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"Congressional Attempts to Limit Supreme Court and Federal Court"

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August-1981

The Judicature Society Executive Committee Meeting in New Orleans

Congressional Attempts to Limit Supreme and Federal Court Jurisdiction

08/08/1981
STATEMENT OF KENNETH R. KAY

CONCERNING

CONGRESSIONAL ATTEMPTS TO LIMIT SUPREME COURT & FEDERAL COURT JURISDICTION

BEFORE THE JUDICATURE SOCIETY EXECUTIVE COMMITTEE MEETING

NEW ORLEANS, LOUISIANA

August 8, 1981

I GREATLY APPRECIATE BEING GIVEN THE OPPORTUNITY TO PARTICIPATE IN TODAY'S DISCUSSION ON THE JURISDICTION OF THE FEDERAL COURTS. I WOULD PARTICULARLY LIKE TO THANK DOROTHY NELSON AND JIM ALFINI FOR EXTENDING ME THE INVITATION TO JOIN YOU.

THE JUDICATURE SOCIETY SHOULD BE COMMENDED FOR FOCUSING ATTENTION ON THE CONGRESSIONAL ATTEMPTS TO LIMIT THE POWERS AND JURISDICTION OF THE SUPREME COURT AND THE LOWER FEDERAL COURTS. THIS DISCUSSION COULD NOT COME AT A MORE APPROPRIATE TIME.

• IN APRIL OF 1979, THE THEN DEMOCRATICALLY-CONTROLLED SENATE VOTED 51 TO 40 IN FAVOR OF AN AMENDMENT, OFFERED BY SENATOR JESSE HELMS OF NORTH CAROLINA, TO A SUPREME COURT JURISDICTION BILL. THE AMENDMENT WOULD HAVE ELIMINATED SUPREME COURT AND LOWER FEDERAL COURT JURISDICTION OVER THE ISSUE OF SCHOOL PRAYER.

• THIS YEAR, SUBCOMMITTEES OF BOTH HOUSE AND SENATE JUDICIARY COMMITTEES HAVE HELD HEARINGS ON THE OVERALL ISSUE OF CONGRESSIONAL ATTEMPTS TO LIMIT THE FEDERAL COURTS.
On July 10 of this year, the Separation of Powers Subcommittee of the Senate Judiciary Committee favorably reported legislation that would eliminate lower federal court jurisdiction in certain abortion cases.

The entire Senate is currently in the middle of prolonged debate on an amendment to the Department of Justice Authorization bill which would limit those instances in which a federal court could issue a busing order. This same issue is currently under active consideration in the Senate Judiciary Committee.

The Separation of Powers Subcommittee has scheduled fall hearings on legislation designed to prevent lower federal courts from issuing any busing orders.

In addition, there are approximately 20 separate pieces of legislation pending in the House and the Senate that would limit the jurisdiction of the federal courts. These bills would deny jurisdiction in cases involving school prayer, abortion, school desegregation, and sex bias in the Selective Service system. One bill would go so far as to remove federal court jurisdiction over any case involving a state court order.

Clearly, the issue of Congressional control over the federal courts is not a mere interesting academic consideration. Rather, the issue may be the single most important item on our nation's non-economic agenda in the 1980's. The outcome of this debate will determine the status of individual rights and liberties in this country for decades to come.
IT IS WITHIN THIS CONTEXT THAT I WOULD LIKE TO EXPLORE THE NATURE OF THE CONGRESSIONAL DEBATE AND THE PENDING PROPOSALS.

UNFORTUNATE FOCUS OF THE DEBATE

IF I HAD TO CHOOSE ONE WORD TO CHARACTERIZE THE CONGRESSIONAL DEBATE ON THE QUESTION OF COURT JURISDICTION, THE WORD WOULD BE "UNFORTUNATE."

IN MY VIEW, IT IS "UNFORTUNATE" THAT THE FOCUS ON EACH PIECE OF LEGISLATION HAS BEEN ON THE EMOTIONAL CONTROVERSY SURROUNDING A PARTICULAR DECISION OF THE SUPREME COURT, RATHER THAN ON THE WITHDRAWAL OF COURT JURISDICTION. FOR EXAMPLE, WHEN THE FULL SENATE VOTED ON THE HELMS' AMENDMENT IN APRIL OF 1979, THE VOTE WAS PERCEIVED AS A VOTE ON SCHOOL PRAYER, NOT AS A VOTE ON THE ROLE OF THE SUPREME COURT IN OUR JUDICIAL SYSTEM.

THE CONSTITUENT MAIL WE RECEIVED IN SENATOR BAUCUS' OFFICE READ:

"DEAR SENATOR, PLEASE SUPPORT SENATOR HELM'S AMENDMENT TO RETURN PRAYER TO THE SCHOOLS. SINCERELY"

I CAN STATE UNEQUIVOCALLY THAT WE HAVE NOT RECEIVED A SINGLE CONSTITUENT LETTER THAT READ:

"DEAR SENATOR, PLEASE CONSIDER THE USEFUL ROLE THAT THE SUPREME COURT MIGHT PLAY IN OUR SYSTEM OF GOVERNMENT. SINCERELY"
I might add that, as of yet, we have not even received such a letter from the Judicial Conference, let alone a constituent.

