD D. RAY

RE: LAWRENCE V. TEXAS/ PROPOSED RESOLUTIONS SEEKING A CONSTITUTIONAL AMENDMENT TO RESTRICT DEFINITION OF "MARRIAGE" ARE NOT NECESSARY

DATE: July 29, 2003

I have been contacted by concerned citizens and leaders over the Lawrence v. Texas decision. My assessment, after much research on the matter, is that a Constitutional Amendment may be well intended, but it's the wrong strategy and direction. Efforts at another Constitutional amendment create a Mt. Everest of legislative effort that the conservative, pro-family religious right and Christian church movement in America will have to undertake. **It is not necessary**. A better course of action is available in our Constitution. An amendment takes enormous legislative capital, and we often have been unsuccessful in the past; i.e., protecting the flag, etc.

Article I of the Constitution deals initially with the more powerful authority, that of Congress; the Peoples' house; Article II deals with the authority of secondary importance, the Chief Executive/President; Article III, deals with the judicial power of the United States, of even lesser importance and third in terms of order in the Constitution which says of the Judiciary "...one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." Judges and Justices can be removed by impeachment for less than good behavior. The Congress is naturally first, because all legitimate government rests on the informed consent of the governed or as Lincoln put, "Government of the People, by the People and for the People."

Under Section 2 of Article III of the Constitution, there is given judicial power or jurisdiction which is the power to decide cases or controversies. What kinds of cases may be decided by the supreme Court are specified in Section 2. For example, in cases involving Ambassadors and other public ministers and counsels and those in which the state shall be a party the supreme Court has original jurisdiction. I represented the Commonwealth of Kentucky in two suits against the states of Ohio and Indiana in terms of the boundary along the Ohio River and the case was originally filed as a case of first hearing in the U.S. supreme Court not in a lower court.

The second paragraph of Article III, Section 2 goes on to say:

> In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, **and under such Regulations as the Congress shall make.** [Emphasis added.]

Yes. Congress does have the authority to regulate the scope of authority of the supreme Court. (The "s" in supreme was not capitalized in the Constitution by the Founders.) Such an effort in Congress has not been attempted since the late 1950s. However, if I recall correctly, sufficient Congressional effort has been mustered in the past to simply pass, by majority vote in each House, to regulate or limit the jurisdiction of the supreme Court, but that's the Constitution's plain meaning and the original intent of the Constitutional language above.

Therefore, rather than a Constitutional Amendment or effort to impeach the six Justices, who found for Lawrence in *Lawrence v. Texas* (2003) and superceded the case before the court exceeding the Court's jurisdiction by "legislating" to strike *Bowers*, or a huge effort at scaling the costly political heights to get a Constitutional Amendment in position, an appropriate resolution could be drafted and submitted in the state legislatures, and among U.S. Senators and Representatives calling upon both Houses of Congress to exercise their Constitutional authority under Article II, Section 2. The Congress could pass, in both houses, by majority vote not requiring any further action by the states, to simply take away any jurisdiction of the supreme Court or the inferior federal court to in any way directly or indirectly attempt to redefine marriage other than it has been defined since the founding of this Country and as defined below in *Black's Law Dictionary* and in the original dictionary of Noah Webster, both of which simply point out that a man and woman marry with fidelity for life for the purpose of nurture and education of children, etc.

> Marriage: Marriage is distinguished from the agreement to marry and from the act of married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex...Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it is most followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations. Marriage is the union of one man and one woman, "so long as they both shall live" to the exclusion of all others, by and obligation which during that time, the parties cannot of their own volition and act dissolve, but which can be dissolved only by the authority of the state. *Roche v. Washington,* 19 Ind. 53, 81. Am. Dec. 376.

> Marriage, *n.* [Fr. *mariage*, from *marier,* to marry, from *mari,* from *mari*, a husband ; L. *mas, mari* ; Sp. maridage.] The act of uniting a man and woman for life ; wedlock ; the legal union of a man and woman for life. Marriage is a contract both civil and religious, by

> which the parties engage to live together in mutual affection and fidelity, till death shall separate them. Marriage was instituted by God himself for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children.
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> *Webster's American Dictionary of the English Language 1828*

This is my recommendation: shorten the arm of the supreme Court by pushing it back with the Constitution, as it exists; reasserting the preeminence of the Congress, We the Peoples House and reaffirming marriage, God's first institution. This action does not eat up time, massive amounts of political capital and keeps God's people from becoming mired down in questionable legislative procedures as our adversaries chase our tails because of our Constitutional ignorance. Further it serves to educate Congress, and there may still be such a pro-marriage majority in both Houses.

Our forefathers understood the threat of one branch of government enlarging itself and embedded in the Constitution the natural path for healing a cancerous growth in the body of our Republic. Let's put the Senators and Congressmen to a real test. Let them know their vote on this will be counted and remembered on election day. Don't give them room to posture and vote for a Constitutional amendment which will not pass, then duck or weave, waver or squish, the vigorous campaign to vote them out begins. We can begin to paper the districts door to door with educational materials that will spell out the problem, instead of taking the years and years of effort to possibly not get the two-thirds majority and the three quarters of the states required for amendment.

> At a time not so far distant as it has been, when the last trace of human liberty shall have been swallowed up in the regimentation of citizens who have never known true liberty from pointless governmental restraints, always imposed under the fraudulent pretense that human rights are being more fully protected, a fitting epitaph for the best designed government that ever existed on the face of the earth may be found in the wise words of Alexander Hamilton:
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> *". . . Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . . notwithstanding a nominal and apparent separation."*[1]
>
> ***Alexander Hamilton***

For further reading on the matter see: Carrol D. Kilgore's, *Judicial Tyranny: An Inquiry into the Integrity of the Federal Judiciary Published at the beginning of the Third Century of American Independence* (1977), and Raoul Berger, *Government by Judiciary* Harvard University Press, (1977); Raoul Berger, *Congress v. the Supreme Court* (1969).

[1] Carrol Kilgore, *Judicial Tyranny: An Inquiry Into the Integrity of the Federal Judiciary* (Nashville, TN: Thomas Nelson, Inc., 1977), p. 318.