U.S. Department of Justice

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cc: Olson
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Washington, D.C. 20530

13 JUL 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Congressional Limitations on Federal Court Jurisdiction

I have reviewed the material on the above subject which has been supplied by Senator Helms (a copy of which is attached as Exhibit A). The following is a brief analysis of this material:

A preliminary observation is in order. My meeting at the White House to discuss the legal issues raised by the various pending legislative proposals was on June 23, 1981, between 11:45 a.m. and 12:45 p.m. One of the items sent to us by Senator Helms was a letter to him dated June 24, 1981 from former Senator Sam J. Ervin, Jr., following up on a conversation between Senator Helms and former Senator Ervin of that same morning. In the last paragraph of the first page of that letter is the following statement: "The Justice Department probably relies for its position on . . . . [citing a source which we have not used]"

We have also received from Lyn Nofziger a memorandum dated June 24, 1981, from a group named Coalitions for America (a copy of which is attached as Exhibit B). The memorandum is authored by Paul Weyrich and Connie Marshner. That memorandum starts off as follows: "At a meeting yesterday, Lyn, Howard Phillips mentioned the imminence of a report from the Assistant Attorney General of the Office of Legal Counsel which would position the Administration against any limitation on the Supreme Court's appellate jurisdiction." The memorandum goes on to urge action to "prevent the Administration from taking such a position. Such action would be an affront to the Members of Congress and to the President's supporters who have proposed such a remedy for judicial activism . . . . care should be taken that the Administration not get on the wrong side of these issues, and least of all on the wrong side of its friends on those issues."

The point is that there is rather strong evidence (separate and apart from the phone calls and other contacts made to you

and Bob McConnell) that the immediate consequence of my meeting at the White House was disclosure of the substance of that discussion to persons outside the Administration--apparently for the purpose of generating opposition to the position that the Constitution might not support legislative efforts to restrict the Supreme Court's appellate jurisdiction.

The material sent to us by Senator Helms consists of the following (along with my analysis of it):

1. A segment of the Congressional Record for April 27, 1981, pp. 1-26, which contains

(a) Remarks of Senator Helms at the time of his introduction of S. 1005," a bill to amend the Civil Rights Act of 1964 to provide for freedom of choice in student assignments in public schools."

(b) The text of S. 1005. This bill expressly creates a cause of action in the federal district courts for persons affected or aggrieved by any violation or threatened violation of the Act (which prohibits inter alia, withholding federal finanacial assistance to schools on the basis of the racial composition of the school if students are assigned to such schools on the basis of a "freedom of choice system.") The bill removes jurisdiction from the federal courts to issue any judgments or order to make any change in the racial composition of any school or to change school or class assignments if a freedom of choice system is in place.

(c) A letter and a detailed legal argument prepared by former Senator Ervin on the subject of forced busing. Former Senator Ervin calls the Voting Rights Act of 1965, "perhaps the most devious piece of legislation ever enacted by Congress" and articulates his view that that Act violates the constitutional rights of citizens embraced by its provisions. Among the legal points made by former Senator Ervin are the following:

> (i) "The 'occupants of public office love power and are prone to abuse it.'"
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> (ii) The Founding Fathers "made provision for [the Constitution's] amendment in one way and one way only, i.e., by combined action of Congress and the states as set forth in Article V. By doing so . . . [they] forbade Supreme Court Justices to attempt to revise the Constitution while professing to interrupt [sic] it."

(iii) The Founding Fathers "divided among the Congress, the President and the federal judiciary the powers given to the federal government . . . assigning to the judiciary the power to interpret federal laws for all purposes and state laws for the limited purpose of determining their constitutional validity."

(iv) "The Founding Fathers vested in the Supreme Court as head of the federal judiciary the awesome authority to determine with finality whether governmental action, federal or state, harmonizes with the Constitution as the supreme law of the land . . . . "

(v) The words of the Constitution must be understood in their natural sense and "Supreme Court Justices are forbidden to commit verbicide on the words of the Constitution while they are pretending to interpret them . . . . "

(vi) "'While unconstitutional exercise of power by the executive and legislative branches of government is subject to judicial restraint, the only check upon [the Justices'] exercise of power is [their] own sense of self-restraint.'"

(vii) "The Constitution does not suffice, however, to check the unconstitutional exercise of power by Supreme Court Justices who are judicial activists because they are unable or unwilling to subject themselves to the requisite self-restraint."

(viii) Former Senator Ervin presents a long, thoughtful and quite interesting discussion of Brown v. Board of Education and its progeny, supporting Brown as a correct statement of constitutional law and criticizing those cases which have extended Brown to de facto segregation situations and asserting that no child should be forced by virtue of his race, to attend a particular school.

(ix) Former Senator Ervin concludes that Congress has the power under the Constitution to correct the unconstitutional exercise of power by the federal judiciary under Section 5 of the Fourteenth Amendment and the power to regulate the jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court.

(x) With respect to the power of Congress to limit the appellate jurisdiction of the Supreme Court, former Senator Ervin does not discuss the issue, but cites Supreme Court decisions as "holding" that Congress has such power. None of these cases so hold. They are all discussed in the memorandum being prepared on this subject for you.

(d) A copy of Article III, of the Constitution.

(e) A copy of Ex parte McCardle.

(f) Two pages from a textbook on the Constitution.

(g) A copy of Kline v. Burke Construction Company, 260 U.S. 226 (1922), a case involving the jurisdiction of the inferior courts. In fact the court there stated: "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." Id. at 234 (emphasis added).

(h) An excerpt from South Carolina v. Katzenbach, 383 U.S. 301 (1966), another case involving lower federal court juridiction, relative to provisions which required suits to be brought in the Federal District Court in the District of Columbia and which did not preclude Supreme Court appeal.

In summary, Senator Helms' materials do not add anything beyond that which we have already studied other than an interesting and lengthy analysis of the busing decisions which is worth reading. The authorities on jurisdictional limits have already been considered. The core argument is that the words of the Exceptions Clause must be taken in their literal sense. If so, the Supreme Court could be stripped of all power to hear cases involving the Constitution of the United States and all cases involving conflicts between state and federal laws. Such a conclusion seems incompatible with many of former Senator Ervin's comments regarding the separation of powers and the functions of the courts. I will not, however, recite here the arguments contrary to his conclusion, because that will be treated in the longer analysis which is nearing completion.

Theodore B. Olson
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Office of Legal Counsel

cc: The Deputy Attorney General
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