Of course, it is understandable that the focus has remained on the volatile social issues rather than on the broad institutional questions. It is so much easier for a member of Congress to respond:

"Dear constituent, you will be glad to know I voted to restore prayer in the schools"

Rather than responding:

"Dear constituent, I support prayer in the schools, but unfortunately my respect for the doctrine of separation of powers leads me to the conclusion that the Helms' legislation would undermine the essential role of the judiciary."

Robert Bork and Erwin Griswold may be applauded for such an analysis, but it is not effective material for responses to constituents.

Another aspect of the debate that is also "unfortunate" has been the preoccupation with whether or not the proposals to withdraw court jurisdiction are constitutional. The debate, thus far, has progressed on the premise that if the Constitution gives the Congress the authority to do it, then the Congress ought to do it. The interchanging of the terms "constitutional" and "wise" is unfortunate.
I must admit candidly that the Constitution does not help resolve the question as easily as one might expect.

It is clear that the Supreme Court is a creature of the Constitution, not of Congress, and Congress' power over the court's appellate jurisdiction is limited to making "exceptions" and "regulations."

But, it is also clear the "exceptions" clause gives Congress real and significant power to control the Supreme Court's jurisdiction.

In the final analysis, the fascinating constitutional dialogue is simply that: The debate over this question would greatly benefit from far more attention being paid to the public policy considerations of the various proposals.

The Public Policy Debate

The argument in favor of the proposals to remove court jurisdiction goes something like this: The Supreme Court has acted unconstitutionally in reaching decisions -- for example, *Engle v. Vitale*. When the Court so acts, it is not only permissible, but appropriate for the Congress to take the Court out of the business of acting unconstitutionally.

The argument is based on the every day analogy that if a child has used his BB gun to put a hole through a window at the Jones' house, then the parents should take the gun away. If he doesn't have a gun, he can't do any more damage.
THE ANALOGY BREAKS DOWN IMMEDIATELY BECAUSE THE CONGRESS AND THE COURTS ARE IN A CO-EQUAL RELATIONSHIP. BUT EVEN IF ONE STAYS WITH THE ANALOGY, 'PENDING PROPOSALS AMOUNT TO MUCH MORE THAN THE PARENTS SIMPLY TAKING THE GUN AWAY. THE PROPOSALS AMOUNT TO THE PARENTS TELLING THE CHILD THAT HE CAN NEVER GO OVER TO THE JONES' HOUSE AGAIN, EVEN FOR SOME POSITIVE PURPOSE LIKE HELPING THEM MOW THEIR LAWN.

AND IT'S IMPORTANT TO NOTE THAT KEEPING THE CHILD FROM EVER GOING TO THE JONES' AGAIN DOES NOT REPLACE THE BROKEN WINDOW. A RESPONSIBLE PARENT WOULD WANT TO REPAY THEIR NEIGHBORS FOR THE DAMAGE THAT WAS DONE. REMOVAL OF COURT JURISDICTION OVER SPECIFIC SUBJECT MATTER DOES NOT REPAIR ANY DAMAGE.

THE SIMPLE FACT IS THAT WITHDRAWING THE SUPREME COURT'S JURISDICTION OVER SCHOOL PRAYER DOES NOT RETURN PRAYER TO THE SCHOOLS.

WITHDRAWING COURT JURISDICTION OVER ABORTION DOES NOT OUTLAW ABORTION.

WHILE THIS MAY SEEM OBVIOUS, IT IS A POINT THAT HAS ESCAPED MANY WHO HAVE ENGAGED IN THE DIALOGUE OVER THIS ISSUE.
In fact, one can plausibly argue that not only do these jurisdictional bills not alter the substantive state of the law, but that they actually elevate Supreme Court decisions to the status of the "permanent" law of the land. *Engel v. Vitale* and its progeny would not only be the law of the land today, but would be locked in stone as the last word from the Supreme Court.

Also possible is the situation where state courts might further restrict the scope of current Supreme Court rulings and declare periods of silent meditation in schools unconstitutional. Those citizens who support school prayer might have to live with an even more unacceptable state of the law than that which the Supreme Court has already declared.

Not only do these proposals do so little to promote the cause of their proponents, but they do so much to upset many basic principles upon which our judicial system currently operates.

One principle profoundly affected by such legislation is that of stare decisis. One of the most unfortunate aspects of these jurisdictional bills is that at their heart they depend on an erosion of the principle.

The Congressional sponsors of the legislation realize that they cannot directly reverse the Supreme Court school prayer decision, so instead they want to withdraw the Supreme Court's jurisdiction and give the state courts a knowing wink and say, "go ahead -- they can't touch you now." This Congressional wink is, in my view, not responsible legislation. It is an open invitation to the states to overrule decisions of the Supreme Court.
A second principle that would be affected is the uniformity of constitutional interpretation.

