I have attempted to reformulate the "test" as to what would and would not be a "core" function of the U.S. Supreme Court in order to delineate between the type of situations in which Congress would not be able to withdraw the Supreme Court's appellate jurisdiction. This formulation embraces the concepts of uniformity and supremacy as well as simply whether a case involves a constitutional question. I have expressed it in two slightly different but essentially similar ways to include in different paragraphs of the draft Attorney General statement which I furnished to you last week. The balance of the Attorney General statement would be changed to make sure that nothing in it is inconsistent with these general statements of the test.
I have also revised the test to make it clear that you are only addressing S. 1742 and that you could and would defend the constitutionality of S. 1742 if it was enacted by Congress.

Rex and I are satisfied with this formulation. Unfortunately, Ken and John are not. Rather than try to articulate their objections and/or reservations for them and possibly mischaracterize their positions, I will leave it to them to explain their positions to you.

Attached are the two sentences which Rex and I have agreed upon.

cc: Rex E. Lee
    Kenneth A. Starr
    John Roberts
I believe, for the reasons set forth in detail below, that S. 1742, a proposal which would attempt to withdraw from the Supreme Court its ability to perform its core function as the final arbiter of questions involving the uniform and dispositive meaning of the Constitution and its status as the supreme law of the land is impermissible under the Constitution.

However, after careful and deliberate consideration, I have concluded that attempts to withdraw the Supreme Court's jurisdiction over a class of cases such as this so that the Court would be unable to perform its core function of assuring a uniform, final and authoritative resolution of such types of Constitutional questions would be unconstitutional.
TO: The Attorney General

FROM: John Roberts

RE: Supreme Court Jurisdiction

Attached are two inserts in the OLC draft. The first would be substituted for the first three paragraphs in the OLC draft on pages 1-2. The second would be substituted for the final paragraph on pages 18-19.
A number of bills presently pending in the 97th Congress propose withdrawing the jurisdiction of the Supreme Court over federal constitutional issues. These bills raise fundamental and difficult questions regarding the role of the Supreme Court in our constitutional system, as well as the power of Congress to define and circumscribe that role. The issues involved have been the subject of intense scholarly debate and respectable constitutional scholars have differed as to the extent of congressional power to limit Supreme Court jurisdiction. Commentators on both sides of the dispute are able to point to constitutional provisions, court decisions, historical material, and analytic arguments supporting their positions. The legal questions in this area are exceedingly close.

This is perhaps to be expected since the question of congressional power over the appellate jurisdiction of the Supreme Court implicates in a basic way the relations between Congress and the Supreme Court, two co-equal branches of government. Relations between the different branches in our tripartite system are generally governed by the doctrine of separation of powers. Neither the Constitution nor the decisions of the Supreme Court have attempted to define the precise contours of this doctrine. As two astute students of our constitutional system have noted:

"The accommodations among the three branches of government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of lines of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory."

The doctrine of separation of powers touches fundamentally on how the Nation is governed, and, as the Supreme Court noted last Term in a separation of powers case, "it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed." Dames & Moore v. Regan, U.S. (1981). In this area more than any other we must heed Justice Holmes' wise admonition that "The great ordinances of the Constitution do not establish and divide fields of black and white." Springer v. Philippine Islands, 277 U.S. 189, 209 (1928)(dissenting opinion).

The very nature of the issues involved, therefore, and the closeness of the legal arguments, counsel strongly against my issuing any generalized pronouncements regarding the limits of congressional power over the appellate jurisdiction of the Supreme Court. It would be presumptuous for the Executive Branch to provide abstract and gratuitous constitutional law analyses to a coordinate and co-equal Branch, whose members are likewise sworn to uphold the Constitution. My views have been specifically requested,
however, concerning the constitutionality of S. 1742, a proposal which would withdraw all jurisdiction from the Supreme Court to consider "any case arising out of any State statute, ordinance, rule, [or] regulation . . . which relates to voluntary prayers in public schools and public buildings." My analysis of the constitutionality of this proposal is set forth in this letter.

It is incumbent upon me to emphasize at the outset that my opinion is restricted to the particular bill before me. The considerations that have been found to be relevant in assessing this bill may not be similarly relevant in addressing other legislation in this area. Other factors may come into play, and the significance of the factors relied upon in this case may recede.
Finally, I cannot conclude without reiterating that the question of the limits, if any, of Congress' authority under the Exceptions Clause is an extraordinarily difficult one. Thoughtful and respected authorities have come to conclusions which differ from mine. The language of the Exceptions Clause, broad pronouncements in certain Supreme Court opinions, and some historical materials do offer support for the argument that the bill under consideration falls within Congress' constitutional authority. Respected scholars have argued that the Framers intended to permit Congress to determine in its discretion how broadly the federal judicial institution -- including the appellate jurisdiction of the Supreme Court -- should extend. For reasons which I have developed at some length, I do not agree and have concluded that S. 1742 is unconstitutional. Ultimately, however, it is for Congress to determine what laws to enact and for the Executive Branch to "take care that the Laws be faithfully executed." It is not for the Attorney General but for the courts ultimately to rule on the constitutionality of Congress' enactment. As I have stated in another context, the Department of Justice must and shall defend the Acts of Congress "except in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid." Accordingly, while I believe that S. 1742 is unconstitutional, should the Congress believe otherwise and should I be called upon to defend its constitutionality before the courts, I responsibly could and would do so with all of the resources at my command.

William French Smith
Attorney General
MEMORANDUM FOR: The Attorney General  
Deputy Attorney General  
Associate Attorney General  
Solicitor General  
Theodore Olson  
Jonathan Rose  
Robert McConnell  
Ken Starr  
Stan Morris  
Tex Lezar  
Hank Habicht  
Carolyn Kuhl  
John Roberts  

FROM: Tom DeCair  

Attached are transcripts of network reporting of the court-stripping and busing opinions.
DAN RATHER: Long before President Reagan backed a prayer amendment today, conservatives in Congress have been trying to accomplish the same thing another way, but passing a law limiting the powers of the court, and not just on prayers, but also on court-ordered school busing and abortion.

Today, Attorney General William French Smith ended a long silence on two of those bills. Smith said he would defend the constitutionality of one bill that would strip the Supreme Court of the power to rule on voluntary prayers in the public schools. He also said he would defend the bill curtailing the power of federal courts to order school busing for desegregation.

However, the Attorney General told conservatives there is a limit to what Congress can do to keep controversial social issues out of the Supreme Court.
ROGER MUDD: Just a few hours before the President made his Rose Garden appearance, Attorney General William Smith let it be known that he would support a Senate bill denying the Supreme Court jurisdiction over public prayer cases. That bill has heavy backing from the conservatives.
FRANK REYNOLDS: The Attorney General, William French Smith today gave a very lukewarm endorsement to a bill that would deny the Supreme Court the right to rule on school prayer cases. In a letter to Congress, Smith expressed strong misgiving about legislators possibly intruding on the rights of the Court.

In a separate letter today, the Attorney General declared that the anti-busing legislation now working its way through the Congress, is constitutional.
GOOD MORNING WASHINGTON

May 7, 1982

Attorney General's Statement on Busing


What's going on and could there be some problems on this one?

Prof. Arthur Miller: Well, there's a great movement to get the federal courts of the United States out of controversial areas such as busing, school prayer and abortions. And the proposal before Congress literally strips away the jurisdiction, the power of the federal courts to hear cases involving busing.

It would not affect our policy toward desegregation of racially imbalanced schools. It simply would eliminate the use of court-ordered busing as a remedy to correct that imbalance.
Attached is the information provided to the
White House today—all but the talking points
were provided to the press at noon for release
at 1 p.m.

Tom DeCair
TALKING POINTS

JOHNSTON-HELMS AMENDMENTS TO DEPARTMENT OF JUSTICE
APPROPRIATIONS AUTHORIZATION BILL FOR FISCAL YEAR 1982.

- These provisions limit the power of lower federal
courts to order student transportation to schools beyond
those closest to their homes, with certain exceptions, beyond
10 mile or 30 minute round trips, and restrict the power
of the Justice Department to seek busing decrees.

- These provisions do not restrict the power of
school boards or state courts to order desegregation decrees.
They do not limit the power of the Supreme Court to consider
constitutional questions.

- Congress has substantial power over the jurisdic-
tion and remedial powers of the lower federal courts. In
numerous instances, most notably with respect to the Norris-
La Guardia Act, the Supreme Court has upheld legislative
restrictions on the power of the courts to issue injunctions.

- Mandatory cross-town busing has been destructive
of quality education and the goal of desegregation. The
Supreme Court has held that busing may be limited by factors
of time and distance which would "risk the health of the
children or significantly impinge on the educational process."

- These provisions are within Congress' power
under Article III of the Constitution and Section 5 of the
14th Amendment. They do not violate the Equal Protection
or Due Process Clauses.

- The restrictions on Department of Justice author-
ity, while unnecessary and unduly restrictive of Department
discretion, are not unconstitutional. The Department retains
ample authority to enforce civil rights statutes.

LIMITS ON SUPREME COURT'S APPELLATE JURISDICTION

- S. 1742, limiting Supreme Court appellate juris-
diction over cases involving prayer, raises fundamental
and difficult constitutional questions regarding the role
of the Supreme Court. Prominent constitutional scholars
have reached different conclusions.
After careful and lengthy analysis, the Attorney General has concluded that Congress may not, consistent with the Constitution, make "exceptions" to Supreme Court appellate jurisdiction which would intrude on the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

Various factors must be considered in determining whether the core function would be invaded by particular legislation including whether constitutional issues would be withheld from the Court, the need for uniformity of results among the states, the extent to which Supreme Court review is necessary to ensure supremacy of federal law and whether suitable alternative forums have been left in place.

If Congress determines to consider S. 1742 further, it may wish to do so in light of the Attorney General's analysis of the constitutional issues and the factors enunciated by him.

The legislative record, debates in Congress, and committee reports are important analytical tools and final Attorney General analysis is necessarily predicated on completion of that process.

As a policy matter, the Department of Justice has grave concerns over the withdrawal of Supreme Court appellate jurisdiction over classes of cases. The integrity of our federal system depends upon a single court of last resort having final say on the resolution of federal questions.

