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THE CONSTITUTIONALITY OF THE WITHDRAWAL OF ALL FEDERAL
COURT JURISDICTION OVER QUESTIONS INVOLVING
STATE-SPONSORED PRAYER IN PUBLIC SCHOOLS
AND PUBLIC BUILDINGS

David M. Ackerman
Legislative Attorney
American Law Division
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In the case of Engel v. Vitale^{1/} the Supreme Court held the establishment of religion clause of the First Amendment to be violated by a state requirement that school children say aloud at the beginning of each school day the following prayer:

Almighty God, we acknowledge our dependence upon
Thee, and we beg Thy blessings upon us, our
parents, our teachers and our country.

The following year the Court similarly held unconstitutional, in the case of Abington School District v. Schempp,^{2/} a state requirement that at least ten verses from the Holy Bible be read at the beginning of each school day and that students join in the unison recital of the Lord's Prayer. The Court found these requirements to constitute establishments of religion notwithstanding that in both cases the states made provision for the excusal or nonparticipation of students either at their own request or at the request of their parent(s) or guardian(s).

^{1/} 370 U.S. 421 (1962).

^{2/} 374 U.S. 203 (1963).

On April 9, 1979, the Senate adopted an amendment which would deny the federal district courts all original jurisdiction, and the Supreme Court all appellate jurisdiction, over

any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of an Act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation which relates to voluntary prayers in public schools and public buildings. 3/

That is, under this amendment, sponsored by Senator Helms, no case challenging the constitutionality of a state statute relating to voluntary prayer in the public schools could be heard in any federal district court. Such cases could be adjudicated only in state courts. Moreover, no decision by the highest court of any state concerning such a statute or regulation could be reviewed in the Supreme Court. Each state's highest court would be its own final arbiter in such cases. Engel and Schempp would continue to stand as controlling precedents, but future litigation on the issue could be heard only in state courts, with no opportunity for review by any federal court.

3/ On April 5, 1979, the Senate had first added this amendment to S.210, a bill to establish a Department of Education, by a vote of 47-37. But on April 9 the Senate added the amendment instead to S.450, which specifically concerned federal court jurisdiction, by a vote of 51-40, then voted by a margin of 50-43 to reconsider its earlier amendment to the Department of Education bill and subsequently tabled that amendment, 53-40. See 125 Cong. Rec. S4128-S4132 (April 5, 1979) and S4138-S4165 (April 9, 1979).

The issue addressed in this report is whether Congress has the constitutional power to eliminate completely all federal court jurisdiction over a matter involving a constitutional right. Assuming the efficacy of the Senate-adopted amendment,^{4/} the constitutional right that is implicated is the First Amendment right to be free from governmental establishments of religion, in this instance, as held by the Supreme Court in Engel and Schempp, state-sponsored voluntary prayer in the public schools. The Senate amendment would remove all federal court jurisdiction, both original and appellate, over all cases related to such state-sponsored prayer. The issue is, does Congress have that power under the Constitution?

Congressional Power Over the Jurisdiction of the Lower Federal Courts

Article III of the Constitution defines the judicial power of the United States in the following terms:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;--to all Cases affecting Ambassadors, other

^{4/} Several questions have been raised about the efficacy of the amendment as adopted by the Senate in accomplishing its purpose of depriving the federal courts of jurisdiction. For instance, it has been suggested that the federal courts could still assert jurisdiction in prayer-related cases simply by holding that the state-sponsored exercises in question were not "voluntary." That issue was not resolved by the Supreme Court's decisions in Engel and Schempp, because the voluntariness of the exercises was not deemed material to their constitutionality. This report, however, assumes the efficacy of the Senate amendment in depriving the federal courts of all jurisdiction over all cases relating to state-sponsored voluntary prayer in the public schools.

public Ministers and Consuls;--to all Cases of admiralty and maritime jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States; and Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article III does not by its terms create any of the inferior federal courts, but instead confers that power on Congress:

Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

This Congressional power is also affirmed in Article I of the Constitution concerning the legislative power, which states:

Section 8. The Congress shall have the Power... To constitute Tribunals inferior to the Supreme Court.