Regardless of the intentions of the framers of the Constitution, Congress can, and should make the judgment that today in 1981, the First Amendment in Montana will offer the same protections as the First Amendment in North Carolina. The definition of the term "person" under the Fourteenth Amendment should be the same in Louisiana as it is in Illinois. Permitting 50 state courts to engage in setting 50 different definitions of constitutional terms destroys the ability of our Constitution to serve as a meaningful federal document.

The third principle that would be profoundly affected is that of judicial independence. This point is perhaps best made in a statement made over 100 years ago by then President Andrew Johnson in his message of veto of the legislation that became the subject of the famous McCARDLE decision.

"The legislation proposed (to foreclose constitutional review in the Supreme Court) is not in harmony with the spirit and intention of the Constitution... it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation."
THUS FAR, DURING THE EXISTENCE OF THE
government, the Supreme Court of the United States
has been viewed by the people as the true expounder
of their Constitution, and in the most violent party
conflicts, its judgments and decrees have always been
sought and deferred to with confidence and respect...
any act which may be construed into or mistaken for an
attempt to prevent or evade its decisions on a
question which affects the liberty of the citizens
and agitates the country cannot fail to be attended
with unpropitious consequences."

Many members of Congress have not only underestimated the
impact of these bills on the basic principles of our judicial
system, but have also underestimated the impact on the Congress
itself. If Congress decides to enter this arena, the pressure
to respond to a wider range of constitutional issues will grow and
grow. Every constituency that feels victimized by an adverse
constitutional ruling will come running to the Congress for a
jurisdiction withdrawal bill.

If the Supreme Court ever upheld legislation to withdraw
jurisdiction over the issue of school prayer or abortion, there is
no area of constitutional law which would be immune from Congressional
action. If one accepts the desirability of even a partial removal of
substantive constitutional jurisdiction, then one is condoning
the possibility of the removal of the entire Supreme Court appellate
jurisdiction.
AND, FURTHERMORE, THE PROONENTS OF THESE MEASURES OUGHT TO CONTEMPLATE FUTURE CONGRESSES, WHO MAY HAVE SIGNIFICANTLY DIFFERENT VIEWS ON SUBSTANTIVE ISSUES, PLAYING THE JURISDICTIONAL WITHDRAWAL GAME AS WELL. WE SHOULD CONSIDER CAREFULLY WHETHER WE WOULD LIKE A PRO-GUN CONTROL CONGRESS TO PRECLUDE THE SUPREME COURT FROM INTERPRETING THE MEANING OF THE RIGHT TO BEAR ARMS.

MANY IN THE CONGRESS ARE NOT CONCERNED ABOUT THESE IMPACTS. THEY BELIEVE THAT WITHOUT THE ENACTMENT OF THESE PROPOSALS, THE CONGRESS AND THE NATION ARE DEFENSELESS AGAINST AN "IMPERIAL" JUDICIARY.

I WOULD SUGGEST THAT OUR SYSTEM OF GOVERNMENT DOES PERMIT US TO RESPOND TO FUNDAMENTALLY WRONG OR "UNCONSTITUTIONAL" DECISIONS OF THE SUPREME COURT. THE FRAMERS OF OUR CONSTITUTION WISELY PROVIDED WITHIN ARTICLE 5 A MECHANISM FOR CONGRESS AND OUR CITIZENRY TO RESPOND TO SUCH DECISIONS.

THE ELEVENTH AMENDMENT, THE FOURTEENTH AMENDMENT, THE SIXTEENTH AMENDMENT AND THE TWENTY-SIXTH AMENDMENT WERE ALL RESPONSES TO SUPREME COURT DECISIONS. THIS COUNTRY HAS HAD A LONG AND CONSISTENT HISTORY OF ACTIVELY RESPONDING TO CONSTITUTIONAL DECISIONS OF THE SUPREME COURT.

THE PRESIDENT OF THE UNITED STATES AND 100 MEMBERS OF THE U.S. SENATE HAVE BEEN ABLE TO CHANGE THE PHILOSOPHICAL COMPOSITION OF THE FEDERAL JUDICIARY TO RESPOND TO CHANGES IN PUBLIC POSITIONS ON MAJOR CONSTITUTIONAL ISSUES.
Additionally, partial remedies are often available to those in Congress who want to respond to Constitutional decisions of the Supreme Court.

For example, many of those in Congress who opposed the Court's ruling in *Roe v. Wade* exercised their constitutional power to eliminate federal funding over most abortions.

**Conclusion**

In conclusion, it is my view that our constitutional amendment process, the judicial appointment process and control over the federal pocketbook do give Congress and our citizenry adequate tools with which to deal with controversial decisions of the Supreme Court.

It would be unfortunate if in an effort to promote a specific social agenda that basic principles of governance that have served this country well for 200 years would be undermined.

It is my hope that the dialogue here this morning and the subsequent dialogue this week at the ABA Convention will help the Congress and the nation to re-examine what is really at stake in the Court jurisdiction proposals. I very much look forward to the continued dialogue, I appreciate the opportunity to be here with you and I look forward to your comments and questions.

Thank you.