Ultimately it is for Congress to enact laws and for the Executive to defend them unless clearly unconstitutional or an infringement on Executive Branch powers. If S. 1742 were enacted, the Attorney General would defend its constitutionality in the courts.
PRESS RELEASE AND BOTH LETTERS
EMBARGOED FOR RELEASE
UNTIL 1:00 P.M. EDT
THURSDAY, MAY 6, 1982

Attorney General William French Smith today released two letters he has written in response to congressional inquiries about legislative proposals that would restrict the authority of federal courts. One letter, to Chairman Peter Rodino of the House Judiciary Committee, concerns the anti-busing provisions contained in S. 951, the Senate-passed version of the Department of Justice appropriations authorization bill for Fiscal Year 1982. Those provisions would prevent the Department of Justice from expending funds to bring or maintain an action requiring busing, and limit the circumstances in which lower federal courts could order busing. The other letter, to Chairman Strom Thurmond of the Senate Judiciary Committee, addresses questions raised by members of that Committee about S. 1742, a bill to divest the Supreme Court of appellate jurisdiction over cases involving voluntary prayer in public schools or buildings.

With regard to the anti-busing legislation, the Attorney General has concluded that this legislation may be enacted consistent with the Constitution. With regard to the issue of congressional authority over Supreme Court jurisdiction raised by the school prayer bill, the Attorney General has concluded that although Congress may in some instances limit Supreme Court appellate jurisdiction, it may not do so in a
manner that intrudes upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers. The Attorney General also concluded that even if legislation in this area could be enacted consistent with the Constitution, he would have concerns as a policy matter about the withdrawal of a class of cases from the appellate jurisdiction of the Supreme Court.

The Attorney General stressed the distinctions between the two bills in his separate analyses. The anti-busing provisions of S. 951 do not affect the jurisdiction of the Supreme Court, but only limit equitable remedies in the lower federal courts. In this respect the bill is similar to the anti-injunction provisions of the Norris-LaGuardia Act, which has been in effect for fifty years. The school prayer bill, however, raises the more difficult question of the scope of congressional authority over Supreme Court appellate jurisdiction. The two issues are quite distinct.

In his letter to Chairman Rodino, the Attorney General concluded that Congress could enact the anti-busing provisions consistent with the Constitution. The bill itself does not prohibit all busing. It restricts the authority of only the lower federal courts to order busing within specified limits. It does not affect state court or U.S. Supreme Court jurisdiction, or the jurisdiction of the lower federal courts to hear desegregation cases. Congress has broad authority to regulate remedies in the lower federal courts because article III, section 1 of the Constitution vested totally within
Congress' discretion the decision whether even to establish such courts in the first place.

Congress may also, consistent with the Constitution, limit Department of Justice advocacy of busing remedies. The provisions in S. 951 that would do so do not prevent the federal government from bringing desegregation suits, but only restrict in a limited fashion participation in the remedy stage.

The Attorney General concluded that neither the limit on lower federal court remedies nor the limit on Department of Justice advocacy of busing violates the Constitution. It is reasonably clear that the bill would be sustained on the basis of the rationales advanced by its proponents -- primarily, the destructive effect of racial busing on quality education and its tendency in many communities to contribute to more, not less segregation in the schools.

In his letter on S. 1742, a bill to divest the Supreme Court of jurisdiction over cases involving voluntary prayer in public schools, the Attorney General began by noting that the bill raises fundamental and difficult questions concerning the extent of congressional power over Supreme Court appellate jurisdiction. Although Congress possesses some power over Supreme Court appellate jurisdiction under the "Exceptions Clause" of the Constitution, article III, section 2, the Attorney General concluded that Congress may not under this clause intrude upon the core functions of the Supreme Court as an independent and equal branch in the system of separation of powers. In determining if a particular
bill does intrude upon core functions, it is necessary to consider a number of elements: whether the issue is constitutional or nonconstitutional; the extent to which the area is one in which uniformity of interpretation is required; the extent to which Supreme Court review is necessary to ensure the supremacy of federal law; and whether other forums or remedies have been left in place so the intrusion can properly be characterized as an exception.

The Attorney General considered the language of the Constitution, the views expressed during the Constitutional Convention and ratification debates, opinions of the Supreme Court, and the historical record of Supreme Court jurisdiction. He also reviewed the scholarly literature and testimony before the Congress. Only following that careful review did the Attorney General reach his conclusion that Congress does not possess unlimited power over Supreme Court appellate jurisdiction but may only make exceptions to that jurisdiction which do not intrude upon the core functions of the Court. A view which accepted unlimited congressional power over Supreme Court jurisdiction would be inconsistent with the understanding of the Founding Fathers that the Supreme Court would be an independent and equal branch in the system of separation of powers.

The Attorney General stressed that the question of precise limits to congressional power under the Exceptions Clause was a difficult one on which prominent scholars had reached differing conclusions. Quoting the Supreme Court opinion in Rostker v. Goldberg, the Attorney General noted
that the legislative process was a significant factor in assessing not only the meaning of legislation, but also its constitutionality. He indicated that Congress, should it consider S. 1742, may wish to do so in light of the principles articulated in his letter.

Since the Department of Justice has the responsibility to defend acts of Congress unless they intrude on executive powers or are clearly unconstitutional, the Attorney General stated that if S. 1742 were enacted, the Department responsibly could and, if called upon to do so, would defend its constitutionality.

Last, the Attorney General indicated that he has concerns as a policy matter about the withdrawal of a class of cases from the appellate jurisdiction of the Supreme Court. The integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions. The ultimate result of depriving the Supreme Court of jurisdiction over a class of cases would be that federal law would vary in its impact among the inferior courts. There would also exist no guarantee through Supreme Court review that state courts accord appropriate supremacy to federal law when it conflicts with state enactments. Congress has wisely avoided testing the limits of its authority under the Exceptions Clause, and should continue to do so.

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Folder: Supreme Court Jurisdiction  
Series: Correspondence Files of Ken Starr, 1981-83  
Acc. #60-88-0498 Box 6  
RG 60 Department of Justice
The Honorable Strom Thurmond  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C.

Dear Mr. Chairman:

This letter is written to you as Chairman of the Committee on the Judiciary. It is written in response to a number of earlier inquiries from members of your Committee concerning S. 1742, a proposal which would withdraw jurisdiction from the Supreme Court to consider "any case arising out of any State statute, ordinance, rule, [or] regulation . . . which relates to voluntary prayers in public schools and public buildings." A second provision of the bill would withdraw the jurisdiction of the district courts over any case in which the Supreme Court has been deprived of jurisdiction. This bill raises fundamental and difficult questions regarding the role of the Supreme Court in our constitutional system, as well as the power of Congress to define and circumscribe that role. The issues involved have been the subject of intense scholarly debate and prominent constitutional scholars have differed as to the extent of congressional power to limit Supreme Court jurisdiction.

This is perhaps to be expected since the question of congressional power over the appellate jurisdiction of the Supreme Court implicates in a basic way the relations between Congress and the Supreme Court, two co-equal branches of government. Relations between the different branches in our tripartite system are generally governed by the doctrine of separation of powers. Neither the Constitution nor the decisions of the Supreme Court have attempted to define the precise contours of this doctrine. As two astute students of our constitutional system have noted:

The accommodations among the three branches of government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of lines of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory. Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harv. L. Rev. 1010, 1016 (1924) (emphasis in original).
The doctrine of separation of powers touches fundamentally on how the Nation is governed, and, as the Supreme Court noted last Term in a separation of powers case, "it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed." Dames & Moore v. Regan, 101 S. Ct. 2972, 2977 (1981). In this area more than any other we must heed Justice Holmes' wise admonition that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white." Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (dissenting opinion).

There is no doubt that Congress possesses some power to regulate the appellate jurisdiction of the Supreme Court. The language of the Constitution authorizes Supreme Court appellate jurisdiction over enumerated types of cases "with such Exceptions, and under such Regulations as the Congress shall make." The Supreme Court has upheld the congressional exercise of power under this clause, even beyond widely accepted "housekeeping" matters such as time limits on the filing of appeals and minimum jurisdictional amounts in controversy. See Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

Congress may not, however, consistent with the Constitution, make "exceptions" to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

In determining whether a given exception would intrude upon the core functions of the Supreme Court, it is necessary to consider a number of factors, such as whether the exception covers constitutional or nonconstitutional questions, the extent to which the subject is one which by its nature requires uniformity or permits diversity among the different states and different parts of the country, the extent to which Supreme Court review is necessary to ensure the supremacy of federal law, and whether other forums or remedies have been left in place so that the intrusion can properly be characterized as an exception.

Concluding that Congress may not intrude upon the core functions of the Supreme Court is not to suggest that the Supreme Court and the inferior federal courts have not occasionally exceeded the properly restrained judicial role envisaged by the Framers of our Constitution. Nor does such a conclusion imply an endorsement of the soundness of some of the judicial decisions which have given rise to various of the legislative proposals now before Congress. The Department of Justice will continue, through its litigating efforts, to urge the courts not to intrude into areas that properly belong to the State legislatures and to Congress. The remedy for judicial overreaching, however, is not to restrict the Supreme Court's jurisdiction over those cases which are central to the core functions of the Court in our
system of government. This remedy would in many ways create problems equally or more severe than those which the measure seeks to rectify. 1/

With respect to other pending legislation, the Department of Justice has concluded that Congress may, within constraints imposed by provisions of the Constitution other than Article III, limit the jurisdiction or remedial authority of the inferior federal courts. See letter from the Attorney General to Chairman Rodino concerning S. 951. The question of congressional power over lower federal courts is quite different from the question of congressional power over Supreme Court jurisdiction, and the two issues should not be confused.

I.

Proponents of congressional constitutional authority to limit the Supreme Court's entire appellate jurisdiction have contended that such authority exists under the "Exceptions Clause" of Article III of the Constitution. Article III provides, in pertinent part:

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 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. (Emphasis added.)

