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19 APR 1982

Memorandum for the Attorney General

Re: Constitutionality of Bills Limiting Supreme
Court Jurisdiction

TBO
GPM
This supplements our memorandum to you of July 16, 1981, regarding the constitutionality of the various measures pending in Congress to limit Supreme Court jurisdiction over classes of constitutional cases. While that memorandum reflected a thorough and comprehensive analysis of the history of Article III, Supreme Court decisions bearing on the issue, and scholarly analyses of the debate, there has been considerably more written and spoken on the subject since then. The purpose of this memorandum is to provide additional analysis of various arguments which have been made by various commentators. Our conclusions relative to the constitutionality of such proposals remain the same. 1/

A. Argument: The Exceptions Clause of the Constitution, Art. III, § 2, cl. 2, is on its face a plenary grant of power to make exceptions to the Supreme Court's appellate jurisdiction.

Response: This argument misperceives the proper role of constitutional interpretation. Even if we were to accept -- as we do not -- that the language of the Exceptions Clause is clear and unambiguous, this construction would by no means establish the constitutionality of these bills. The Constitution, unlike a statute, is not drafted in specific terms. Designed as the fundamental charter of our political system, the Constitution is necessarily phrased in broad and general terms. Moreover, the Framers deliberately made the Constitution difficult and burdensome to amend. We are not aware of any instance in which the Supreme Court has held that when the language of the Constitution is "plain" the task of interpretation is at an end. The "plain language" rule, adapted to issues of statutory interpretation, has little efficacy "when it is a constitution we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

1/ We address in this memorandum only those proposals which would deprive the Supreme Court of jurisdiction to decide constitutional questions. Different issues, not considered in this memorandum, are raised by congressional attempts to limit the Court's jurisdiction to decide non-constitutional issues, or to limit the jurisdiction of the inferior federal courts.

For example, those who argue that the Exceptions Clause is to be read literally take the Exceptions Clause out of its context in Article III and fail to read Article III as a whole literally. Yet Article III, if read literally, would deny Congress any power whatsoever to remove issues falling within the judicial power of the United States from the jurisdiction of the federal courts and place them within the exclusive purview of the state courts. Insofar as jurisdiction is concerned, Article III is structured as follows:

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

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 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; -- between 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.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. 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.

The Constitution itself, not Congress, vests the federal judicial power in the Supreme Court and whatever inferior Article III courts Congress decides to create. It also describes the extent of that judicial power. The "plain language" of Article III, therefore, requires that all of the federal judicial power, as defined in that Article, be vested either in the Supreme Court or in the inferior federal courts. No authority is given to Congress to make exceptions to this rule -- an omission which has particular significance in light of the fact that the Framers did authorize Congress to create "exceptions" to the Supreme Court's appellate jurisdiction. Thus, a literal reading of Article III would require that the entire federal judicial power be vested in some federal court. Read in this fashion, any "exceptions" which Congress might make to the Supreme Court's appellate jurisdiction would be constitutional only if the inferior federal courts retained

jurisdiction over the cases. A literal reading of the Judicial Article, in short, would conclusively establish the unconstitutionality of the pending jurisdiction-limiting bills insofar as they leave the resolution of federal issues to the state courts.

The point is that it is not useful to take the Exceptions Clause out of its context and insist on a literal interpretation. The Constitution contains a number of other rules which, although seemingly unambiguous and absolute, have necessarily been interpreted as limited in their applicability. For example, Art. 1, § 10, cl. 1 provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts" Although the Contract Clause seems to prohibit all state laws which interfere with private contractual rights, the Court has not adopted such a literal construction. In Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), the Court upheld a statute which authorized state courts to extend a period of redemption from mortgage foreclosure sales for a "just and equitable" period. Although the law clearly altered the terms of mortgage contracts, to the detriment of mortgagees, and thereby "impaired" the obligation of contract in a literal sense, the Court upheld the law on the ground that it was a reasonable response to an economic emergency.

Even more to the point is the First Amendment, which provides in absolute terms that Congress shall make "no law" respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or impairing certain other rights. Although each of these prohibitions on government conduct is stated in absolute terms, each has been held to be limited in its ambit, qualified by the purposes which the prohibition was designed to serve, the practical necessities of government, or the inherent limitations of the constitutional scheme.

