U.S. Department of Justice

Office of Legal Counsel

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL
APR 12 12 09 PM '82

Office of the
Assistant Attorney General

Washington, D.C. 20530

12 APR 1982

Memorandum for the Attorney General

Re: Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases

The following policy and/or political arguments might be made for and against the legislation which would withdraw Supreme Court appellate jurisdiction over classes of constitutional cases.

I. Arguments in Support of Jurisdictional Withdrawal

1. Such legislation is needed to curb judicial activism.

a. As the Attorney General has repeatedly stated, the federal courts have engaged in undesirable judicial activism in recent years. Opinions such as Roe v. Wade, holding that there is a constitutional right to an abortion, find no support in the text or history of the Constitution and represent judicial excesses that need to be curbed in the best interests of the nation.

b. Jurisdiction-limiting legislation restricted to particular classes of cases would effect a "surgical" removal of Supreme Court jurisdiction in those areas where the Court has exceeded its constitutional role. Wholesale removal of Supreme Court jurisdiction is not contemplated. Critics who suggest dire consequences from such legislation have employed hyperbole to warn that the Supreme Court as an institution would be threatened. Such arguments are simply "scare" tactics.

c. This legislation -- even if it is not passed -- will have the beneficial effect of deterring the Court from engaging in further judicial activism and encouraging it to modify or overrule previous activist decisions.

d. The Court's decisions in the areas of abortion, school prayer and busing have proved to be extremely controversial and have impaired the Court's prestige, thus damaging the country as a whole. The bills would enhance public confidence in the Court by eliminating its jurisdiction in areas that have damaged its credibility.

2. Such legislation is a way of expressing popular disenchantment with the Court's decisions.

a. It is perfectly legitimate for the people to express their strongly held views through any constitutionally valid mechanism at their command. These bills are a proper means of expressing popular dissatisfaction with the Court's decisions.

b. In deciding cases under the open-ended provisions of the Constitution the Court has looked to basic national values as a source of constitutional interpretation. These bills are expressions of those values and may well influence the Court's thinking.

c. The prudent course is to avoid tampering with the Constitution, except where absolutely necessary, and to choose instead, whenever possible, the much more limited device of legislatively withdrawing jurisdiction from the Court.

3. Jurisdiction-limiting legislation is consistent with the basic policy of federalism insofar as it returns issues of local concern to the state courts and permits their experimentation with respect to social issues on which reasonable persons may differ.

a. Issues such as abortion, school prayer, and busing are essentially local concerns. They involve private institutions such as family, church and school. Disputes involving this type of issue are appropriate for resolution at the local rather than national level.

b. State courts would remain open to adjudicate such disputes, in a way attuned to the realities and needs of the local community. At the same time, the state courts, as the Supreme Court has expressly recognized, will be vigilant at protecting federal constitutional rights.

4. These bills are the most expeditious way of returning power to the elected representatives of the people.

a. A constitutional amendment is a long, arduous process which is very difficult to attain. This legislation will remove the power from the institution which has created the problem without going through the amendment process.

b. The state courts will more readily be responsive to expressions of the national legislature on constitutional issues. Hence, control will be restored to the elected representatives of the people.

5. These bills are strongly supported by the President's most loyal and powerful constitutents.

a. The President should solidify his support with conservatives, especially in an election year, by expressing his leadership on these issues which are so important to them.

b. People overwhelmingly oppose busing and support prayer in school. They do not favor abortion when properly polled. Support for these measures aligns the President with popular sentiment on those subjects.

II. Arguments Against Jurisdictional Withdrawal

1. Eliminating Supreme Court jurisdiction over specific classes of cases would deprive the nation of a single and authoritative statement of what the Constitution means in these areas.

a. Some issues of national importance imperatively require authoritative adjudication which results in uniform application of the law to similarly situated persons. For example, it is not difficult to envisage the confusion and virtually insurmountable difficulties which could result from a law prohibiting Supreme Court review of disputes arising out of the 1981 agreement with Iran. The split in authority regarding the legality of the settlement that actually developed among the many district courts involved, and which most probably would have developed among courts of appeals, had the Supreme Court not resolved the issues expeditiously, is a prime example of the mischief that can be sown by selectively withdrawing the Court's jurisdiction to decide issues of national significance.