The language of the Exceptions Clause, underscored above, does not support the conclusion that Congress possesses plenary authority to remove the Supreme Court's appellate jurisdiction over all cases within that jurisdiction. The concept of an "exception" was understood by the Framers, as it is defined today, as meaning an exclusion from a general rule or law. An "exception" cannot, as a matter of plain language, be read so broadly as to swallow the general rule in terms of which it is defined.
The Constitution, unlike a statute, is not drafted with specific situations in mind. Designed as the fundamental charter of our political system, its most important provisions are phrased in broad and general terms. As eloquently expressed by Justice Holmes in *Missouri v. Holland*, 252 U.S. 416, 433 (1920):

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago.

For example, a literal interpretation of Article III as a whole would seem to mandate that Congress vest the full judicial power of the United States either in the Supreme Court or in an inferior federal court. Under such an interpretation, Congress could make "exceptions" to the Supreme Court’s appellate jurisdiction only if it vested the jurisdiction at issue either in an inferior federal court or in the Supreme Court's original jurisdiction. This interpretation, which would require the conclusion that any measure which entirely ousted the federal courts from exercising any portion of the judicial power of the United States and vested that authority in state courts would be unconstitutional, is rejected by all authorities today. 2/

The Constitution contains a number of other pronouncements which, although seemingly unambiguous and absolute, have necessarily been interpreted as limited in their applicability. See, e.g., *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) (Contract Clause); *Evers v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause); *Reynolds v. United States*, 98 U.S. 145 (1878) (Free Exercise Clause); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (Free Speech Clause). The Supreme Court has also recognized that even when a statute is otherwise within a power granted to Congress by the Constitution, extrinsic limitations on congressional power contained in the Bill of

2/ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), established that Congress has no authority to enlarge the Supreme Court's original jurisdiction by creating "exceptions" to its appellate jurisdiction. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330-31 (1816), Justice Story argued that, if Congress creates any inferior federal courts, it must confer on them the full federal jurisdiction. This view, however, has never since been accepted by a majority of the Supreme Court.
Rights or elsewhere may nevertheless render the statute unconsti-
tutional. See, e.g., National League of Cities v. Usery, 426
U.S. 833 (1976) (limitations on Commerce Clause); McCulloch v.
Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (limitations on
Necessary and Proper Clause).

In light of these principles of constitutional interpretation,
the Exceptions Clause may not be analyzed in a vacuum but must be
understood in terms of Article III as a whole, 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 implicit in the Constitution and contained in
the Bill of Rights. The construction of the Exceptions Clause
that is most consistent both with the plain language of the
Clause and with other evidence of its meaning is that Congress
can limit the Supreme Court's appellate jurisdiction only up to
the point where it impairs the Court's core functions in the
constitutional scheme.

II.

The events at the Constitutional Convention support a
construction of the Exceptions Clause that would preclude Congress
from interfering with the Supreme Court's core functions. The
Framers agreed without dissent on the necessity of a Supreme
Court to secure national rights and the uniformity of judgments.
The Resolves which were agreed to by the Convention and given to
the Committee of Detail provided, simply, that "the jurisdiction
[of the Supreme Court] shall extend to all cases arising under
the Natl. laws; And to such other questions as may involve the
Natl. peace & harmony." No mention was made of any congressional
power to make exceptions to the Court's jurisdiction. The
Committee of Detail, charged with drafting a provision to implement
these Resolves, proposed the language of the Exceptions Clause.
It seems unlikely that the Committee of Detail could have deviated
so dramatically from the Convention's Resolves as to have given
Congress the authority to interfere with the Supreme Court's core
functions without considerably more attention to the subject at
the Convention.

This inference is strengthened by the events surrounding the
adoption of the Judicial Article by the full Convention. In
determining the scope of the Court's jurisdiction, the Convention
agreed to provisions expressly confirming that the jurisdiction
included cases arising under the Constitution and treaties; but
it rejected, by a 6-2 vote, a resolution providing that, except
in the narrow class of cases under the Court's original juris-
diction, "the judicial power shall be exercised in such manner as
the Legislature shall direct." 3/ The Convention thus rejected a

3/ 2 M. Farrand, The Records of the Federal Convention of 1787
46 (1911).
clear statement of plenary congressional power over the Court's appellate jurisdiction. Nevertheless, on the same day -- without any recorded debate or explanation -- the Framers adopted the Exceptions and Regulations language now contained in Article III. In light of the value placed on the Supreme Court's appellate jurisdiction, as evidenced by the other actions of the Convention, it seems highly unlikely that the Framers would have agreed, without the slightest hint of controversy, to a provision that would authorize Congress to interfere with the Court's core constitutional functions.

There are additional reasons why the lack of controversy surrounding the adoption of the Exceptions Clause supports the inference that no power to intrude on the Court's core functions was intended. First, the historical materials show the great importance which the Framers attached to these functions. They envisaged that the Supreme Court was a necessary part of the constitutional scheme and believed that the Court would review state and federal laws for consistency with the Constitution. These sentiments were echoed by the authors of the Federalist Papers, a work which is justly regarded as an important guide to the meaning of the Constitution. In light of this explicit recognition by the Founding Fathers of the Court's vital role in the constitutional scheme, it seems unlikely that they would have adopted, without controversy, a provision which would effectively authorize Congress to eliminate the Court's core functions.

A second reason for inferring a more limited construction of the Exceptions Clause from the lack of discussion at the Convention concerns the compromise agreed to by the Framers regarding the establishment of inferior federal courts. While the necessity of a Supreme Court was accepted without significant dissent among the Framers, there was vigorous disagreement over whether inferior federal courts should be provided. The Convention first approved a provision calling for mandatory inferior federal courts, then struck this provision by a divided vote, and finally determined to leave to Congress the question whether to establish inferior federal courts. The Supreme Court was viewed as a necessary part of the constitutional structure and was established by the Constitution itself; Congress was given no control over whether the Court would be created. The inferior federal courts, however,

4/ See, e.g., 1 id. at 124; 2 id. at 589 (Madison).

5/ See, e.g., Federalist No. 39 (Madison) (Supreme Court is "clearly essential to prevent an appeal to the sword and a dissolution of the compact"); id. No. 80 (Hamilton); id. No. 82 (Hamilton).
were viewed as an optional part of the Government and were authorized but not established by the Constitution. The decision whether to create them was given to Congress. This distinction, 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 with respect to the Supreme Court and the inferior federal courts.

If the Exceptions Clause authorized Congress to eliminate the Supreme Court's appellate jurisdiction, thus limiting it to the exercise of original jurisdiction, the power of Congress 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 be squared with the stark difference in treatment which the Framers accorded to the Supreme Court and the inferior federal courts. Given the intensity of the debate regarding inferior federal courts, and the compromise arrived at by the Framers, it seems highly unlikely that the Convention would have adopted without comment a provision which, for most practical purposes, would place the Supreme Court and the inferior federal courts in the same position vis-a-vis Congress.

A third reason to infer a limited construction of the Exceptions Clause from the lack of debate accompanying its adoption is found in the theory of separation of powers which formed the conceptual foundation for the system of government adopted by the Convention. The Framers intended that each of the three branches of Government would operate largely independently of the others and would 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. Indeed, 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." 6/

6/ Federalist No. 47 (Madison).
Essential to the principle of separation of powers was the proposition that no one Branch of Government should have the power to eliminate the fundamental constitutional role of either of the other Branches. 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 means 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 "applaud[ed] the wisdom of those states who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men." Federalist No. 81 (Hamilton). They believed that, by the inherent nature of their power, the legislature would tend to be the strongest and the judiciary the weakest of the Branches. This insight is reflected in the very structure of the Constitution: the provisions governing the legislature are placed first, in Article I; those establishing and governing the Judicial Branch are in the third position, in Article III. Madison recognized the great inherent power of the Legislative Branch 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." See also Federalist No. 51 (Madison).

It was in no sense a derogation on the concept of governance responsive to popular will that the Founding Fathers desired checks on the power of the Legislature they were creating. The Acts of Parliament as well as those of the King formed the litany of grievances which produced the Revolution. The Founding Fathers believed in the voice of the people and their elected representatives and placed substantial power in the Legislature. At the same time, however, they were acutely sensitive to the rights of individuals and minorities. Most of them had first-hand experience with 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. They crafted a representative republic with restraints on the legislature. "[A]n elective despotism was not the government we fought for..." Federalist No. 48 (Madison), quoting Jefferson's Notes on the State of Virginia (emphasis in original).
The Supreme Court was viewed as a part of this restraint, but, nonetheless, inherently as 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.

As a consequence of this view, Hamilton believed that it was necessary for the judiciary to remain "truly distinct from the Legislature and the Executive. For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" Id., quoting Montesquieu's Spirit of Laws. Thus, he concluded: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution." Id.

It was in recognition of the inherent 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 diminution 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.

The notion that the Exceptions Clause grants Congress plenary authority over the Supreme Court's appellate jurisdiction cannot easily be reconciled with these principles of separation of powers. If Congress had such authority, it could reduce the Supreme Court to a position of impotence in the tripartite constitutional scheme. The Court could be deprived of its ability to protect its core constitutional functions against the power of Congress. The salary and tenure protections so carefully crafted in Article III could be rendered virtually meaningless in light of the power of the Congress simply to eliminate appellate
jurisdiction altogether, or in those areas where the Court's decisions displeased the legislature. It is significant that while the Framers did not focus on the Exceptions Clause, they did point to the impeachment power as "a complete security against risks of "a series of deliberate usurpations on the authority of the legislature." Federalist No. 81.

In light of these basic considerations, it seems unlikely that the Framers intended the Exceptions Clause to empower Congress to impair the Supreme Court's core functions in the constitutional scheme. Even if some of the Framers could have intended this, it is improbable 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 such a deviation from the carefully crafted separation of powers mechanisms provided elsewhere in the Constitution was intended. Nor does it seem likely that the Convention would have developed the Exceptions Clause as a check on the Supreme Court in such a manner that an exercise of power under the Clause to remove Supreme Court appellate jurisdiction would not return authority to Congress, but vest it in the state courts instead. Hamilton regarded even the possibility of multiple courts of final jurisdiction as unacceptable.

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. Federalist No. 80.