For example, notwithstanding the prohibition on laws "respecting" the establishment of religion, the government may reimburse parents for bus transportation of their children to and from schools, including parochial schools; loan textbooks to private school children; or provide a tax exemption for properties owned by religious organizations and used solely for religious purposes. E.g., Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education v. Allen, 392 U.S. 236 (1968); Walz v. Tax Commission, 397 U.S. 664 (1970). Similarly, notwithstanding the prohibition on laws interfering with the free exercise of religion, the government can limit or prohibit religious practices where necessary to protect otherwise compelling public interests, such as the protection of the

family, e.g., Reynolds v. United States, 98 U.S. 145 (1878), or the protection of society against the harmful effects of drug usage, e.g., United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968).

The prohibitions of government action abridging the freedoms of speech and the press are similarly qualified. Although some individual justices have contended that these prohibitions are absolute, the Court itself has consistently rejected such an interpretation. Instead, the Court has recognized that some forms of speech, such as pornography, are not entitled to any constitutional protection, e.g., Miller v. California, 413 U.S. 15 (1973); others, such as commercial speech, are entitled to some protection but are subject to reasonable government regulation, e.g., Virginia State Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976); and others are entitled to a high degree of constitutional protection but may still be abridged where necessary to further a compelling public interest. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). Even in the case of speech entitled to the highest level of protection, therefore, the constitutional prohibition is qualified, notwithstanding the seemingly absolute character of the constitutional text.

Moreover, the broad provisions of the Constitution are also subject to the explicit limitations on government action contained in the Bill of Rights. For example, although the Necessary and Proper Clause has been interpreted as an extremely broad grant of authority to Congress, Chief Justice Marshall's seminal opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), recognized that the powers granted by that Clause are subject to limitations contained elsewhere in the Constitution: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." Similarly, although the Commerce Clause is a broad grant of authority to Congress, its reach is limited by the prohibitions of the Bill of Rights, including the principle of state sovereignty embodied in the Tenth Amendment. National League of Cities v. Usery, 426 U.S. 833 (1976). 2/

2/ Moreover, Professor Ratner has argued that the Exceptions Clause itself, even if read literally, does not connote a plenary congressional power to control the Court's appellate jurisdiction. Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960). Ratner argues that the concept of an "exception" was understood by the Framers, as it is understood today, as connoting only a limited deviation from a general rule. The word "exception" derives from the same root as "exceptional," meaning unusual, extraordinary or special. Professor Ratner supports his thesis with extensive research into the (footnote 2 continued on next page)

As the foregoing discussion has demonstrated, the broad provisions of the Constitution -- including those designed to guarantee fundamental personal liberties -- are each limited by the purposes they are designed to fulfill and by the structure of the Constitution itself. Moreover, those provisions are also qualified by external limitations found in other parts of the Constitution, most notably in the Bill of Rights. And, they can be fully understood only by an understanding of the Constitution as a whole and the history of its creation. It is a greatly oversimplified and misleading view of the Constitution to argue that the "plain language" of a few isolated words in a constitutional provision should be a conclusive guide to its interpretation. Accordingly, even if the language of the Exceptions Clause were unambiguous and plenary -- as we have concluded it is not -- it would be necessary to examine the provision in terms of its intended purposes, as evidenced by the history of its framing and ratification, its place in the system of separation of powers embodied in the structure of the Constitution, and its consistency with external limitations on congressional power contained in the Bill of Rights.

B. Argument: The history of the drafting and enactment of the Exceptions Clause is not particularly revealing.

2/continued

meaning of the word "exceptions" as it would have been understood by the Framers. Among the sources he cites for the proposition that an exception means an exclusion from a general rule or law are Ash's Dictionary of the English Language (1775); Webster's American Dictionary of the English Language (1828); and Sheppard's Touchstone of Common Assurances (5th ed. 1784). It would stretch the word beyond its natural meaning to permit Congress, in the guise of creating "exceptions" to the Supreme Court's appellate jurisdiction, to eliminate that jurisdiction altogether or limit it to the point where the existence of appellate jurisdiction was the exception and the absence of such jurisdiction the rule.

