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4 MEMORANDUM FOR THE ATTORNEY GENERAL4 Re: "Necessary and Proper" Clause
/ of the Constitution.2008
2/14

You have requested an analysis of the "necessary and proper" clause contained in Article I, Section 8, paragraph 18 of the Constitution, including an inquiry into (a) the nature of this authorization to Congress: (b) the extent to which the basic power has to be established; (c) and whether or not it is a grant of original power, or merely authority to carry out the enumerated powers.

10A. The Nature of the Authorization

In the Federalist, Hamilton stated that this clause is "only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."^{1/} As Hamilton pointed out by way of example:^{2/}

4/ ## FN1
1/ The Constitution and the Courts (Ed. 1924), Vol. 1, p. 853.

4/ 2/ Id.

FN2

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10 "A power to lay and collect taxes must be a power to pass all laws necessary and proper for the execution of that power * * *."

However, our founding fathers wanted to make their intention clear rather than leave it to general rules of construction. Chief Justice Marshall took cognizance of this in his decision in McCulloch v. Maryland:^{3/}

10 "But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof.'"

In famous words, Marshall stated the proper interpretation and scope to be given the necessary and proper clause:^{4/}

10 "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

44/ ## FN3
3/ 4 Wheat. 316, 411

44/ 4/ Id. 421.

FN4

It has been said by Corwin that the "elastic" clause is "an enlargement, not a constriction, of the powers expressly granted to Congress, and that it enables the lawmakers to select any means reasonably adopted to effectuate these powers * * *." ^{5/} And as he illustrates by many examples, practically every power of the National Government has been expanded in some degree by the clause. ^{6/}

10 B. ⁷ The extent to which the basic power has to be established.

Examination of the cases suggest no definable or clear-cut test to show to what extent the basic power has to be established. In this area, reliance upon the basic power depends a good deal upon the composition of the Court and the period of the Country's development.

Generally, it may be said that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they may increase the

44/ ^{##} FN5

5/ Corwin, Constitution of the United States (Ed. 1953), p. 307.

44/ ^{6/} Id. 308-311.

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FN6

A few examples should suffice to show when the basic power has been adequately established.

Congress may incorporate banks and kindred institutions as an appropriate means for executing the powers to lay and collect taxes, to borrow money and to regulate commerce. 7/

Congress may create corporations to manufacture aircraft or merchant vessels as incidental to the war power. ^{8/} The Selective Draft Act of 1917 is another valid exercise of the war power. ^{9/} Congress may provide criminal sanctions for alteration of registered bonds under its express authority to punish counterfeiting of the securities and current coin of the United States. ^{10/}

In other cases where legislation was held to be invalid, the Court was apparently not convinced that the basic power was established. Several cases indicate that there must be a reasonable connection between the law enacted by Congress and the power granted by the Constitution.

7/ Corwin, supra note 5, 309.
8/1 Id. 310.
9/1 Arver v. United States, 245 U.S. 366.
10/ Corwin, supra note 5, 308.

In 1867 Congress forbade the sale of illuminating oils which were below a certain fire test. The law was declared invalid because it was entirely unrelated to any of the delegated powers of Congress.^{/11/} It was not a regulation of interstate commerce. It was not a tax, and Congress did not pretend that it was. For the same reason the Act of 1876 punishing the counterfeiting of trademarks and the sale of trademark goods was declared unconstitutional.^{/12/} In 1907, Congress, acting on its authority to regulate immigration, enacted a law which made it a felony for any person to harbor an alien prostitute within three years after her entrance into the country. The Court found that the provision did not as a matter of fact regulate immigration.^{/13/} The statute was held to be invalid because it did not bear a sufficiently close relation to anything over which the Constitution gives Congress authority to act.

It is particularly in cases construing the "commerce power" that the Court has indulged in the greatest amount of leeway for expansion of the elastic clause.

At first Congressional regulation was largely confined to prohibition by criminal statute of interstate transporta-

##FN11

11/ United States v. DeDewitt, 9 Wall. 41.

12/ Trade-Mark Cases, 100 U.S. 82.

13/ Keller v. United States, 213 U.S. 138.

##FN12
##FN13

tion of specified commodities or persons. Their relationship to the basic commerce clause was easier to ascertain. As our economy developed, regulations such as the Sherman Antitrust Act and Interstate Commerce Act necessarily took a broader sweep. The commerce clause was slowly extended to activities which had previously been considered to be local in character and beyond the competence of Congress.

Thus for example, in the Shreveport Case ^{/14/} it was contended that Congress was impotent to control intrastate charges of an interstate carrier, even though it found such control necessary to prevent injurious discrimination. This claim was overruled by the Court.