Thus, unless there is sound and compelling evidence of a contrary interpretation in the decisions of the Supreme Court, or in the long-accepted historical practices regarding congressional control of Supreme Court jurisdiction, it must be concluded that the Exceptions Clause does not authorize Congress to interfere with the Court's core functions in our constitutional system.

III.

An examination of the Supreme Court's cases does not require any different interpretation. The Supreme Court has provided only inconclusive guidance on the meaning of the Exceptions Clause. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), the Court noted "the importance, and even the necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution." In the absence of the Supreme Court, Justice Story observed, "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; for it cannot be believed, that they could have escaped the enlightened convention which formed the Constitution.

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... [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils." Similar statements are found in the opinions of Chief Justice Marshall, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 415 (1821), and Chief Justice Taney, Ableman v. Booth, 62 U.S. (21 How.) 506, 517-18 (1858). 8/ Although these cases do not squarely address the question whether Congress could constitutionally deprive the Court of its core functions, the Court's language seems strong enough to cast considerable doubt, at least by implication, on the power of Congress to eliminate Supreme Court jurisdiction over cases in which a final, uniform and supreme voice is necessary in the guise of creating "exceptions" to that jurisdiction. In the words of Chief Justice Taney, the exercise of 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 [that] Government." Id.

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 The "Francis Wright," 105 U.S. 381, 386 (1881); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865); Burrousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810); United States v. More, 7 U.S. (3 Cranch) 159 (1805); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796). However, every one of these statements is dicta; the Court has never held that Congress has the power entirely to preclude the Court from exercising its core functions. It may also be doubted whether these broad statements are intended to cover cases in which such an extraordinary congressional 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.

8/ Cf. the famous statement of Justice Holmes:

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).
Proponents of the "plenary power" thesis rely most heavily on the only Supreme Court decision which could be characterized as upholding a power of Congress to divest the Court of jurisdiction over a class of constitutional cases: Ex parte McCordle, 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. 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." \textit{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." \textit{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 McCordle 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 ..." \textit{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 ..." \textit{Id.} at 103. Thus, within months of the McCordle decision, the Court made it clear that McCordle 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," \textit{id.} at 102, neither McCordle, nor Yerger, nor any other case, constitutes an authoritative statement that Congress could deprive the Court of its core functions.

Finally, the historical record regarding the authority actually asserted by Congress to control the Court's appellate jurisdiction supports, on balance, the construction that the Exceptions Clause does not authorize Congress to interfere with
the Court's core functions. 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. Although Supreme Court review over these cases may have been available in special circumstances, it is probably true that most 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 failure of Congress in the First Judiciary Act to provide the Court with the full appellate jurisdiction authorized under Article III does not undermine the conclusion that Congress cannot interfere with the Supreme Court's core functions, 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 striking down federal statutes or upholding state statutes against constitutional attack. 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 federal laws or striking down state laws, or over federal criminal cases, does not undercut the position that the Court cannot be divested of its ability to fulfill its essential responsibility under the Constitution. The supremacy of federal law, guaranteed by the Supreme Court, would not be seriously threatened by state court decisions upholding federal laws or striking down state laws on federal constitutional grounds.

Second, the history of Supreme Court appellate review has confirmed the importance of its core functions. 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. 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) (concurring opinion).
The gloss which life has written on the Supreme Court's jurisdiction
is one which protects the essential role of the Court in the
constitutional plan.

V.

As noted at the outset, Congress has substantial authority
over the jurisdiction and power of the inferior federal courts.
It also is given the power under Article III to regulate the
Supreme Court's appellate jurisdiction in circumstances which do
not threaten the core functions of the Court as an independent
branch in our system of separation of powers. Congress may, for
example, specify procedures for obtaining Supreme Court review
and impose other restraints on the Court. But the question of
the limits of Congress' authority under the Exceptions Clause is
an extraordinarily difficult one. Thoughtful and respected
authorities have come to conclusions which differ.

The legislative process itself is often important in assessing
not only the meaning but also the constitutionality of Congressional
enactments. The Court has stated that it must have "due regard
to the fact that this Court is not exercising a primary judgment
but is sitting in judgment upon those who also have taken the
oath to observe the Constitution and who have the responsibility
for carrying on government." Rostker v. Goldberg, 453 U.S. 57,
64 (1981).

If Congress considers the subject matter of S. 1742 it may
wish to do so in light of the principles enunciated above and
carefully weigh whether whatever action is taken would intrude
upon the essential functions of the Supreme Court as an indepen-
dent branch of government in our system of separation of powers.
As the Court has stated, "The customary deference accorded the
judgments of Congress is certainly appropriate when . . . .
Congress specifically considered the question of the Act's
constitutionality." Id. at 64.

Ultimately, it is for Congress to determine what laws to
enact and for the Executive Branch to "take care that the Laws be
faithfully executed." It is settled practice that the Department
of Justice must and will defend Acts of Congress except in the
rare case when the statute either infringes on the constitutional
power of the Executive or when prior precedent overwhelmingly
indicates that the statute is invalid. Accordingly, should the Department be called upon to defend the constitutionality of this bill before the courts, it responsibly could and would do so.

It is appropriate to note, however, that even if it were concluded that legislation in this area could be enacted consistent with the Constitution, the Department would have concerns as a policy matter about the withdrawal of a class of cases from the appellate jurisdiction of the Supreme Court. History counsels against depriving that Court of its general appellate jurisdiction over federal questions. Proposals of this kind have been advanced periodically, but have not been adopted since the Civil War. There are sound reasons that explain why Congress has exercised restraint in this area and not tested the limits of constitutional authority under the Exceptions Clause.

The integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions. The ultimate result of depriving the Supreme Court of jurisdiction over a class of cases would be that federal law would vary in its impact among the inferior courts. State courts could reach disparate conclusions on identical questions of federal law, and the Supreme Court would not be able to resolve the inevitable conflicts. There would also exist no guarantee through Supreme Court review that state courts accord appropriate supremacy to federal law when it conflicts with state enactments.

Sincerely,

William French Smith
Attorney General
6 MAY 1982

Honorable Peter W. Rodino
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your request concerning those portions of S. 951, the Senate-passed version of the Department of Justice appropriation authorization bill for Fiscal Year 1982, which relate to the mandatory transportation of school children to schools other than those closest to their homes ("busing"). One of these provisions relates to the remedial powers of the inferior courts and the other to the authority of the Department of Justice. This letter discusses the effect of these provisions as well as the policy and constitutional implications of the provisions as construed. The funding provisions of S. 951 will be addressed in a separate letter by the Assistant Attorney General of the Office of Legislative Affairs.

It is important to note at the outset that S. 951 does not withdraw jurisdiction from the Supreme Court or limit the jurisdiction of the federal courts to decide a class of cases. The provisions of the bill and its legislative history make clear that the effect of these provisions relate only to one aspect of the remedial power of the inferior federal courts -- not unlike the Norris-LaGuardia Act, enacted in 1932. Nor do the provisions limit the power of state courts or school officials to reassign students or require transportation to remedy unconstitutional segregation. Careful examination of these provisions indicates that they are constitutional.
I. Busing Provisions of S. 951

The first provision, § 2 of the bill, entitled the "Neighborhood School Act of 1982," recites five congressional findings to the effect that busing is an inadequate, expensive, energy-inefficient and undesirable remedy. It then states that, pursuant to Congress' power under Article III, § 1 and § 5 of the Fourteenth Amendment, "no court of the United States may order or issue any writ directly or indirectly ordering any student to be assigned or to be transported to a public school other than that which is closest to the student's residence unless" such assignment or transportation is voluntary or "reasonable". The bill declares that such assignment or transportation is not reasonable if

"(i) there are reasonable alternatives available which involve less time in travel, distance, danger, or inconvenience;

(ii) such assignment or transportation requires a student to cross a school district having the same grade level as that of the student;

(iii) such transportation plan or order or part thereof is likely to result in a greater degree of racial imbalance in the public school system than was in existence on the date of the order for such assignment or transportation plan or is likely to have a net harmful effect on the quality of education in the public school district;

(iv) the total actual daily time consumed in travel by schoolbus for any student exceeds thirty minutes unless such transportation is to and from a public school closest to the student's residence with a grade level identical to that of the student; or
(v) the total actual round trip distance traveled by schoolbus for any student exceeds 10 miles unless the actual round trip distance traveled by schoolbus is to and from the public school closest to the student's residence with a grade level identical to that of the student.

Section 2(f) of the bill adds a new subparagraph to § 407(a) of Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c-6(a), authorizing suits by the Attorney General to enforce rights guaranteed by the bill if he determines that a student has been required to attend or be transported to a school in violation of the bill and is otherwise unable to maintain appropriate legal proceedings to obtain relief. The bill is made "retroactive" in that its terms would apply to busing ordered by federal courts even if such order were entered prior to its effective date. Section 16 of the bill supplements these provisions by providing that "[n]otwithstanding any provision of this Act, the Department of Justice shall not be prevented from participating in any proceedings to remove or reduce the requirement of busing in existing court decrees or judgments."

The second provision, § 3(1)(D), limits the power of the Department of Justice to bring actions in which the Department would advocate busing as a remedy:

"No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest to the student's home, except for a student requiring special education as a result of being mentally or physically handicapped."
II. General Comments

There appear to be ambiguities in the Neighborhood School Act's provisions for suits to be brought by the Attorney General challenging existing decrees. For example, it is unclear what, if any, obligations are placed on the Attorney General with regard to court decrees that offend § 2. Since the bill does not purport to prevent any governmental entities other than federal courts from requiring the transportation of students, the Attorney General's review of a complaint must include the inquiry whether the transportation is the result of federal court action. It is difficult to determine the party against whom the action is to be brought. The assignment violates the Neighborhood School Act only if it is required by court order. Does the Attorney General sue the court? If so, then what relief is appropriate? Does the bill permit an action against a school board even though its actions are not the subject of the bill's prohibition? If a school board is the defendant, then what relief is appropriate? Does the Attorney General ask that the school board be enjoined from complying with the court order? Does he ask for a declaratory judgment of the board's obligations under the order? If the latter is the case and the board wishes to continue its present assignment patterns, what will have been accomplished by the lawsuit? These questions illustrate the problems incident to the provisions that allow for collateral attack on existing decrees.