Hence, contrary to what proponents of jurisdiction-limiting legislation have argued, the congressional power to create "exceptions" to the Supreme Court's appellate jurisdiction need not, as a matter of plain language, be construed as granting plenary authority to Congress. The construction of the Exceptions Clause which most adequately accounts for the fact that some congressional authority was obviously intended, but that a plenary authority may well be inconsistent with the plain language of the Clause, is that Congress can regulate and make exceptions to the Supreme Court's jurisdiction up to the point where it impairs the Court's power and ability to perform those functions which are necessary for it to fulfill the role assigned to it by the Constitution.

Response: The debate over Article III would not exist if the history of the Exceptions Clause dispositively and unequivocally supported any particular construction. However, the nature of the debate which did occur relative to Article III and the complete absence of any contemporaneous suggestion that the Exceptions Clause gave Congress plenary power to withdraw Supreme Court jurisdiction is, in our judgment, very strong evidence that this is not what was intended. Given everything else we know about the framing of Article III of the Constitution, it is virtually inconceivable that the Convention would have accepted without extensive debate and controversy a provision so contrary both to the differing treatment accorded to the Supreme Court and the inferior federal courts and to the basic principle of separation of powers. The noncontroversial nature of the discussions of the Exceptions Clause strongly indicates that a more limited congressional power was intended.

The necessity of a Supreme Court was accepted without significant dissent among the Framers. They believed that Supreme Court review was necessary to promote uniformity in the interpretation of federal law and to assure respect for the constitutional boundaries among the federal government, the states, and the people. The Court's power to review state and federal statutes for conformance to the Constitution was accepted as a critical element of the constitutional structure and the underlying principle of separation of powers.

While the Framers were virtually unanimous regarding the need for a Supreme Court, they disagreed vehemently over the question whether inferior federal courts were to be provided. The Convention first approved a provision for mandatory inferior federal courts, but on reconsideration struck this provision by a divided vote. See P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 11 (1973). See also Sager, Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L.Rev. 17, 47-51 (1981). The compromise ultimately arrived at by the Convention was to establish the Supreme Court in Article III of the Constitution, but to leave the question whether to establish inferior federal courts to Congress. Thus, Article III, § 1 states that "[t]he 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." (emphasis added).

The Framers evidently intended to draw a sharp distinction between the Supreme Court and the inferior federal courts. The Supreme Court, viewed as a necessary part of the constitutional structure, was established in the Constitution itself; Congress was given no control over whether or not the Court should be created. The inferior federal courts, viewed as an optional part of the government, were authorized but not established in the Constitution; the decision whether to create them was given to Congress. This history, and the role explicitly assigned to Congress with respect to the inferior federal courts, implies that the powers of Congress were to be quite different in the two cases.

If the Exceptions Clause authorized Congress to eliminate the Court's appellate jurisdiction, thus limiting it to the exercise of original jurisdiction, the congressional power over the Supreme Court would be virtually indistinguishable from its power over inferior federal courts. Just as Congress could decline to create inferior federal courts, it could, in the guise of creating "exceptions" to the Supreme Court's appellate jurisdiction, deny the Supreme Court the vast majority of the judicial powers which the Framers insisted "shall be vested" in the federal judiciary. Congress could not eliminate the Supreme Court, but it could reduce it to a position of virtual impotence with only its limited original jurisdiction remaining. Such an interpretation cannot easily be squared with the stark difference in treatment which the Framers accorded to the Supreme Court and the inferior federal courts.

It is no answer to say that the pending legislative proposals would "surgically" withdraw only a limited portion of Supreme Court jurisdiction in a narrow group of cases. Analytically, there would be no stopping point. If abortion cases may be removed, so may cases involving housing, education, speech, searches, religion or punishment.

There is another reason why a plenary congressional authority over Supreme Court appellate jurisdiction would almost certainly have sparked extensive debate and controversy at the Convention. The Framers intended to create a system of separation of powers, in which each of the three Branches operated largely independently of the others and was able to check and balance the other Branches. The purpose of this approach was to ensure that governmental power did not become concentrated in the hands of any one individual or group, and thereby to avoid the danger of tyranny which the Framers believed inevitably accompanied unchecked governmental power. It is not an exaggeration to say that the single greatest fear of the Founding Fathers was tyranny, and that concentration of power was, in their minds, "the very definition of tyranny." See Federalist No. 47 (Madison).