It would appear to be generally conceded that under the provisions in Articles I and III Congress has extensive control over the jurisdiction of the lower federal courts. In Cary v. Curtis,^{5/} for instance, the Supreme Court stated:

...the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may

^{5/} 44 U.S. (3 Howard) 236 (1845).

seem proper for the public good.... (T)he organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature.

44 U.S. (3 Howard) at 245.

Similarly, in Palmore v. United States^{6/} the Court construed Congress' power over the jurisdiction of the inferior federal courts to be virtually plenary:

Article III describes the judicial power as extending to all cases, among others, arising under the laws of the United States; but, aside from this Court, the power is vested "in such inferior Courts as the Congress may from time to time ordain and establish". The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States.... Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III. 411 U.S. 401.

And again in Kline v. Burke Construction Co.^{7/} the court stated:

The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part.... 260 U.S. at 234.

It has sometimes been argued that the language of Article III compels Congress to vest the entire judicial power, as defined by that

^{6/} 411 U.S. 389 (1973).

^{7/} 260 U.S. 226 (1922).

Article, in some federal court, ^{8/} but Congressional practice and the course of judicial decisions since 1789 would seem to sanction extensive Congressional discretion in this matter. Not until 1875, for instance, did Congress vest the inferior federal courts with general federal question jurisdiction, ^{9/} and it has consistently predicated such jurisdiction on a minimum amount in controversy. Moreover, the Supreme Court has consistently upheld such Congressional actions over the jurisdiction of the inferior federal courts as (1) withdrawing jurisdiction even as

^{8/} Justice Story, in Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 330-31 (1816), argued:

Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if in any of the cases enumerated in the constitution, the state courts did not then possess jurisdiction the appellate jurisdiction of the supreme court...could not reach those cases, and, consequently, the injunction of the constitution, that the judicial power "shall be vested" would be disobeyed. It would seem, therefore, to follow, that congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance... (T)he whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

See also Eisentrager v. Forrestal, 174 F. 2d 961 (D.C.Cir., 1949), reversed on other grounds sub nom Johnson v. Eisentrager, 339 U.S. 763 (1950).

^{9/} 18 Stat. 470, Sec. 1 (Mar. 3, 1875). In 1801 Congress had briefly granted the inferior federal courts jurisdiction over "all cases in law and equity, arising under the Constitution and laws of the United States (2 Stat. 89, Sec. 11 (Feb. 13, 1801), but a year later repealed that grant (2 Stat. 132 (Mar. 3, 1802)).

to pending cases,^{10/} (2) delimiting federal court jurisdiction over a particular cause of action to a single tribunal,^{11/} and (3) selectively withdrawing the jurisdiction of the lower federal courts to adjudicate

^{10/} Bruner v. United States, 343 U.S. 112 (1952) (amendment of statute concerning claims for service to U.S.—the Tucker Act—~~withdrawing~~ federal district court jurisdiction over claims by employees as well as officers, without any reservation as to pending cases, requires dismissal of pending cases). See also De La Rama Steamship Co., Inc. v. United States, 344 U.S. 386 (1953) (general authority of Congress to withdraw federal court jurisdiction even as to pending cases affirmed, but General Savings Clause held to preserve pending claims in instant case).

^{11/} E.g., the Emergency Price Control Act of 1942 (56 Stat. 23) required all challenges to the validity of regulations adopted to enforce it to be brought in a single Emergency Court and barred all other federal, state, or territorial courts from asserting jurisdiction over such challenges. The decisions of the Emergency Court were reviewable in the Supreme Court. This unusual jurisdictional scheme was held to be within Congress' constitutional power in Lockerty v. Phillips, 319 U.S. 182 (1943) and Yakus v. United States, 321 414 (1944). Similarly, the Voting Rights Act of 1965 (79 Stat. 437, 42 U.S.C. 1973) limited jurisdiction over proceedings to terminate the coverage of the Act in a particular area to a single court in the District of Columbia, and this was upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966). See also the jurisdiction of the Temporary Emergency Court of Appeals as created by the Economic Stabilization Act of 1970 (P.L. 91-379, 12 USC 1001) and as further defined in the Emergency Petroleum Allocation Act of 1973 (P.L. 93-159, 87 Stat. 628, 15 USC 751 et seq.) and the Energy Policy and Conservation Act of 1975. (P.L. 94-163, 89 Stat. 871).