Serious concern arises also because of the limitation on the Attorney General's discretion contained in § 3(1)(D). This Administration has repeatedly stated its objection to the use of busing to remedy unlawful segregation in public schools. See Testimony of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, Concerning Desegregation of Public Schools, October 16, 1981. The express limitation on the Department's authority is unnecessary and may inhibit the ability to present and advocate remedies which may be less intrusive and burdensome than those being urged on a court by other litigants. Moreover, because the limitation is imposed only in the Department's one-year authorization, there is no force to the argument that a statutory provision is necessary to ensure that successive Administrations will also carry out congressional intent. Finally, to the extent that Congress does intend to effect a long-term substantive change in the law, the proper vehicle would seem to be permanent substantive legislation, not an authorization bill which must be reviewed annually by Congress and which becomes more difficult to
enact and thus less efficient for its necessary purposes when it is encumbered by extraneous matters.

III. Constitutionality

A. Textual Interpretation of the Neighborhood School Act

The Neighborhood School Act restricts the power of inferior federal courts to issue remedial busing decrees where the transportation requirement would exceed specified limits of reasonableness. That it does not purport to limit the power of state courts or school boards is amply demonstrated by its text and by statements of its supporters. Senator Hatch, in a colloquy with Senator Johnston, stated that "this bill does not restrict in any way the authority of State courts to enforce the Constitution as they wish . . . ." 127 Cong. Rec. S 6648 (daily ed. June 22, 1981). On the day that the bill passed the Senate, Senator Johnston echoed these remarks:

If a school board wants to bus children all over its parish or all over its county, it is not prohibited from doing so by this amendment. Nor indeed would a state court if it undertook to order that busing. The legislation deals only with the power of the Federal courts . . . .


The impact of the Neighborhood School Act on the federal courts is also limited. It withdraws, in specified circumstances, a single remedy from the inferior federal courts. The substantial weight of the text and legislative history supports the proposition that the bill limits the remedial power only of the inferior federal courts, not the Supreme Court. There is strong textual support for this conclusion, because the bill recites that it is enacted pursuant to congressional power under Article III, § 1. Section 1 of Article III provides authority for limiting the jurisdiction and the powers of the inferior federal courts, not the Supreme Court. The source of congressional authority relative to the jurisdiction of the Supreme Court is the "Exceptions Clause," Article III, § 2, cl. 2. The conspicuous
and apparently intentional omission of that clause as a source of congressional authority to enact this measure strongly indicates that no restriction of the Supreme Court appellate jurisdiction was intended.

Moreover, there do not appear to be any direct statements in the legislative history to the effect that any restriction on the Supreme Court's jurisdiction was intended. To the contrary, there is an explicit colloquy between Senators Hatch and Johnston indicating that no restriction on Supreme Court jurisdiction was intended. In response to a question posed by Senator Mathias to Senator Johnston, Senator Hatch stated:

There is little controversy, in my opinion . . . that the constitutional power to establish and dismantle inferior federal courts has given Congress complete authority over their jurisdiction. This has been repeatedly recognized by the Supreme Court . . . .

This amendment would be only a slight modification of lower federal court jurisdiction. These inferior federal courts would no longer have the authority to use one remedy among many for a finding of a constitutional violation.

*   *   *

I would hasten to add that this bill does not, however, restrict in any way . . . the power of the Supreme Court to review State court proceedings and ensure full enforcement of constitutional guarantees.

In short, this is a very, very narrow amendment, it only withdraws a single remedy which Congress finds inappropriate from the lower Federal courts.

*   *   *

Mr. JOHNSTON. Mr. President, I thank the distinguished Senator from Utah for his exegesis on the legality, the power of Congress under Article III to restrict jurisdiction.

B. Legal Status of Transportation Remedies

In Brown v. Board of Education [II], 349 U.S. 294, 300 (1955), the Supreme Court held that federal courts must be guided by equitable principles in the design of judicial remedies for unlawful racial segregation in public school systems. Under those principles, as the Court has more recently explained, "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Milliken v. Bradley [I], 418 U.S. 717, 746 (1974). The Court has indicated that the principle that justifies judicial discretion to impose transportation remedies also implies a limitation on that discretion.

The judicial power to impose such remedies "may be exercised only on the basis of a constitutional violation," Swann v. Charlotte-Mecklenburg Board, 402 U.S. 1, 16 (1974), and "a federal court is required to tailor 'the scope of the remedy' which included the transportation of students to schools other than the ones which they had formerly attended, to fit 'the nature and the extent of the constitutional violation,'" Dayton Board of Education v. Brinkman [I], 433 U.S. 406, 420 (1977), quoting Milliken v. Bradley [I], supra at 744. In other words, reassignment of students and concomitant transportation of students to different schools is appropriate only when it is "indeed . . . remedial," Milliken v. Bradley [II], 433 U.S. 267, 280 (1977), that is, when it is aimed at making available to the victims of unlawful segregation a school system that is free of the taint of such segregation.

The Supreme Court has stated that circumstances might conceivably exist in which the imposition of a desegregation remedy which included the transportation of students to schools other than the ones which they had formerly attended would be unavoidable in order to vindicate constitutional rights. If school authorities have segregated public school students by race, they shoulder a constitutional obligation "to eliminate from the public schools all vestiges of state-imposed discrimination," Swann, supra, 402 U.S. at 15. The Court has said that if this duty cannot be fulfilled without the mandatory reassignment of students to different schools, with the concomitant requirement of student transportation, this remedy cannot be statutorily eliminated. In North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971), the Court overturned a North Carolina statute that proscribed the assignment of students to any school on the basis of race, "or for the purpose of creating a balance or ratio of race," and prohibited "involuntary" busing in violation of the statutory proscription. The Chief Justice, writing for a unanimous Court, concluded:
[I]f a State-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fail; state policy must give way when it operates to hinder vindication of constitutional rights.

* * *

We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio" will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As we noted in Swann, supra, at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it.

402 U.S. at 45-46.

Although the Court has indicated that some student transportation might be a necessary incident to a desegregation decree, it has never stated with particularity what those cases might be, nor has it identified the limitations on busing orders in cases where transportation is constitutionally required. In Swann v. Charlotte-Mecklenburg Board, supra, for example, the Court declined to provide "rigid guidelines" governing the appropriateness of busing remedies. It stated only that busing was to be limited by factors of time and distance which would "either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-31. Limits on time and distance would vary with many factors, "but probably with none more than the age of the students." Id. at 31.

C. Congressional Power Under Section 5 of the Fourteenth Amendment

In light of the Supreme Court's conclusion that student transportation might in some circumstances be a necessary feature of a remedial desegregation decree, it is necessary to consider whether the limitation on the power of the inferior federal courts under the Neighborhood School Act would be justified as an exercise of congressional authority under § 5 of the Fourteenth Amendment. Section D, infra, focuses on Congress' power under Article III, § 1, which is broader in this context than § 5.
Section 5 provides that Congress "shall have power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including the Equal Protection Clause, which has been held to guarantee all students a right to be free of intentional racial discrimination or segregation in schooling. Brown v. Board of Education [I], 347 U.S. 483 (1954). The question is whether congressional power to enforce that right by appropriate legislation includes authority to limit the power of the lower federal courts to award transportation remedies generally and specifically in those cases in which some transportation is necessary fully to vindicate constitutional rights.

The cases of Katzenbach v. Morgan, 384 U.S. 641 (1966), Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); and Fullilove v. Klutznick, 448 U.S. 448 (1980) (plurality opinion), firmly establish that the § 5 power is a broad one. Congress may enact statutes to prevent or to remedy situations which, on the basis of legislative facts, Congress determines to be violative of the Constitution. At the same time, these cases rather firmly establish that Congress is without power under § 5 to revise the Court's constitutional judgments if the effect of such revision is to "restrict, abrogate, or dilute" Fourteenth Amendment guarantees as recognized by the Supreme Court.

The limitation on busing remedies contained in the Neighborhood School Act would be authorized under § 5 to the extent that it does not prevent the inferior federal courts from adequately vindicating constitutional rights. The grant of power under § 5 to "enforce" the Fourteenth Amendment carries with it subordinate authority to determine specific methods by which that amendment is to be enforced. As an incident of its enforcement authority, therefore, Congress may instruct the lower federal courts not to order mandatory busing in excess of the § 2(d) limits, so long as the court retains adequate legal or equitable powers to remedy whatever constitutional violation may be found to exist in a given case.

Moreover, federal and state courts would probably pay considerable deference to the congressional factfinding upon which
the bill is ultimately based in determining the scope of constitutional requirements in this area. The Court has stated that, so long as it can "perceive a basis" for the congressional findings, Katzenbach v. Morgan, supra, 384 U.S. at 653, it will uphold a legislative determination that a situation exists which either directly violates the Constitution or which, unless corrected, will lead to a constitutional violation. Similar deference would be appropriate for findings under this bill, notwithstanding the somewhat limited hearings which were held and the absence of printed reports. It does not appear that any particularized research was presented to the Senate which might have supported or undermined the specific limitations on federal court decrees contained in § 2(d) of the bill. It is likely, however, that the time and distance limitations contained in § 2(d) of the bill would serve as legitimate benchmarks for federal and state courts in the future in devising appropriate decrees. To this extent, the exercise of congressional power under § 5 would be fully proper and effective.

Nor does it appear that the Neighborhood School Act would be interpreted to "dilute" Fourteenth Amendment rights merely because it denies a certain form of relief in the inferior federal courts or includes certain retroactivity provisions in §§ 2(f) and (g). Congress cannot, under § 5, prohibit a federal district court from granting a litigant all the relief that the Fourteenth Amendment requires. Moreover, the state courts would remain open to persons claiming unconstitutional segregation in education after this bill becomes law, and would be empowered -- indeed, required -- to provide constitutionally adequate relief.