Essential to the principle of separation of powers was the proposition that no one Branch of government could have the power to eliminate the fundamental constitutional role of either of the other Branches. The Constitution was not, to be sure, intended to effect a "hermetic sealing off of the three Branches of the Government from one another." Buckley v. Valeo, 424 U.S. 1, 121 (1976). Essential governmental powers were shared and distributed in various ways. The Constitution enjoins on the three Branches "separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Nevertheless, while the Branches were related to each other through the system of checks and balances, it would be fundamentally inconsistent with the notion of separation of powers if any one Branch were given inherent authority to destroy the essential constitutional function of any other Branch. As Madison stated in Federalist No. 51:

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.

This basic principle of the Constitution -- that each Branch must be given the necessary weapons to defend itself against the encroachments of the two other Branches -- has special relevance in the context of legislative attempts to restrict judicial authority. The Framers believed that, by the inherent nature of their powers, the legislature would tend to be the strongest and the judiciary the weakest of the Branches. This insight is reflected in the structure of the Constitution: the provisions governing the legislature are placed first, in Article I; those establishing and governing the Judicial Branch are in third position, in Article III. Madison recognized this fact in Federalist No. 48. Drawing extensively from Jefferson's Notes on the State of Virginia, Madison concluded that in a representative republic "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." It was the Framers' fear of legislative power that caused them to divide Congress into two Houses, as Madison explained in Federalist No. 51:

In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

It is not a derogation on the concept of governance responsive to popular will that the Founding Fathers feared the Legislature they were creating. But, it was the acts of Parliament as much as the King which formed the litany of grievances which produced the Revolution. The Framers believed in the power of the people and their elected representatives and placed substantial authority in the Legislature. They were acutely sensitive, however, to the rights of individuals and minorities. Most of them had experienced persecution. The idea of a written Constitution was precisely to place a check on the popular will and, in large part, to restrain the most powerful Branch. Moreover, they crafted a representative republic and not a pure democracy because "[a]n elective despotism was not the government we fought for" See Federalist No. 48 (Madison), quoting Jefferson's Notes on the State of Virginia (emphasis in original).

The courts were viewed as a part of the restraint, but, nonetheless, inherently the least dangerous Branch. Hamilton, in a famous passage from Federalist No. 78, eloquently testified to the inherent weakness of the Judicial Branch:

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

It was in recognition of the weakness of the judiciary, particularly as contrasted with the inherent power of the legislature, that the Framers determined to give special protections to the judiciary not enjoyed by officials of the other Branches. Federal judges were given lifetime positions during good behavior, and were protected against diminishment of salary while in office. The purpose of these provisions was largely to provide the judiciary, as the weakest Branch, with the necessary tools for self-protection against the encroachments of the other Branches.

Legislative control over the judiciary was not considered a desirable objective. Specific examples of legislative encroachment into the judicial sphere were available. Madison, in Federalist No. 48, cited the experience of Pennsylvania where "cases belonging to the judiciary department [were] frequently drawn within legislative cognizance and determination" as an object lesson which the new Constitution would avoid.

The notion that the Exceptions Clause grants Congress plenary authority over the Supreme Court's appellate jurisdiction is plainly and simply irreconcilable with these basic principles of separation of powers and the oft articulated concerns and objectives of the Framers. If Congress had such authority, it could reduce the Supreme Court to an impotent role in the constitutional scheme. The Supreme Court could be deprived of the ability to protect its essential constitutional functions against the power of Congress. The salary and tenure protections carefully crafted in Article III could be rendered virtually meaningless in light of the power of Congress simply to eliminate appellate jurisdiction altogether or in those areas where the Court's decisions displeased the legislature. Conversely, an important check on congressional power, the Court's authority to declare federal statutes unconstitutional, could be swept away if Congress, under the Exceptions Clause, could simply eliminate Supreme Court appellate jurisdiction over cases challenging the constitutionality of federal statutes.

In light of these basic considerations of separation of powers, it seems highly unlikely that the Framers intended the Exceptions Clause to empower Congress to eviscerate the Supreme Court's raison d'etre in the constitutional scheme. Even if some of the Framers could have intended this, it is all but inconceivable that the Exceptions Clause could have been approved by the Convention without debate or controversy, or indeed without any explicit statement by anyone associated with the framing or ratification of the Constitution that this extraordinary deviation from the principles applicable to the rest of the Constitution was intended.