Another example is provided by several bills introduced last year which would have deprived the Supreme Court of jurisdiction over cases challenging sex-bias in the Selective Service System. Although the sponsors hoped thereby to preserve the all-male draft, the result of enactment of these bills could have been to leave standing the decision of a three-judge federal district court which had ruled the current draft registration law unconstitutional, a decision ultimately reversed by the Supreme Court. If the bills stripped all federal courts of jurisdiction, they would have left the highest courts of the 50 states free to reach their own conclusions regarding the issue, conclusions which would have almost inevitably differed because the Supreme Court had never previously ruled on any issue sufficiently analogous to produce a uniform result. The completely unsatisfactory outcome could well have been to deny the federal government the power to require registration in some states unless Congress acted to provide for the registration of women.

b. Even when issues of compelling national importance are not involved, the lack of any final judicial authority can have deleterious consequences. The Supreme Court, recognizing the importance of uniformity in the application and interpretation of federal law, takes many cases in order to resolve splits in authority among two or more courts. If the Court were not available, the result could be that different state supreme courts or federal courts of appeals would adopt differing interpretations of the law. There would be no way of ensuring that constitutional rights are universally guaranteed. In the case of abortion, for example, it might be argued that differences in legal availability of abortions among the states, which existed prior to Roe v. Wade, could occur again without threatening the survival of the Republic. It would be more difficult, however, to accept the proposition that the same Constitution protected the right to an abortion in one state and allowed a woman to be imprisoned for obtaining an abortion in another.

Furthermore, differing interpretations of federal law could cause forum-shopping by litigants among federal courts, between state and federal courts, or among state courts.

c. The Supreme Court has an important, intangible institutional role in ensuring due respect for the Constitution and the rule of law in our society. Without a unifying interpretive body, respect for the Constitution and federal law might be diminished. The Constitution might mean one thing in one state or region of the country, and something quite different in another. Conflicting interpretations in different parts of the country would tend to foster individual interpretation of the Constitution or the laws; resolution of disputes would accordingly become more difficult.

Moreover, the prestige of the Supreme Court is sometimes necessary in order to ensure that parties accept the judgment of what the law requires, even if they vehemently disagree with the result. For example, there is nearly universal acceptance today of the principle that conscious, governmentally sponsored or supported racial discrimination has no legitimate role in our political system. This fact surely owes much to the Supreme Court's determination to place its prestige and authority squarely behind the nondiscrimination principle in cases beginning with Brown v. Board of Education in 1954.

d. If Congress possessed the power asserted here, it could remove the only means of resolving disputes between Congress and the President. Congress could pass laws intruding on the power of the President and simultaneously preclude

Supreme Court review of these laws. A constitutional crisis might occur if Congress sought to exercise power properly belonging to the President and provided that the Supreme Court had no jurisdiction to review the legislation giving it that power.

NO 1. 2. Eliminating Supreme Court jurisdiction would remove the possibility of modifying or overruling existing precedent.

a. Attempts to limit the Supreme Court's jurisdiction over classes of constitutional cases, which the proponents of these measures believe have been wrongly decided, would have the practical and legal effect of keeping these decisions on the books with no possibility of their being reconsidered and either modified or overruled. Eliminating the Supreme Court's jurisdiction over abortion cases, for example, would fix Roe v. Wade and its progeny as the law of the land. The Supreme Court, even with new membership, could not return to that decision and overrule it in a subsequent case or modify it in light of developments in legal thinking or medical knowledge.

b. These Supreme Court decisions would control all future federal court adjudications and, by virtue of the Supremacy Clause, would bind all state courts as well. If the purpose of these bills is to obtain decisions by state or federal courts which depart from the rules previously announced by the Supreme Court, that purpose implicitly contains an invitation to state and federal court judges to violate their oaths and the principle of respect for law by issuing opinions inconsistent with binding authority. In unanimously objecting to this legislation, the Conference of State Chief Justices made clear that they and their colleagues would continue to follow existing Supreme Court precedent should the legislation be enacted and these constitutional issues be presented to them.

c. The Constitution is a dynamic instrument which must be capable of development as conditions change. The Supreme Court has recognized this by holding that stare decisis applies with considerably less force in constitutional than in statutory cases. The Court must be permitted to overrule or modify constitutional decisions that have not stood the test of time. These bills would remove that needed flexibility by eliminating Supreme Court jurisdiction over classes of constitutional cases. For example, a bill enacted in 1953 to eliminate Supreme Court jurisdiction over school desegregation cases would effectively have fixed the "separate but equal" doctrine of Plessy v. Ferguson as the law of the land and would have prevented the salutary movement towards nondiscrimination which the Supreme Court initiated in 1954.