Under § 5 Congress cannot impose mandatory restrictions on federal courts in a given case where the restriction would prevent them from fully remedying the constitutional violation. Congressional power to enforce the Fourteenth Amendment is not a power to determine the limits of constitutional rights. Although it includes the power to limit the equitable discretion of the lower federal courts to impose remedial measures which are not necessary to correct the constitutional violation, the courts must retain remedial authority sufficient to correct the violation. And although Congress can express its view through factfinding, but subject to the limitations set forth in § 2(d) of the bill, that busing is an ineffective
remedial tool and that extensive busing is not necessary to remedy a constitutional violation, it is ultimately the responsibility of the courts to determine, after giving due consideration to the congressional findings contained in this bill, whether in a given case an effective remedy requires the use of mandatory busing in excess of the limitations set forth in § 2(d) of the bill.

In sum, Congress, pursuant to § 5, can: (1) limit the authority of federal district courts to require student transportation where it is not required by the Constitution; and (2) adopt guidelines, based on legislative factfinding, as to when busing is effective to remedy the violation, which guidelines will tend to receive substantial deference from the courts. Section 5 does not, however, authorize Congress to preclude the inferior federal courts from ordering mandatory busing when, in the judgment of the courts, such busing is necessary to remedy a constitutional violation. This authority must be found, if at all, in the power of Congress under Article III, § 1 to restrict the jurisdiction of the lower federal courts.

D. Congressional Power Under Article III, § 1

Congress' authority to limit the equitable powers of the inferior federal courts has been repeatedly recognized by the Supreme Court. Article III, § 1 of the Constitution provides that "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." See also U.S. Const., Art. 1, § 8, cl. 9 (giving Congress power to "constitute Tribunals inferior to the supreme Court"). It seems a necessary inference from the express decision of the Framers that the creation of inferior courts was to rest in the discretion of Congress that, once created, the scope of the court's jurisdiction was also discretionary. The view that, generally speaking, Congress has very broad control over the inferior federal court jurisdiction was accepted by the Supreme Court in Cary v. Curtis, 44 U.S. (3 How.) 236 (1845), and Sheldon v. Hill, 49 U.S. (8 How.) 441 (1850). That view remains firmly established today.

Congress' power over jurisdiction has been further recognized, most notably in cases under the Norris-LaGuardia
Act, to include substantial power to limit the remedies available in the inferior federal courts. In Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), the Court upheld provisions of the Norris-LaGuardia Act which imposed restrictions on federal court jurisdiction to issue restraining orders or injunctions in cases growing out of labor disputes. In two cases under the Emergency Price Control Act, the Supreme Court recognized the power of Congress to withdraw certain cases from the jurisdiction of the inferior federal courts and to prohibit any court from issuing temporary stays or injunctions. See Lockerty v. Phillips, 319 U.S. 182 (1943); Yakus v. United States, 321 U.S. 414 (1944).

The provisions of the Neighborhood School Act appear to be firmly grounded in Congress' Article III, § 1 power, as interpreted in Lauf, Lockerty, and Yakus, to control the inferior federal court jurisdiction. The bill does not represent an attempt by Congress to use its power to limit jurisdiction as a disguise for usurping the exercise of judicial power. The bill does not instruct the inferior federal courts how to decide issues of fact in pending cases. See United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

Nor does the bill usurp the judicial function by depriving the inferior federal courts of their power to issue any remedy at all. The bill does not withdraw the authority of inferior federal courts to hear desegregation cases or to issue busing decrees, so long as they comport with the limitations in § 2(d) of the bill. This limited effect on the court's remedial power does not convert the judicial power -- to hear and decide particular cases and to grant relief -- into the essentially legislative function of deciding cases without any power to issue relief affecting individual legal rights or obligations in specific cases. Whatever implicit limitations on Congress' power to control jurisdiction might be contained in the principle of separation of powers, they are not exceeded by this bill, which does not withdraw all effective remedial power from the inferior federal courts.

Neither the text of the bill nor the legislative history appears to support the conclusion that the bill requires an automatic reversal of any outstanding court order that imposed a busing remedy beyond the limits specified in the bill. Such an attempt to exert direct control over a court order would raise constitutional problems associated with legislative revision of judgments. E.g., Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (on petition for mandamus). The "retroactive" effect is felt instead through a change in the substantive law, in this case the law of remedies, to be applied by courts in determining whether to impose or to
revise a busing remedy, coupled with the grant of authority to the Attorney General to seek relief on behalf of a student transported in violation of the Act. Upon the Attorney General's application, the court would itself determine whether the busing remedy was consistent with the Act. The bill, therefore, does no more than require the court to apply the law as it would then exist at the time of its decision in a "pending" case. See The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

The busing remedy is "pending" and not final to the extent that the court has retained jurisdiction over the case or the order is otherwise subject to modification by the court in the exercise of its equity jurisdiction. See United States v. Swift & Co., 286 U.S. 106, 114-15 (1932). Prior to or in the absence of relief by the court from a previously imposed busing order, the parties before the court would be required to continue to perform pursuant to the court's order. Cf. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

E. Constitutionality of § 3(1)(D)

Section 3(1)(D) of the bill prohibits the Department of Justice from using any appropriated funds to bring or maintain any action to require, directly or indirectly, virtually any busing of school children. The Department's authority to institute litigation under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, against segregated school systems would not be diminished. Nor would the federal courts, under this section, be limited in their power to remedy constitutional violations. The effect of § 3(1)(D) is only to prohibit the Department in the litigation in which it is involved from seeking, directly or indirectly, a busing remedy. If the language and legislative history of the bill, as finally enacted, support this interpretation, it would appear that § 3(1)(D) would be upheld despite the limitations that it would impose on the discretion currently possessed by the Executive Branch.

The limitation would restrict the litigating authority presently conferred upon the Department by Title IV to seek all necessary relief to vindicate the constitutional rights at stake. At least in cases that do not involve the use of federal funds by segregated school systems, the Executive's authority may be restricted to this limited extent. Because the restriction does not entirely preclude enforcement actions by the United States, § 3(1)(D) does not impermissibly limit the Executive's "inherent" authority to remedy constitutional violations, to the extent recognized in United States v.
Philadelphia, 644 F.2d 187 (3d Cir. 1980), or New York Times v. United States, 403 U.S. 713, 741-47 (1971)(Marshall, J., concurring). And because the restriction applies only to one remedy and does not preclude the Department from seeking other effective remedies or prevent the Executive from objecting to inadequate desegregation plans, § 3(1)(D) does not exceed the congressional power over the enforcement authority that is granted.

Where federal funds are provided, § 3(1)(D) would be constitutional if read to preserve the Government's ability to fulfill its Fifth Amendment obligations by initiating antidiscrimination suits, restricting only, and in a very limited fashion, the Department's participation, by seeking a busing order, in the remedial phase of such suits. The Department would be authorized to seek alternative remedies and to comment on the sufficiency of these alternatives. If the alternative remedies to busing are inadequate in a particular case to vindicate the rights at stake, the court would retain authority, subject, of course, to the Neighborhood School Act provisions, to order a transportation remedy. The Department could be asked to comment on the sufficiency of this remedy if ordered by the court.

Moreover, § 3(1)(D) would not appear to disable the Department of Justice from seeking a court order foreclosing the receipt of federal funding by schools in unconstitutionally segregated school systems in those cases, if any, where the court was prevented by the limits contained in the Neighborhood School Act from issuing an adequate remedy and the administrative agency was precluded from terminating federal funds. See Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980).

F. Due Process Clause

Finally, both the limitation on the courts under the Neighborhood School Act and on the Department of Justice under § 3(1)(D) should be upheld if challenged under the equal protection component of the Fifth Amendment's Due Process Clause, see Bolling v. Sharpe, 347 U.S. 497 (1954), as a deprivation of a judicial remedy from a racially identifiable group. These provisions neither create a racial classification nor evidence a discriminatory purpose. Absent either of these constitutional flaws, the provisions will be upheld if they are rationally related to a legitimate government purpose. See Harris v. McRae, 448 U.S. 297 (1980).
As the law has developed, the courts will review statutory
classifications according to a "strict scrutiny" standard
either if they create a racial or other "suspect" classification,
e.g., Hunter v. Erickson, 393 U.S. 385 (1969), or if they
reflect an invidious discriminatory purpose. E.g., Village
of Arlington Heights v. Washington Metropolitan Housing
Development Corp., 429 U.S. 252 (1977); Washington v. Davis,
(plurality opinion). Satisfaction of the strict scrutiny
standard requires a classification that is narrowly tailored
to achieve a compelling governmental interest. Neither
basis for invoking strict scrutiny appears to be applicable
here.

First, these provisions, unlike the provision found
unconstitutional in Hunter v. Erickson, supra, do not contain
a racial classification. Mandatory busing for the purpose
of achieving racial balance is only one of the circumstances
in which student transportation is placed off limits to
Justice Department suits or district court orders. The
proposals prohibit Justice Department suits or court orders
for the transportation of students specified distances or
away from the schools nearest their homes for any reason.
Moreover, a racial classification would not result even if
these provisions limited advocacy or ordering of mandatory
busing only to achieve racial integration. The issue of
what sorts of remedies the Justice Department should advocate
or the federal district courts should order simply does not
split the citizenry into discrete racial subgroups. Cf.
Personnel Administrator of Massachusetts v. Feeney, 442

Second, there appears to be no evidence of purposeful dis-
crimination. Whatever might be the arguable impact on racial
minorities, the legislative history to date contains no
suggestion of an invidious discriminatory purpose. To the
contrary, the sponsors and supporters of these measures
endorsed the decision in Brown v. Board of Education, 347 U.S.
483 (1954), and repeatedly stated their abhorrence of de jure
segregation in schooling. The proponents rest their support
of this legislation on the conclusion that busing has been
destructive not only of quality education for all students
but also of the goal of desegregation. Even the opponents
of the bill did not suggest that any invidious purpose was
present.
Accordingly, the bill will not be subject to review under the strict scrutiny standard. Instead, the bill will be reviewed, and upheld, under the principles of equal protection, if it is rationally related to a legitimate governmental purpose. This test is a highly deferential one. It is reasonably clear that the defects in busing noted by the proponents of the bill and discussed above would suffice to satisfy the minimum rationality standard. Moreover, the proponents of these provisions advanced other rationales to support the measure, including that mandatory busing is a excessive burden on the taxpayer; that it wastes scarce petroleum reserves; and that education is a local matter that should be administered on a local level. These reasons appear to be legitimate governmental purposes, and the busing restrictions appear to be rationally related to these purposes.