In short, the history of the Exceptions Clause, when understood in light of the constitutional compromise regarding inferior federal courts and the basic theory of separation of powers, is irreconcilable with the contention that the Exceptions Clause grants Congress plenary authority to limit Supreme Court jurisdiction. Instead, that history strongly supports the interpretation that the Exceptions Clause was intended to grant Congress power over the Court's jurisdiction and mode of operation up to -- but not beyond -- the point where that power would remove the Supreme Court from performing the functions which are essential to its place in the delicate balance of our Constitution.

C. Argument: Judicial pronouncements on the Exceptions Clause support Congress' authority to divest the Supreme Court of appellate jurisdiction over classes of constitutional cases.

Response: The Supreme Court has provided no authoritative guidance on this question. The Supreme Court has, in a number of early cases, referred to the power of Congress over its appellate jurisdiction as being quite broad. For example, in Barry v. Mercein, 46 U.S. (5 How.) 103 (1847), the Court stated that, "[i]f Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction, and if the rule is provided, we cannot depart from it." See also Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810); United States v. More, 7 U.S. (3 Cranch) 159 (1805); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796); The "Francis Wright", 105 U.S. 381, 386 (1881).

However, there are several reasons to conclude that these statements were not intended to acknowledge plenary congressional authority to remove the Supreme Court's ability to decide constitutional cases. First, every one of these statements is merely dicta. The Court has never held that Congress has the power to preclude the Court from hearing a claim that a state or federal law violates the Constitution. Second, it may be doubted whether these broad statements are intended to cover cases in which such an extraordinary power was exercised. They may instead be designed to recognize a broad power which, like the Commerce Clause, is limited by other provisions of the Constitution and by the structure of the document as a whole. Finally, the Court and individual Justices have on several occasions, especially in recent years, indicated that congressional power over the appellate jurisdiction of the Supreme Court may only be exercised in conformity with other provisions of the Constitution. See,

e.g., United States v. Bitty, 208 U.S. 393, 399-400 (1908) (dictum); National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting). For these reasons, we believe that these dicta, not specifically addressed to the issue at hand, offer only little support to those who believe that Congress may preclude the Court from exercising its authority to decide whether state and federal laws are constitutional.

Proponents of the plenary power thesis rely most heavily on the only Supreme Court decision which could even remotely be characterized as upholding a power of Congress to divest the Court of jurisdiction over a class of constitutional cases: Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869). At issue in that case was the constitutionality of an 1868 statute repealing a provision enacted the previous year which had authorized appeals to the Supreme Court from denials of habeas corpus relief by a circuit court. The appellant had invoked the Court's jurisdiction solely under authority of the 1867 statute. The case had been argued in the Supreme Court when Congress passed the 1868 repeal of the jurisdictional avenue contained in the 1867 enactment. In a brief opinion which did not discuss the scope or implications of the Exceptions Clause, the Court upheld Congress' withdrawal in 1868 of jurisdiction under the 1867 law, stating that "the power to make exceptions to the appellate jurisdiction of this court is given by express words." Id. at 514. Despite this broad language, the Court suggested that the withdrawal of jurisdiction provided by the 1867 law did not deprive the Court of jurisdiction over habeas corpus cases that had been conferred by § 14 of the Judiciary Act of 1789. "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error." Id. at 515.

The Court's dictum regarding alternative procedures for Supreme Court review of habeas corpus cases was converted into a holding several months later in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869). The petitioner in that case had invoked the Court's jurisdiction under the Judiciary Act of 1789. In holding that it had jurisdiction, the Court in Yerger made it clear that the 1868 legislation considered in McCardle was limited to appeals taken under the 1867 act and upheld the petitioner's right to Supreme Court review under the proper jurisdictional statute. The Court noted that the 1868 act did "not purport to touch the appellate jurisdiction conferred by the Constitution" Id. at 105. In doing so, the Court observed that any total restriction on the power to hear habeas corpus cases would "seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained

through appellate jurisdiction" Id. at 103. Thus, within months of the McCardle decision, the Court made it clear that McCardle did not decide the question of Congress' power to deprive it of all authority to hear constitutional claims in habeas corpus cases. For this reason, while the Yerger Court acknowledged that the Court's jurisdiction as given by the Constitution "is subject to exception and regulation by Congress," id. at 102, we believe neither McCardle nor Yerger constitutes an authoritative statement in support of the constitutionality of bills that purport to deprive the Court of any opportunity to address a constitutional issue.