At times, an Act of Congress has been declared invalid because so inartistically drawn as to satisfy the Court that it was not tied to a basic power.

For example, the first time Congress enacted the Grain Futures Act, regulating future trading in grain exchanges in the form of prohibitory taxation upon those who failed to comply, the Court struck it down. ^{/15/} The Court said: ^{/16/}

44/ ^{##}FN14
14/ 234 U.S. 342. (Houston & Texas Ry. v. United States).
15/ Hill v. Wallace, 259 U.S. 44.
16/ Id. 68-69.

44/ ^{##}FN15
15/ ^{##}FN16


10 "There is not a word in the Act from which it can be gathered that it is confined in its operation to interstate commerce. * * * A reading of the Act makes it quite clear that Congress sought to use the taxing power to give validity to the Act. It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the Act the limitations which certainly would accompany and mark an exercise of the power under the latter clause."

At the following term the Court passed upon another act adopted by Congress dealing with the grain futures business. This time Congress was more astute. In its title and in various sections, it was stressed that regulation of transactions on grain futures was necessary to prevent obstruction and burdens of interstate commerce. This Act was upheld by the Court. ^{17/} It distinguished the earlier decision, stating that the Act before it supplied the features wanting in the prior Act upon which it had been condemned.

Cases of this kind may be multiplied. ^{18/} Once the test no longer became one of direct interference or burden, it became one of limits, as to which one Court could take one view and a later Court another view. These illustrations

44 / ## FN17
17/ Board of Trade v. Olsen, 262 U.S. 1.
44 / 18/ Thus Carter v. Carter Coal Co., 298 U.S. 238 was to all intents overruled in United States v. Darby, 312 U.S. 100, 123.
FN18 Hammer v. Dagenhart, 247 U.S. 251 was expressly declared to be out of line with the Darby case (312 U.S. supra at 116).

merely show the difficulty of drawing any guides from the cases as to how closely related to the basic power legislation must be before it may be upheld as "necessary and proper".

 It should be noted, moreover, that even if the basic power is established, there are other limitations which may operate to invalidate legislation enacted by the Congress. The specific prohibitions contained in the Constitution and particularly the Bill of Rights, act as restraints upon the general grants of power to the Congress.^{19/} Thus it has been held that even the exercise of the war power is subject to the Fifth and Sixth Amendments.^{20/}

Still another limitation upon the general grant of powers to Congress is the doctrine of separation of powers which is inherent in the Constitution itself. Under this doctrine, Congress is forbidden from legislating as to matters which have been reserved under the Constitution either to the Executive or Judicial branch. For example, the President's power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment" is not subject to legislative control.^{21/} So too, "the supreme court, possesses

44/ ~~##~~ FN19
19/ Monongahela Navigation Co. v. United States, 148 U.S. 312, 336; Story, Constitution II, Sec. 1864 et seq.

44/ 20/ Ex parte Milligan, 4 Wall. 2.

44/ 21/ Ex parte Garland, 4 Wall. 333, 380.

jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it.^{/22/} These and other cases make plain the general principle that the powers confided by the Constitution to one branch of the government, may not be exercised by another.

10 C. Whether the "elastic" clause is a grant of original power, or merely authority to carry out the enumerated powers.

It would appear from the foregoing discussion that in applying the doctrine of implied powers the Courts attempt to find a definite constitutional "peg" among the enumerated powers of Congress. The fact that critics of certain opinions contend that the basic power is lacking, does not alter the fact that the Court at least believes it to be present and essential. Story is of the opinion that the elastic clause "neither enlarges any power specifically granted, nor is it a grant of any new power to Congress."^{/23/} In his view, "it is merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant."^{/24/} The Supreme Court

44 / ## FN22
22/ United States v. Hudson, 7 Cranch. 31, 32.
23/ Story, Constitution of the United States (Ed. 1891) 140.
24/ Id. 140.

FN23
44 / ## FN24

has said "every valid act of Congress must find in the Constitution some warrant for its passage." ^{/25/} Quoting with approval from Mr. Justice Story's Commentaries on the Constitution, ^{/26/} the Court said:

10 "Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it."

4 In Kansas v. Colorado, ^{/27/} the Court said:

10 " * * * The last paragraph of the section which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. * * *"

4 In view of these expressions, it would appear that the "necessary and proper" clause is not an independent grant of power to Congress which may be operative even if not tied to

FN25

44 ^{25/} United States v. Harris, 106 U.S. 629, 636.

44 ^{26/} Id.

44 ^{27/} 206 U.S. 46, 88.

FN26

FN27

a basic enumerated power. Rather it would seem that one or more of the basic powers must be present before the clause may be invoked "for the purpose of carrying into Execution the foregoing powers," as the Constitution requires.

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