particular issues or to order particular remedies. ^{12/}

Nonetheless, it has occasionally been suggested that Congressional power to withdraw jurisdiction once granted to the Federal courts may be subject to other Constitutional provisions. For instance, in the Portal-to-Portal Act of 1947 ^{13/} Congress removed federal court jurisdiction over suits claiming overtime compensation, under the Fair Labor Standards Act, ^{14/} for activities prior and subsequent to the principal employment activity of the day. The Supreme Court had held such activities as walking to and from employees' work stations, changing clothes, and cleaning up to be compensable under the FLSA. ^{15/} Congress responded by passing the

^{12/} In 1839 Congress by statute (Act of Mar. 3, 1839, chap. 83, sec. 2) disallowed suits in assumpsit against the collectors of customs duties which were allegedly assessed unlawfully, and this was upheld in Gary v. Curtis, supra. In the Norris-LaGuardia Act (47 Stat. 70, 29 USC 101 et seq.), Congress restricted the jurisdiction of the federal courts to issue restraining orders or temporary or permanent injunctions in labor disputes, and this was upheld in Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938). In the Anti-Injunction Act (26 U.S.C. 7421 (a)), first adopted in 1867, Congress barred all courts from entertaining suits to restrain the assessment or collection of any tax, and this was most recently upheld in Bob Jones University v. Simon, 416 U.S. 725 (1974). The Judiciary Act of 1789 exempted from the federal courts' diversity jurisdiction those cases in which diversity resulted from an assignment of a chose in action, and this exemption was upheld in Sheldon v. Sill, 49 U.S. (8 Howard) 441 (1850).

^{13/} 61 Stat. 84-90; 29 U.S.C. 251-262.

^{14/} 29 U.S.C. 216(b).

^{15/} Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680.

Portal-to-Portal Act defining such activities as not compensable and, further, removing all federal court jurisdiction over suits claiming compensation for such activities. In the leading case of Battaglia v. General Motors Corporation,^{16/} however, the U.S. Court of Appeals for the Second Circuit held the validity of the withdrawal of jurisdiction to depend on the validity of Congress' redefinition of compensable activities:

We think... that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation. Thus regardless of whether subdivision (d) of section 2 (withdrawing federal court jurisdiction) had an independent end in itself, if one of its effects would be to deprive appellants of property without due process or just compensation, it would be invalid, 169 F. 2d at 257.

In other words, the court said that Congress cannot use its power over jurisdiction to deprive persons of rights otherwise protected by the Constitution.

Similarly, several cases suggest that Congress may exceed its power over jurisdiction if it uses it to deny a person all judicial remedies to a claimed deprivation of a federal right. In Cary v. Curtis, supra, Justice McLean argued in dissent that the majority misconstrued the effect

^{16/} 169 F.2d 254 (2nd Cir., 1948), cert. den. 335 U.S. 887 (1948).

of a Congressional statute. The statute in question had the effect of barring the traditional remedy of suing a customs collector personally for duties paid under protest or for indeterminate assessments. The statute required the collector to turn the moneys over to the Treasury upon receipt and authorized an appeal to the Secretary of the Treasury by complainants, without any judicial review. Justice McLean argues that this statute submitted citizens to summary executive action without any possibility of judicial review, and that, so construed, the statute exceeded Congress' power over the courts. The statute, he said, violated the independence and necessary function of the judiciary:

In this aspect, then, I say, the act is unconstitutional and void. It not only strikes down the rights of the citizens, but it inflicts a blow on the judicial power of the country. It unites, in the same department, the executive and judicial power.... In my judgment, no principle can be more dangerous than the one mentioned in this case. It covers from legal responsibility executive officers.... If he cannot be sued, what may he not do with impunity. 44 U.S. (3 Howard) at 266 (McLean, J., dissenting).