D. Argument: There is no support in the debates at the Constitutional Convention, the Federalist papers, the cases, or the actions of early Congresses for the view that Congress does not have the authority to remove any and all of the Supreme Court's appellate jurisdiction.

Response: As noted earlier, there is no dispositive, unequivocal and indisputable evidence of the meaning or limits on the Exceptions Clause. However, that is true of any interpretation of the Exceptions Clause. What authority there is supports the existence of limits on congressional authority over the Supreme Court's appellate jurisdiction.

Some of the most significant Supreme Court decisions in our history have articulated the Supreme Court's vital function in ensuring uniformity and consistency in constitutional law. While, as noted earlier in this memorandum, there are dicta in some cases which could be read as implying a broad congressional power under the Exceptions Clause, the Supreme Court, in reviewing its role in the constitutional system, has explicitly recognized that its indispensable function under the Constitution is to review the constitutionality of state and federal laws.

In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1806), the Court held that it could constitutionally review state court decisions involving federal questions as provided by § 25 of the Judiciary Act. Justice Story noted "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." Without a reversing authority to harmonize discordant judgments, he declared, "the laws, the treaties and the constitution of the United States would be different, in different 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."

Oliver Wendell Holmes echoed the same sentiments a century later: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that determination as to the laws of the several states." O.W. Holmes, Collected Legal Papers 295 (1920).

In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall upheld the Court's authority to review on writ of error a criminal conviction by a state court involving the interpretation of a federal statute. His opinion stated:

[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved [The Framers of the Constitution] declare, that in such cases, the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.

And in Ableman v. Booth, 62 U.S. (21 How.) 506, 517-18 (1858), the Court, per Chief Justice Taney, held that state courts had no jurisdiction to issue habeas corpus for persons in federal custody and that the Supreme Court could review by writ of error the issuance of habeas corpus by state courts in such cases. The opinion observed:

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, whether in a State court or a court 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

It is true, as some have noted, that these cases hold only that the Supreme Court was authorized by statute and by the Constitution to exercise the jurisdiction in issue. They do not squarely address the question whether Congress could constitutionally deprive the Court of such jurisdiction. The Court's language in these cases, however, is strong enough to cast considerable doubt, at least by implication, on the power of Congress to eliminate Supreme Court jurisdiction over classes of cases involving the Constitution or the supremacy of federal laws in the guise of creating "exceptions" to that jurisdiction. To use Chief Justice Taney's words, to exercise such a power would withdraw authority which is "essential . . . to [the] very existence [of the Federal] Government [and] essential to secure the independence and supremacy of the [Federal] Government." Id.

Numerous statements at the Constitutional Convention recognized the Supreme Court's appellate jurisdiction as constitutionally essential to maintain the uniformity and supremacy of federal law. In discussing proposals to give the Supreme Court a veto over congressional and/or state legislation, proponents and opponents alike agreed that the Court would at least have ultimate authority to decide the constitutionality of state and federal legislation. In successfully opposing the mandatory establishment in the Constitution of inferior federal courts, Rutledge of South Carolina, a strong states-rights advocate, urged that the state tribunals "might and ought to be left in all cases to decide in the first instance[,] the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments." 1 M. Farrand, The Records of the Federal Convention of 1787 124 (1911). Madison, replying to the question of what redresses would be available if a state imposed prohibited export duties, stated: "There will be the same security as in other cases -- The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States." 2 M. Farrand, supra, at 589.

The process of decision at the Convention strongly supports a broad role for the Court and a relatively narrow construction of the Exceptions Clause. The Convention, while expanding the scope of the Supreme Court's jurisdiction to include cases arising under the Constitution and treaties, rejected by a 6-2 vote a resolution providing that, except in the narrow class of cases under the Court's original jurisdiction, "the judicial power shall be exercised in such manner as the Legislature shall direct." 2 M. Farrand, supra, at 425, 431. Thus, the Convention rejected a clear statement of plenary congressional power over the Court's appellate jurisdiction.