3. These bills are, in effect, attempts to amend the Constitution without resort to the constitutional processes for doing so.

a. The goal of many of these bills, as stated by their sponsors, is to obtain reversal of the Supreme Court's interpretations of the Constitution in particular cases. However, the Framers did not contemplate that the fundamental charter could be so easily altered. Article V of the Constitution sets forth the proper procedure for constitutional amendment, requiring proposal by a two-thirds vote of each House of Congress and ratifiation by three-fourths of the States. These bills attempt to circumvent the intentionally burdensome procedures of Article V by simple legislation. Even if not unconstitutional, they run counter to the evident purposes of the Framers.

b. Another, indirect way of influencing, over the long term, interpretation of the Constitution by the Court is to alter its membership. The President is elected by the people, and has the power and duty to replace members of the Court (by and with the advice and consent of the Senate) as vacancies arise. It is entirely proper for the President to appoint individuals whose judicial philosophy is in accordance with his views and the popular mood. If the Court musters a majority for overruling a precedent, then the prevailing interpretation of the Constitution will have changed. These bills, however, attempt to weaken or destroy the currency of the Court's interpretation of the Constitution, not by changing the membership of the Court, but by depriving the Court of jurisdiction over classes of cases. Even if not unconstitutional, these bills would short-circuit this accepted and legitimate way of creating the potential for altering the prevailing interpretation of the Constitution.

4. These bills are opposed by the vast majority of the bench and bar. This sentiment is meaningful because it reflects the views of those trained in law. Ignoring this opposition will appear to be unwise or anti-constitutional -- an undesirable image to develop.

a. The Conference of State Chief Justices -- individuals who, under these bills, would be given vastly increased authority to interpret the Constitution -- have unanimously opposed these bills. Their action refutes the argument that the States wish to have the responsibility, free of Supreme Court oversight, for interpreting the Constitution.

b. The professional bar associations which have taken a position on the subject have strongly opposed these measures. We know of no major professional bar organization which has supported these measures.

c. While legal scholars are divided on the constitutionality of these measures, they are virtually unanimous that the bills represent bad policy. The two most prominent scholars associated with the position that Congress may use the Exceptions Clause to withdraw classes of constitutional cases from Supreme Court review, Herbert Wechsler and William Van Alstyne, have each noted the strong policy objections against enactment of such legislation. Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1006-07 (1965); Constitutional Restraints on the Judiciary, Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 101 (1981)(testimony of William Van Alstyne).

5. The mechanism of restricting jurisdiction cannot be limited in principle to any particular subject area.

a. If Congress can divest the Court of jurisdiction over one class of constitutional cases, it can do so over any and all classes. Once the principle is established, immense pressures will be generated by special interest groups to divest the Supreme Court of jurisdiction in any number of fields. These pressures may be difficult for Congress to resist.

b. Even if not unconstitutional, these bills would upset the policy of checks and balances embodied in the Constitution. The Supreme Court has traditionally acted as a check on popular passions, by exercising a sober and deliberate review of hasty or ill-considered legislation to determine whether it comports with fundamental constitutional principles. The Justices, with their life tenure and salary protections, were deliberately insulated by the Framers from the influence of popular sentiment. This important safeguard of individual liberty should not be removed by simple legislation which could reflect popular passions for extreme or short-sighted solutions to complex problems. For example, Congress could ban private ownership of weapons or take away the right to free speech and simultaneously withdraw federal court jurisdiction over these issues. The Supreme Court would not be available to check the tyranny of the strong over the weak or the majority over the minority.

c. The mechanism of limiting jurisdiction can be used by all sides of a political issue. If the Supreme Court can be divested of jurisdiction over suits involving school prayer, abortion, and busing, it can be deprived of power to review federal laws on the ground that they infringe on the principle of state sovereignty protected by the Tenth Amendment. The Court could be divested of jurisdiction to review the actions of states in denying parents the right send their children to the private or religious school of their choice.

Congress could also eliminate the Supreme Court's power to ensure that private property not be taken without just compensation, in violation of the Fifth Amendment, or that states do not impair the obligation of contacts, in violation of Article 1, § 1, cl. 1. It is not difficult to imagine other examples of how this mechanism could be used or abused.