The majority avoided the force of this argument by saying that the statute in question did not have the asserted effect, that other avenues of judicial redress remained open to aggrieved citizens.

Again, in Yakus v. United States, supra, the Court upheld the unusual judicial review provisions of the Emergency Price Control Act which barred the issue of the validity of regulations issued under the Act from being raised as a defense in criminal prosecutions of alleged violations of the regulations. The Act provided that the validity of the regulations could be challenged only upon an administrative protest to the Administrator and subsequently upon review of his action by a specially-created Emergency

Court of Appeals. In upholding this unusual procedure, the Court seemingly implied that some judicial review was a constitutional necessity:

Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, the present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. 321 U.S. at 444.

In sum, it is clear that Congress' power over the jurisdiction of the inferior federal courts is extensive. Moreover, it should also be noted that even in those cases where the courts have suggested possible limitations on Congress' power, they have upheld the particular expressions of that power in the cases before them. In other words, the suggested limitations have not yet been employed by the courts as actual constraints.

Congressional Jurisdiction Over the Appellate Jurisdiction of the Supreme Court

Congressional power over the appellate jurisdiction of the Supreme Court would appear to be more problematic. In part this is due to the language of Article III itself. As noted above, Section 1 of Article III provides that:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

More specifically, Section 2 of Article III defines the original and appellate jurisdiction of the Supreme Court as follows:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, 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.

Thus, Article III confines Congressional power over the appellate jurisdiction of the Supreme Court to the making of "Exceptions and ... Regulations..." a power seemingly less complete on its face than Congress' power to "ordain and establish" the inferior courts. Uncertainty also stems from the fact that beginning with the Judiciary Act of 1789^{17/} Congress has made no attempt to sharply curtail the appellate jurisdiction of the Supreme Court, and thus the possible limits of its power have not been fully tested. This is particularly true with respect to Supreme Court review of state court decisions concerning federal rights:

(T)he Supreme Court has always had authority, under certain circumstances, to review a final judgment or decree of the highest court of a state in which a decision could be had, where... the judgment turns upon a substantial federal question. Moore's Federal Practice, Vol. 1 (2nd ed.), Section 0.6(6), pp. 252-53.

Nonetheless, numerous statements by the Supreme Court can be found describing Congress' power over its appellate jurisdiction in terms as sweeping as those it has used to describe Congress' power over the jurisdiction of the inferior federal courts. In Durousseau v. United States,^{18/} for instance, Chief Justice Marshall stated:

The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.

^{17/} 1 Stat. 73.

^{18/} 10 U.S. (15 Otto) 38 (1810).

When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it. 10 U.S. (6 Cranch) at 314.

Similarly, in The "Francis Wright" ^{19/} Chief Justice Waite stated:

... while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe.... What (the Court's appellate powers) shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. 105 U.S. at 385-86.

Most significantly, in the leading case of Ex parte McCardle ^{20/} the Court dismissed for want of jurisdiction an appeal of a habeas corpus proceeding when Congress repealed the statute on the basis of which the appeal was taken, even though the case had been argued before the Court and was awaiting final decision. McCardle had been imprisoned by the post-Civil War military government in Mississippi under the authority

^{19/} 105 U.S. (15 Otto) 381 (1881).

^{20/} 74 U.S. (7 Wallace) 506 (1868).

of the Reconstruction Acts for publishing allegedly libelous and incendiary articles in his newspaper. Under the authority of an 1867 statute he sought a writ of habeas corpus in federal circuit court alleging that the Reconstruction Acts were unconstitutional, and when that was denied brought an appeal to the Supreme Court, as authorized by the 1867 statute. The Court held that it had jurisdiction of the appeal under the 1867 statute ^{21/} and heard oral argument on the merits of the case. But before the Court could render a final decision, Congress repealed that part of the 1867 statute which authorized an appeal to the Supreme Court. After reargument on the effect of the repeal, the Court dismissed the case, stating:

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. 74 U.S. (7 Wallace) at 514.

^{22/}

Other cases contain similar sweeping statements.