The Exceptions Clause was added to the Judicial Article by the Committee of Detail. The Convention's resolves, from which the Committee of Detail was to fashion its draft, made no mention of any legislative discretion over the Supreme Court's jurisdiction. The Convention resolved, simply, that "the jurisdiction shall extend to all cases arising under the national laws: And to such other questions as may involve the national peace and harmony." 2 M. Farrand, supra, at 46. It is unlikely that the Committee of Detail would have adopted a substantial deviation from the charge given it by the Convention or, as previously noted, that the Convention would have accepted such an action without a ripple of recorded debate. See generally, Sager, supra, at 50-51.

The Federalist also contains a number of significant statements recognizing the Supreme Court's essential role in the constitutional scheme. These comments are extremely persuasive both because of the prestige of this work and the role it played in the ratification of the Constitution. Because the debates of the Convention were kept secret at the time of ratification and for a considerable period thereafter, the Federalist was the single most authoritative early guide to the Constitution and can appropriately be regarded as containing the arguments which were persuasive in securing the ratification of the compact. In the words of Clinton Rossiter:

The Federalist is the most important work in political science that has ever been written, or is likely ever to be written, in the United States. It is, indeed, the one product of the American mind that is rightly counted among the classics of political theory.

This work has always commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States It would not be stretching the truth more than a few inches to say that The Federalist stands third only to the Declaration of Independence and the Constitution.

itself among all the sacred writings of American political history. It has a quality of legitimacy, of authority and authenticity, that gives it the high status of a public document, one to which, as Thomas Jefferson put it, 'appeal is habitually made by all, and rarely declined or denied by any' as to the 'genuine meaning' of the Constitution.

C. Rossiter, Introduction to The Federalist vii (New American Library ed. 1961.) See also G. Wills, Explaining America xi (1980).

Madison noted the importance of the Supreme Court's vital function in Federalist No. 39:

It is true that in controversies relating to the boundary between the two jurisdictions [nation and state], the tribunal which is ultimately to decide is to be established under the general government Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact.

Hamilton also commented on the importance of the Supreme Court's fundamental role. In Federalist No. 80, he stated:

If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

And in Federalist No. 82 Hamilton observed that:

[T]he national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal [the Supreme Court of the United States] which is destined to unite and assimilate the principles of national justice and the rules of national decisions.

Proponents of congressional power to withdraw Supreme Court jurisdiction have pointed to the fact that Congress did not vest full jurisdiction in the Supreme Court to review constitutional cases until after the Civil War. It is, indeed, true that Congress did not, in the First Judiciary Act, explicitly authorize the Supreme Court to exercise the full range of appellate jurisdiction established by Article III. Perhaps the most prominent category of cases in which the Court was not granted statutory jurisdiction were federal criminal cases, which were not explicitly brought within the Court's appellate jurisdiction until 1889. Professor Ratner has noted that there were certain avenues for Supreme Court review of federal criminal cases during the period before 1889 to resolve conflicting interpretations of the federal Constitution and laws. Where federal circuit judges were divided, they were required to certify the disputed question to the Supreme Court. A habeas corpus petition could also be filed in the Supreme Court to test constitutionality after conviction and probable cause for pretrial commitment. Constitutional Restraints on the Judiciary, Hearings before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 23-24 (1981) (statement of Leonard G. Ratner). Nonetheless, it is probably true that a fair percentage of federal criminal cases were not reviewable by the Supreme Court during this period under the terms of the applicable legislation.

The Judiciary Act also failed to grant the Supreme Court appellate jurisdiction over state court decisions striking down state laws as being inconsistent with the federal Constitution, or upholding federal statutes against constitutional attack. The Judiciary Act did, of course, establish the Court's appellate jurisdiction over state court decisions upholding state laws or striking down federal statutes.