6. There are sound political reasons to oppose these bills.

a. The current Court is more "conservative" than the Court that decided the most important school prayer, busing, and abortion cases. The trend on the Supreme Court has been toward more judicial self-restraint and more acceptable decisions to the points of view of those who now support limits on the Court's power. The Chief Justice and Justices Powell, Blackmun, and Rehnquist were appointed by President Nixon; Justice Stevens was appointed by President Ford; and Justice O'Connor was appointed by President Reagan. Only three justices remain from the "Warren Court." Of these, Justice White is not considered to be particularly "liberal." President Reagan is likely to have the opportunity to make additional appointments to the Court.

b. The enactment of this or similar legislation has the clear tendency to reduce an important presidential power. When the federal judiciary's role is diminished, the presidential power to influence the direction of the nation is similarly limited. To the extent that responsibilities for interpreting federal laws are turned over to state courts, the decisions will be made by those appointed by Governors or elected in the states -- not by those appointed by President Reagan.

c. Excluding the federal courts will turn decisions over to judges in many states who are regarded as "very" liberal. Some courts, especially in California, have indicated that they would allow more liberal abortion rights and require more forced busing than would the Supreme Court. If the Supreme Court could not review those rulings, some states might have to pay for abortions, or to bus children in more circumstances than current law requires.

d. The President should consider the political consequences of participating directly in any challenge to the Supreme Court and the structure of the federal judiciary. History suggests that the people are extremely wary of any frontal assault on the Court. President Roosevelt's experience in 1937, at the height of his popularity and when the Court was quite unpopular because of the perception that the Court had blocked New Deal legislation, is instructive. President

Roosevelt's proposal to change the composition of the Court was an unsuccessful and unpopular battle which is regarded as having had a pronounced negative impact on the President's credibility.

e. Opposition to jurisdictional limits on constitutional grounds will be considered as a position of courage, integrity and principle. The President will be in a position to disagree with some of the Court's decisions on policy grounds, but state that he must oppose efforts, however well-intentioned, to weaken the Court's constitutional functions. This would be perceived as a courageous and principled decision, especially in the press, and may have highly salutary long term benefits to the President.

f. The President can continue to fulfill his campaign commitments with respect to issues such as abortion by supporting constitutional amendments in those areas where he believes the Court has gone too far.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

*Authorities who believe restrictions on Supreme Court jurisdiction are constitutional.

1. Professor Martin Redish, Northwestern University (but opposes bills on policy grounds)
2. Professor Charles Rice, Notre Dame (representing Moral Majority)
3. Professor William Van Alstyne, Duke University (but opposes bills on policy grounds and thinks such legislation "might arguably" be unconstitutional in some circumstances)
4. Professor Herbert Wechsler, Columbia University (but opposes bills on policy grounds)

*Authorities who believe restrictions are unconstitutional

1. The American Bar Association
2. The Society of American Law Teachers
3. Professor Robert Bork, Yale Law School ("probably unconstitutional")
4. Irving Brant, Historian, biographer of Madison and author of various texts on the Constitution
5. Professor Paul Brest, Stanford University
6. Former Attorney General Herbert Brownell
7. Professor William Crosskey, University of Chicago
8. Dean George Alexander, University of Santa Clara
9. Professor John Hart Ely, Harvard Law School
10. Professor Paul Freund, Harvard University
11. Professor Thomas Grey, Stanford Law School
12. Professor Louis Henkin, Columbia Law School
13. Attorney General Nicholas Katzenbach
14. Professor Paul Gewirtz, Yale Law School
15. Professor Morris Forkosch, Brooklyn Law School
16. Dean Erwin Griswold, Harvard University
17. Professor Henry J. Merry, Purdue University
18. Professor Leonard Ratner, University of Southern California
19. Former Attorney General Elliot Richardson
20. Professor Ronald D. Rotunda, University of Illinois
21. Former Attorney General William Rogers
22. Professor Lawrence Sager, New York University
26. Professor F.R. Strong, University of North Carolina
27. Professor Lawrence Tribe, Harvard University
28. Former Attorney General William Saxbe
29. Professor Telford Taylor, Columbia University
30. Dean Harry H. Wellington, Yale Law School

*These reflect testimony, legal articles, legal opinions or letters which state these conclusions generally to one extent or another. These views may have changed or been modified and to state that these individuals or organizations are for or against is an obviously risky oversimplification.

31. Professor Raoul Berger, Harvard University
32. Professor Philip Kurland, University of Chicago
33. Professor Louis Schwartz, University of Pennsylvania
34. Professor Charles Allan Wright, University of Texas
35. Former Attorney General Benjamin Civiletti
36. Former Attorney General Ramsey Clark
37. Lloyd Cutler, former Counsel to the President