^{21/} 73 U.S. (6 Wallace) 318 (1868)

^{22/} In Turner v. Bank of North America, 4 U.S. (4 Dallas) 8, 10 (1799), Justice Chase stated:

The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise: and if congress has not given the power

Notwithstanding these assertions, however, some limitation would still appear to attach to Congress' control of the Supreme Court's appellate jurisdiction. In Ex parte McCordle itself and subsequently in Ex parte Yerger^{23/} the Court emphasized that the repeal of the 1867 statute did not deprive it of all appellate power over cases involving the constitutional right of habeas corpus:

The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. 74 U.S. (7 Wallace) at 515.

That is, under the Judiciary Act of 1789 the Court had, prior to 1867, exercised the authority to review lower federal court decisions concerning habeas corpus, not by appeal but by a writ of certiorari. In Ex parte Yerger it was argued that the 1867 act authorizing direct appeals implicitly repealed the jurisdiction granted in the 1789 act, and that the subsequent repeal of the 1867 act deprived the Court of all appellate jurisdiction

22/ (cont'd)

to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.

In Daniels v. Railroad Company, 70 U.S. (3 Wallace) 250, 254 (1865)

the Court stated:

The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.

23/ 75 U.S. (8 Wallace) 85 (1868).

over habeas corpus proceedings. But the Court rejected the argument, stating:

...it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example... it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.

These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. Ex parte Yerger, 75 U.S. (8 Wallace) at 102-103.

The Court deemed the sudden withdrawal of jurisdiction in McCardle to be justified by "some imperious public exigency... within the constitutional discretion of Congress to determine....^{24/} But it refused to construe the 1867 and 1868 statutes as withdrawing

...the whole appellate jurisdiction of this court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto....
Ex parte Yerger, 75 U.S. (8 Wallace) at 106.

Subsequently, in United States v. Klein^{25/} the Court held a particular Congressional statute limiting the appellate jurisdiction of the Supreme Court and the original jurisdiction of the Court of Claims to

^{24/} Id., at 104.

^{25/} 80 U.S. (13 Wallace) 128 (1871).

be unconstitutional. The case concerned the effect to be given to Presidential pardons of those who had aided and abetted the rebellion during the Civil War. Several Presidential proclamations during and after the war had offered pardon and restoration of rights of property to those who had taken part in or aided and abetted the rebellion upon the taking and keeping of a prescribed oath. In 1869 the Court of Claims ruled in a case involving a claimant named Padelford and another involving Klein that such pardons cured any effects of having participated in the rebellion and held them entitled to the proceeds of cotton that had been seized and sold by the U.S. as abandoned during the conflict. In 1870 the Supreme Court affirmed in United States v. Padelford^{26/} that claimants so pardoned were entitled to the proceeds of their seized property. Congress then attached a proviso to an appropriations bill providing that such pardons could not be introduced in evidence in support of a claim against the U.S., that proof of such a pardon would deprive the Court of Claims and the Supreme Court of any jurisdiction over a claim against the U.S., and that the Supreme Court would have no further jurisdiction over any pending case in which the judgment of the Court of Claims was based on a pardon. The Supreme Court held this proviso unconstitutional as infringing the powers both of the judiciary and of the President. With respect to the judiciary the Court held that the proviso was not within "the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" because it had

^{26/} 76 U.S. (9 Wallace) 531 (1870)

the effect of prescribing what the Court must decide in the case pending before it:

...the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end...(T)he denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.

* * * *

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself. 80 U.S. (13 Wallace) at 145-147. 27/

Other cases suggest further possible limitations based on the supremacy clause of Article VI of the Constitution, which states:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It is argued that this constitutional provision would be a nullity if there were not a single supreme tribunal with the authority to interpret and pronounce

27/ With respect to the powers of the Presidency, the Court found the pardoning power to be granted "without limit" to the Executive and held the Congressional provision to be an unconstitutional impairment of that independent power.

on the meaning of the Constitution and of federal law. Thus, Justice Taney, in Ableman v. Booth,^{28/} stated:

But the supremacy thus conferred on this Government (by the supremacy clause) could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place...and the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that...a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, should be finally and conclusively decided... And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; (and) to make the Constitution and laws of the United States uniform, and the same in every State... 62 U.S. (21 Howard) at 517-18.