It should be noted in closing that these conclusions are predicated in substantial part on the legislative history of this bill to date. Subsequent history in the House or thereafter could well affect these views.

Sincerely,

William French Smith
Attorney General
TO: The Attorney General
FROM: John Roberts
RE: Supreme Court Jurisdiction

Attached are the two versions of introductory language which you requested yesterday. They are identical except for the last paragraph.
We have been asked for our views on the constitutionality of
S. 1742, a bill "to restore the right of voluntary prayer in
public schools and to promote the separation of powers." The
bill would divest the federal courts of jurisdiction over suits
challenging voluntary prayer in public schools or other public
places. It contains two principal provisions. The first, to be
added as 28 U.S.C. §1259, would deprive the Supreme Court of
jurisdiction to review "any case arising out of any State
statute, ordinance, rule, regulation, or part thereof, or arising
out of any act interpreting, applying, or enforcing a State
statute, ordinance, rule, or regulation, or part thereof, which
relates to voluntary prayers in public schools and public
buildings." The second provision, to be added as 28 U.S.C.
§1364, would withdraw the jurisdiction of the district courts
over any case in which the Supreme Court has been deprived of
jurisdiction under proposed §1259.

After careful consideration we have concluded that Congress
has the constitutional power to divest the lower federal courts
of jurisdiction over school prayer cases. Under Article III,
section 1 Congress has discretion whether to create lower federal
courts at all, and it follows that the jurisdiction of such
courts, once established, is also discretionary.

We conclude, on the other hand, that Congress does not have
the power to divest the Supreme Court of appellate jurisdiction
over school prayer cases. The appellate jurisdiction of the
Supreme Court is subject to "such exceptions . . . as the
Congress shall make," Article III, section 2, but a broad reading
of this clause authorizing Congress to divest the Supreme Court
of appellate jurisdiction over constitutional cases would
essentially eliminate the federal judicial branch as an
independent check on Congress. If Congress were permitted to
exercise the asserted authority over Supreme Court appellate
jurisdiction, the highest courts of the 50 states would become
the final arbiters of the federal Constitution in school prayer
cases. This could result in disparate readings of the same
constitutional provision in different states, with no final
federal judicial review to guarantee the supremacy and uniformity
of federal law. We find such a prospect very troublesome, and
are persuaded on balance that the Framers did not intend Congress
to have the power to bring about such a result. The question is
very close, however, with no definitive guidance from the Supreme
Court and with reputable scholars arguing both sides of the
issue. If Congress should pass S. 1742, therefore, the
Department of Justice, if called upon to do so, responsibly could
and would defend its constitutionality in the courts.
We have been asked for our views on the constitutionality of S. 1742, a bill "to restore the right of voluntary prayer in public schools and to promote the separation of powers." The bill would divest the federal courts of jurisdiction over suits challenging voluntary prayer in public schools or other public places. It contains two principal provisions. The first, to be added as 28 U.S.C. §1259, would deprive the Supreme Court of jurisdiction to review "any case arising out of any State statute, ordinance, rule, regulation, or part thereof, or arising out of any act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, or part thereof, which relates to voluntary prayers in public schools and public buildings." The second provision, to be added as 28 U.S.C. §1364, would withdraw the jurisdiction of the district courts over any case in which the Supreme Court has been deprived of jurisdiction under proposed §1259.

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We also conclude that Congress has the constitutional authority to divest the Supreme Court of appellate jurisdiction in school prayer cases. The constitutional provision authorizing Supreme Court appellate jurisdiction also specifies that the jurisdiction is subject to "such exceptions . . . as the Congress shall make." Article III, section 2. This clear and unequivocal language supports the congressional exercise of power over Supreme Court appellate jurisdiction in S. 1742. State laws and rules concerning prayer in public schools or other public buildings would still remain subject to judicial review in the state courts. While we are concerned about the possibility that these courts could reach disparate results on the same question of federal law, this prospect does not justify a departure from the express decision of the Framers to leave the scope of the federal judicial institution to the discretion of the Legislature.
April 13, 1982

TO: The Attorney General

FROM: John Roberts

RE: Supreme Court Jurisdiction

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4/16/82

Ken
John

This is a copy of my "rough outline" for the Attorney General's review in connection with the Opinion Letter on "Legislative Authority To Remove or Limit Supreme Ct. Jurisdiction.

Brad
Proposed Outline

Re: Legislative Initiatives Directed at Supreme Court Jurisdiction

I. Introduction

A. Acknowledge that there are currently pending in Congress over 20 bills designed to divest the Supreme Court (and in some instances, the lower federal courts) of jurisdiction to hear certain issues.

B. State that, in speaking to the constitutionality of such legislative proposals, it would be injudicious to address the issue in the context of any particular bill that is pending but has not passed either House. (Such bills will be debated and likely amended in a number of respects as they proceed through the legislative process. It would serve no useful purpose for the Attorney General to opine on the constitutionality of proposals before they have emerged in final form either in the House or Senate -- or preferably both).

C. At the same time, my opinion has been requested on the general constitutional question presented by the various legislative proposals, and this letter is in response to that (those) request(s).

D. Issue lends itself to no easy resolution. It has been the subject of extensive legal commentary, scholarly debate and thoughtful discussion both within and outside the profession. There are perhaps as many who endorse one side of the issue as the other.

E. It is, therefore, with an understandable measure of caution that the Attorney General enters the debate. In so doing, I have found it useful to the analysis of this complex issue to examine the question of constitutionality on two levels: first, legally in terms of the Courts' Article III powers; and second, from the public policy vantage point.
F. For the reasons that follow, my opinion is that Article III contains no absolute prohibition against Congress divesting the Supreme Court of appellate jurisdiction in discrete and particularized classes of cases where it has determined that there exists an overriding need to take such dramatic action. To say that Congress has such power, however, does not suggest an endorsement of the exercise that power. Fundamental policy considerations as integral to our Constitution as the provisions themselves counsel against Congress moving into this area unless absolutely necessary. Even then, there is reason to caution against legislating too broadly. The Exceptions Clause in Article III may well have inherent limitations that were intended to protect the Supreme Court's jurisdiction from wholesale assault, and there are in any event other constitutional provisions that cannot be ignored by Congress if it seeks to legislate in this area.

G. For present purposes, however, it is not necessary to resolve the outer limits of Congress' authority under the Constitution to restrict Supreme Court appellate jurisdiction. None of the bills currently under consideration seek to denude the Court of all, or even a substantial portion, of its appellate jurisdiction. Rather, the various efforts to legislate in this area are limited in scope and carefully tailored to discrete and well-defined issues. It is to that situation -- and that situation alone -- that this opinion is directed.
II. Constitutionality

A. The starting point in the analysis is with the language of Article III. At first blush, it is seemingly straightforward and assigns to Congress unfettered power to make "such Exceptions" to the Supreme Court's appellate jurisdiction as it deems appropriate. There are those who argue for a narrower interpretation of the Exceptions Clause, and some have suggested that it should be read as applying solely to the jurisdiction of lower federal courts. On balance, I cannot read the Exceptions Clause as having no application whatsoever to the Supreme Court's appellate jurisdiction. Moreover, whatever implicit limitation might be contained in use of the word "exception" (suggesting something less than total removal), it seems to me that the current bills under consideration would not overstep the bounds of permissible congressional authority to act in this area.

B. When one turns to the history of the Constitution, there are weighty arguments on both sides of the issue. [The opinion letter would undertake to summarize the differing positions in this regard.] Here again, I favor the position of those who argue that the Framers did not intend to insulate entirely from legislative redefinition the Supreme Court's appellate jurisdiction.

C. Interestingly, when one looks at the manner in which the Supreme Court has reacted to this issue, its response seems to reinforce the foregoing conclusion. In those instances where Congress has in fact enacted legislation that "cuts back on" Supreme Court jurisdiction in particularized fashion, the Court has declined to invalidate the legislation as unauthorized action. See Ex parte McCordle, 74 U.S. (7 Wall) 506 (1869); Ex parte Yerger, 75 U.S. (8 Wall) 85 (1869); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); And see J. Roberts memo discussing judicial response, et. pg. 8-13. This is not to suggest that the Court might not do so if Congress enacted a statute that cuts too deeply into the appellate jurisdiction of the Supreme Court. On that I express no opinion. But, Congress has not yet gone to such lengths, nor do the pending bills suggest that it is contemplating doing so.
III. Policy Considerations

A. Having concluded as a legal matter that the Constitution does not preclude Congress from imposing restraints on Supreme Court's appellate jurisdiction, at least to a limited extent, does not, in my view, end the matter. The issue is, as the foregoing discussion demonstrates, a terribly complex one. As tempting as it sometimes is for lawyers to discuss such matters in a legal vacuum, that is often ill-advised and can frequently lead to undesirable (and even unintended) results. Here, it would be a monumental mistake to take so cabined an approach.

B. The fact is that, as persuasive as is the legal argument upholding constitutionality where the legislation is carefully drawn and narrowly defined, the policy considerations counselling against such legislation seems to tilt the balance just as far in the other direction. Fidelity to the fundamental principle of Separation of Powers is alone a strong argument against Congress moving into this area. Other policy questions raising doubts as to the wisdom of such legislation relate to the interest in uniformity of judicial decision, the integrity of our system of federal law, the credibility of legislative action that bears the earmarks of retaliation for particular court decisions, and the long-term ramifications if a precedent is set that allows congressional intrusion on court jurisdiction, even if done on a piecemeal basis. [This list can, of course, be expanded and further developed].

C. These policy considerations are obviously not to be decided by the Attorney General; they are peculiarly within the province of the elected representatives of the people. As such, with respect to every bill pending in Congress that seeks to redefine the Supreme Court's jurisdiction, it is incumbent on every member of the House and Senate to assess fully
how much legislation will impact on our system of government in terms of the several policy considerations discussed above. It is not enough simply to conclude that a piece of legislation is constitutionally permissible under Article III. Congress has a higher threshold of inquiry. Before it enacts a statute it must, in addition, be satisfied that the legislation is sound public policy, that it is as wise as it is lawful. That is not a responsibility that can be avoided simply because the Attorney General has announced a position on the pure legal question.