The failure of Congress in the First Judiciary Act to provide the Court with the full appellate jurisdiction authorized under Article III does not, we believe, cast any substantial doubt on our conclusion that Congress cannot divest the Supreme Court of jurisdiction over constitutional cases, for several reasons. First, while Congress did omit certain specific categories of cases from the appellate jurisdiction provisions of the First Judiciary Act, it is noteworthy that the first Congress, containing among its members many delegates to the Constitutional Convention, recognized the Court's appellate jurisdiction over an extremely broad range of constitutional cases. Most significantly, the Court was given authority, under § 25 of the Judiciary Act, to review decisions of state courts in specified classes of constitutional cases. That authority was conferred despite the intense controversy which

it sparked among the states, controversy which resulted in state resistance to Supreme Court judgments and in attempts in Congress, foreshadowing the current attempts to limit the Court's jurisdiction, to repeal § 25 of the Judiciary Act. The fact that the Judiciary Act did not explicitly recognize jurisdiction over state court decisions upholding the validity of a federal law or striking down a state law, or over federal criminal cases, does not detract from our conclusion that the Court cannot be stripped of its ability to fulfill its essential responsibility under the Constitution. In the Framers' conception, a primary function of the Supreme Court was to ensure the supremacy of federal law guaranteed by the Constitution. This supremacy would be most threatened by state court decisions either striking down federal laws on the ground that they were unconstitutional, or upholding state laws against constitutional attack. In these cases the dangers of parochialism and of state disrespect for federal law imperatively required appellate review by the Supreme Court.

Second, the history of the Supreme Court's appellate review has confirmed the breadth of its functions in constitutional cases. To the extent that any inferences can be drawn from the failure of the First Judiciary Act explicitly to recognize the full range of the Supreme Court's appellate jurisdiction over constitutional cases, those inferences are subject to refutation by later events. As noted above, the Supreme Court now has appellate jurisdiction over all federal cases. Each of the areas of incomplete jurisdiction has long since been fulfilled. The vast majority of constitutional decisions which are on the books today, and which affect our national life in many and important ways, have been rendered by the Court under a statutory regime which included such broad appellate jurisdiction. As Justice Frankfurter said in another context, "the content of the three authorities of Government is not to be derived from an abstract analysis It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). The gloss which life has written on the Supreme Court's jurisdiction is one in which the Court stands as the final arbiter of constitutional questions. Most citizens would be unsettled by a construction which removed the Supreme Court as the final voice on the meaning of the Constitution.

It is also noteworthy, in this regard, that throughout our history there have been movements to curb the Court's jurisdiction which have never succeeded. In the 1830's, for example, a bill to repeal § 25 of the Judiciary Act was reported out of the House Judiciary Committee. The majority of the Committee stated in their report that they believed the provision for Supreme Court review of state court decisions was "unconstitutional, and ought to be repealed." H.R. Rep. No. 43, 21st Cong., 2d Sess. 1 (1831). The dissenting members of the Committee strenuously disagreed. In their view, it was "the imperious duty of Congress to make such a law, and it is equally its duty to continue it: indeed, without it, the judicial power of the United States is limited and restricted to such cases only as arise in the federal courts, and is never brought to bear upon numerous cases, evidently within its range." Id. at 17 (emphasis in original). The bill, opposed by Daniel Webster and others, was soundly defeated.

There have been numerous other court-curbing proposals in our Nation's history. See generally, Nagel, Court-Curbing Periods in American History, 18 Vand. L. Rev. 925 (1965). It is, we believe, highly significant that during our entire history only one such proposal has been enacted which has purported to impact the Supreme Court -- the statute at issue in Ex Parte McCardle, supra. Aside from this one ambiguous action by Congress, every one of the many proposals to curb Supreme Court appellate jurisdiction has been defeated. This fact tends to support, albeit indirectly, the conclusion that Congress may not constitutionally interfere with the Court's fundamental role in the constitutional system.

Third, and finally, it is noteworthy that none of the provisions of the Judiciary Act which have been read to deny the Court appellate jurisdiction over classes of constitutional cases were ever challenged in court. Thus, there is no judicial precedent addressing the question whether the jurisdictional restrictions found in the Judiciary Act were authorized as an exercise of congressional power under the Exceptions Clause.

CONCLUSION

We do not believe that Congress may make "exceptions" which would negate the power of the Supreme Court to decide cases arising under the Constitution and laws of the United States. If it had the power to do so, it could remove the Court from the function which it has served for nearly two hundred years of providing an authoritative and final expression of the meaning of the Constitution. It would be exercising a power which was not mentioned once during the drafting of the Constitution or the ratification debates. We do not believe this power was intended and we believe that an exercise

of it would be unconstitutional. George Washington's final words of advice to his countrymen are appropriate: "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates."

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