With even more dramatic flourish Justice Story justified Supreme Court review of state court decisions as follows:

A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws,

^{28/} 62 U.S. (21 Howard) 506 (1858).

the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution... (T)he appellate jurisdiction must continue to be the only adequate remedy for such evils. Martin v. Hunter's Lessee, supra, at 347-348.

In other words, a Supreme Court with authority to review and revise lower and state court judgments may be constitutionally necessary to assure the national uniformity and supremacy of the Constitution and federal law. ^{29/}

Another argument related to the above stems from the due process clause. ^{30/} If appellate review by the Supreme Court were denied in cases involving a constitutional right, and if as a consequence different interpretations of the law developed in the various states or federal judicial circuits, then the effect would be unequal treatment of persons similarly situated. That is, persons asserting the same right would be treated differently in different jurisdictions. This result, it has been suggested,

^{29/} For fuller development of this argument, see Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," University of Pennsylvania Law Review 109: 157, 160-67 (1960). In Hart and Wechsler's famous dialogue on Congress' power over the jurisdiction of the federal courts, the limitation asserted as to Congress' power over the Supreme Court's appellate jurisdiction is simply that "...the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Bator, Mishkin, Shapiro, and Wechsler, Hart and Wechsler's The Federal Courts and the Federal System, (2nd ed., 1973), p. 331.

^{30/} Sedler, "Limitations on the Appellate Jurisdiction of the Supreme Court," University of Pittsburg Law Review 20: 99, 113-114 (1958).

would be "a manifest abuse of due process, one of the bases of which is equal treatment before the law."^{31/} Thus, appellate review may be a necessary consequence of due process, "if such an appeal is necessary to secure uniform treatment before the law."^{32/}

In sum, then, it is clear that the full scope of Congress' power over the appellate jurisdiction of the Supreme Court has never been tested, but it would appear that some limitations exist. Klein establishes that Congress may not, in jurisdictional guise, mandate a rule of decision for particular cases. McCardle and Yerger establish that Congress can extinguish one means for obtaining appellate review of an asserted constitutional right when other means remain available, or, conversely, that the courts will narrowly construe jurisdictional statutes when to do otherwise would have the effect of extinguishing a constitutional right. Other cases suggest that fundamental constitutional limitations on Congress' power may stem from the Supreme Court's essential functions of giving uniformity and national supremacy to federal law or from a due process right that constitutional freedoms not depend on geographic location in the United States. Nonetheless, it should be emphasized that these limitations remain indefinite and uncertain. With the exception of Klein, no Congressional restrictions on the Supreme Court's appellate jurisdiction have been struck down. But neither, on the other hand, have there been many such restrictions: Congress has generally accorded the Court a broad scope of appellate review, and consequently there has been little opportunity for the Court to address

^{31/} Id., at 113.

^{32/} Id., at 114.

possible limitations on Congress' power. Thus, the possible limitations remain, for the most part, indeterminate.

Congress' Power and the Senate Amendment.

As noted above, Congress has since the beginning of the nation provided for Supreme Court review of state court decisions involving substantial questions of federal law. Thus, the Senate amendment to S.450 would, if enacted into law, be an unprecedented limitation on the jurisdiction of the federal courts. Prior jurisprudence is no sure guide to the constitutionality of the amendment because the amendment raises questions concerning the Constitutional separation of powers which Congress and the judiciary have generally avoided putting to the test in the past. As Justice Jackson commented in the analogous context of President Truman's seizure of the steel mills:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. Youngstown Sheet and Tube Co. v. Sawyer. 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

Nonetheless, it would seem clear that several of the possible limitations on Congress' power suggested by the cases discussed in the previous two sections would not be relevant to the Senate-passed amendment. The amendment does not, for instance, deny aggrieved parties all judicial remedies: The state

courts would remain open to suits concerning state-sponsored voluntary prayer. Nor can the amendment be said to mandate a rule of decision in cases concerning state-sponsored voluntary prayer that might come before the courts or directly deprive persons of their constitutional right to be free of state-sponsored voluntary prayer. Engel and Schempp would continue to stand as controlling precedents in this area, presumably binding on state court judges as they ruled on related cases.

The primary limitation that might affect the constitutionality of the amendment would appear to be its effect on the supremacy clause and the Supreme Court's role in giving effect to that clause. As discussed in the preceding section, that potential limitation asserts that the Constitution as a whole and particularly as manifested in the supremacy clause contemplates a single judicial tribunal capable of resolving divergent interpretations of the Constitution and federal law and imposing those resolutions as the supreme law of the land. These functions of maintaining the uniformity and supremacy of federal law, it is claimed, are essential constitutional functions. Consequently, legislation that would block or preclude altogether the Supreme Court from performing these essential functions would be an unconstitutional encroachment on the Court.

This argument would seem to have the sanction of several Court decisions early in the nation's history upholding the Court's power to review the decisions of the state courts in various contexts.^{33/} But each

^{33/} Ableman v. Booth, supra; Cohens v. Virginia, 6 Wheaton 264 (1821); Martin v. Hunter's Lessee, supra.

of those decisions constituted an interpretation of the Court's jurisdiction as affirmatively granted or recognized by Congress in the Judiciary Act of 1789. Whether the argument has independent constitutional force against a Congressional denial of jurisdiction has yet to be adjudicated.

It may also be that the Senate amendment possesses some of the constitutional infirmity the Court found in United States v. Klein, supra. As in Klein, the Senate amendment would make the exercise of the Supreme Court's appellate jurisdiction depend on a determination as to whether "a certain state of things exists." As in Klein, the jurisdictional predicate is a finding of fact--the grant and acceptance of a pardon in Klein, the voluntariness of the prayer in the Senate amendment. As in Klein, the Senate amendment gives to that finding of fact an effect on the legal rights involved contrary to earlier decisions of the Court. That is, in Klein the Court had held the grant and acceptance of pardon to be conclusive proof that the statutory conditions for recovery of the proceeds of captured and abandoned property were met. Congress by statute gave it the opposite effect and required jurisdiction to cease if the Court found a claim was based on a pardon. Similarly, in Engel and Schempp the Court has held the voluntariness of state-sponsored prayer in the public schools to be irrelevant to the issue of constitutionality, but the Senate amendment would make voluntariness the determinative factor for jurisdiction. Finally in Klein the jurisdictional predicate was legislated in order to produce a particular outcome in pending and future case; the Senate amendment similarly has as its purpose the production of a

particular judicial result. ^{34/}

The analogy is not perfect, however. The constitutional vice in Klein was that the deprivation of jurisdiction had the effect of deciding a pending case as well as future ones in favor of one of the parties, namely the government, and this, the Court said, "passed the limit which separate the legislative from the judicial power." The Senate amendment could have a similar effect: If a decision were rendered by a state's highest court in favor of state-sponsored prayer and if the Supreme Court were then forced to dismiss an appeal for want of jurisdiction on the basis of a finding that the prayer in question was voluntary, the effect would be similar, that is, the government would prevail. But it would prevail for a different reason than in Klein, namely, because it had prevailed in the state court, not because there had been a statutory change in the significance to be given certain evidence. The constitutional vice in this, if there be one, would seem to be more akin to the supremacy clause and essential functions argument detailed above than to the usurpation of the judicial power struck down in Klein.

Thus, the constitutionality of the Senate amendment cannot be conclusively determined on the basis of existing precedents. The force of the supremacy clause and essential functions argument, particularly in light of

^{34/} Senator Helms stated on offering his amendment:

The limited and specific objective of this amendment, then, is to restore to the American people the fundamental right of voluntary prayer in the public schools. 125 Cong. Rec. S4130 (April 5, 1979)

the Klein holding that Congress' power over the Supreme Court's appellate jurisdiction is limited by the separation of powers doctrine, would seem, at the least, to cast some doubt on its constitutionality. But the paucity of past Congressional action so extensively limiting federal court jurisdiction over a particular class of cases and of consequent judicial interpretations of Congress' power makes that conclusion necessarily tentative.



David M. Ackerman
Legislative Attorney
American Law Division
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