IV. Conclusion

A. The constitutional question is indeed a close one, and in stating my position I am fully aware that many respected authorities have taken the other side of the issue. Perhaps the ultimate irony is that it will in all likelihood be the Supreme Court that finally resolves the debate. Before Congress takes legislative action that forces the issue to the courts, however, I personally would urge that the most serious attention be given to the weighty policy considerations at work any time that an effort is made to alter the delicate balance among the three branches of government. No branch should allow its zeal to correct perceived indiscretions of a sister branch to blind it to the overriding principle embedded in the Separation of Powers doctrine. Even where the raw power exists under Article III for Congress to trench on the authority of the Judiciary, history teaches that the strength and resiliency of our system of government resides not so much in the wholesale exercise of such power, but in our representatives' ability to show wise restraint. I can think of no more appropriate situation for heeding that lesson than where Congress is contemplating the removal of appellate jurisdiction of the Supreme Court.
October 28

Ted,

Attached is the memo that John Roberts has done on the Supreme Court jurisdiction issue. John attended the AEI session on this issue, as you may recall. At my suggestion, John has done an advocacy piece taking a particular position -- namely that Congress does have the power in question -- utilizing the points made during the AEI session and working in other resources. This, I hope, will help crystallize the issues further.

As John's piece makes clear, this does not purport to be an objective dispassionate treatment of the issue; to the contrary, I felt it important that we see on paper the strongest case that can be made by those who feel that, whatever the wisdom of the device, the Exceptions Clause can be used constitutionally by Congress to curb what are deemed to be judicial excesses.

This, I hope, will be of some help in the process.

Thanks.
MEMORANDUM

Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments

There are currently pending in Congress over twenty bills which would divest the Supreme Court (and, in most instances, lower federal courts as well) of jurisdiction to hear certain types of controversies, ranging from school prayer and desegregation cases to abortion cases. Proposals of this sort have been common place in Congress for at least thirty years, covering such diverse subject matter areas as subversive activities, S. 2646, 85th Cong., 2d Sess. (1958), reapportionment, H.R. 11926, 88th Cong., 2d Sess. (1964), and the admissibility of confessions, S. 917, 90th Cong., 2d Sess. (1968). None of the proposals prompted by specific Supreme Court decisions, however, have been enacted into law.

The Office of Legal Counsel has prepared an opinion concluding that such proposals are probably unconstitutional. Since that time, several developments have occurred which are worthy of review. Specifically, the question of the constitutionality of such proposals has been the subject of recent scholarly activity, particularly in the form of testimony before congressional committees and participation at a recent conference sponsored by the American Enterprise Institute for Public Policy Research. The theme of the A.E.I. Conference, chaired by Professor Gunther, was "Judicial Power in the United States: What are the Appropriate Constraints?" Most of the participants at the Conference recognized a serious problem in the current exercise of judicial power, epitomized in the lower courts by intrusive remedial orders and in the Supreme Court by what is broadly perceived to be the unprincipled jurisprudence of Roe v. Wade. The power of Congress to remove the jurisdiction of the lower federal courts over particular classes of cases in response to this problem was generally accepted; more importantly, a number of distinguished commentators recognized a similar power with respect to the appellate jurisdiction of the Supreme Court. Based on the A.E.I. Conference, congressional testimony, and earlier writings, the list of those who consider Congress to have the constitutional authority to divest the Supreme Court of appellate
jurisdiction over certain classes of cases includes Professors Wechsler, Mishkin, Bator, Scalia, Redish and Van Alstyne.

In light of the recent activity on the subject, Ken Starr recommended that a memorandum be prepared that marshals arguments in favor of Congress' power to control the appellate jurisdiction of the Supreme Court. Thus, in order to assist in the process of analysis, this memorandum is prepared from a standpoint of advocacy of congressional power over the Supreme Court's appellate jurisdiction; it does not purport to be an objective review of the issue, and should therefore not be viewed as such. The memorandum does not consider specific proposals but rather the general question of congressional power, particularly in light of the developments summarized above.

I.

The source of Congress' power to remove certain classes of cases from Supreme Court appellate review is found in Article III, Section 2, Clause 2:

"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 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." (Emphasis supplied).

The underscored language stands as a plenary grant of power to Congress to make exceptions to the appellate jurisdiction of the Supreme Court. The exceptions clause by its terms contains no limit; the power to make exceptions to the Court's appellate jurisdiction exists by virtue of the express language of the clause over questions of both law and fact.

This clear and unequivocal language is the strongest argument in favor of congressional power and the inevitable stumbling block for those who would read the clause in a more restricted fashion. The clause does not say that Congress may make such exceptions as do not impair the essential functions of the Supreme Court, see, e.g., Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 137 (1960), however those "essential functions" may be defined, nor does the clause grant the exception power only as to questions of fact, see, e.g., Berger, Congress v. The Supreme Court 285-296 (1969); Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962).

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As Professor Van Alstyne has put it:

"The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated, and hopefully, generally to be respected by Congress as a matter of enlightened policy once the power was granted, as it was, to the fullest extent. In short, the clause is complete exactly as it stands: the appellate jurisdiction of the Supreme Court is subject to such exceptions and under such regulations as the Congress shall make." Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 Ariz. L. Rev. 229, 260 (1973).

Professor Bator, although believing that withdrawal of Supreme Court appellate jurisdiction would violate the "spirit" of the Constitution and would be bad policy, nonetheless concluded that Congress did possess this power under the exceptions clause and that "the arguments which would place serious limits on the power of Congress to make exceptions are not persuasive." Hearings Before the Subcommittee on the Constitution of the Senate Judiciary Committee. His conclusion was based, in large part, on the plain language of the exceptions clause:

"The text of the Constitution provides that the appellate jurisdiction of the Supreme Court shall be subject to 'such exceptions, and under such Regulations as the Congress shall make'. This language plainly indicates that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the appellate jurisdiction, it has the authority to do so. If the Constitution means what it says, it means that Congress can make the state courts -- or, indeed, the lower federal courts -- the ultimate authority for the decision of any category of case to which the federal judicial power extends." Id.

Nor has the impact of the plain language been lost on members of Congress. As Senator Ervin noted during hearings on the exceptions clause, "I don't believe that the Founding Fathers could have found any simpler words or plainer words in the English language to say what they said, which was that the appellate jurisdiction of the Supreme Court is dependent entirely upon the will of Congress." Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 22 (1968).
This focus on the plain language of the exceptions clause is not a simplistic approach. The Framers were not inartful draftsmen and can be expected to have known how to express the more restricted interpretations advanced by modern commentators had such constructions in fact been intended. In this regard it is important to recognize that we are not considering a constitutional clause that is by its nature indeterminate and incapable of precise or fixed meaning, such as the due process clause or the prohibition on unreasonable searches and seizures.

II.

The history of the drafting and enactment of the exceptions clause is not particularly revealing and does not justify a departure from the plain meaning of the words. According to Professor Goebel, the exceptions clause "was not debated" by the Committee of Detail which drafted it or the whole Convention, Antecedents and Beginnings to 1801, in I History of the Supreme Court of the United States 240 (P. Freund, ed., 1971). Nonetheless, several commentators have sought to limit its scope by arguing that it was included for the sole purpose of permitting Congress to prohibit the Supreme Court from reviewing jury determinations of fact. See, e.g., Berger, Congress v. The Supreme Court (1969); Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962). The primary support for this argument is found in the ratification debates. Opponents of ratification criticized Supreme Court appellate jurisdiction "both as to law and fact" on the ground that it would permit the Court to violate the right to jury trial by reviewing questions of fact determined by a jury. As Luther Martin argued:

"The proposed Constitution . . . by its appellate jurisdiction, absolutely takes away that inestimable privilege [trial by jury]; since it expressly declares that the Supreme Court shall have appellate jurisdiction both as to law and fact . . . The Supreme Court is to take up all questions of fact . . . to decide upon them as if they had never been tried by a jury." 3 Farrand 221.

In response, supporters of ratification pointed to the exceptions clause as providing Congress the authority to protect against this danger. Hamilton, in Federalist 81, noted that although appellate jurisdiction in the Supreme Court over questions of law had been generally accepted, there was a clamor against such jurisdiction over questions of fact. He answered:
"It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States all causes are tried in this mode; and such an exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security."

The argument is that the exceptions clause was designed simply to permit exception to Supreme Court appellate review of questions of fact, and that therefore Congress cannot invoke the authority of the clause in making exceptions to Supreme Court review of questions of law.

To the extent the argument focuses on opposition during the ratification debates to the specific language granting appellate jurisdiction "both as to law and fact," it encounters the serious difficulty that this language was added after the exceptions clause. As reported by the Committee of Detail, the clause in question simply provided "in all other cases before mentioned, it [Supreme Court jurisdiction] shall be appellate, with such exceptions, and under such regulations, as the legislature shall make." 5 Elliott 380 (1866). When this draft was being considered on the floor of the convention, Gouverneur Morris of Pennsylvania inquired whether the appellate jurisdiction was to extend to matters of fact as well as law. James Wilson, a member of the Committee of Detail, stated that the Committee intended that to be so. A motion by Dickinson of Delaware to insert the words "both as to law and fact" was made and adopted. See Merry, supra, at 58-59; Goebel, supra, at 243. In light of the chronology, therefore, it cannot be argued that the exceptions clause was designed to answer objections caused by the "both as to law and fact" language, since the exceptions clause antedated the objectionable language. As Professor Strong has concluded, "this sequence raises a presumption that the exception-regulations clause was originally included, and continued, for a purpose quite different from that of limiting the Supreme Court's appellate jurisdiction in fact as well as law." Strong, Prescription For A Nagging Constitutional Headache, 8 San Diego L.Rev. 246, 252 (1971).
It is of course true that it can still be maintained that the purpose of the clause was to permit Congress to restrict Supreme Court jurisdiction to review fact questions, since the appellate jurisdiction was intended to cover both law and fact questions even prior to the clarification amendment proposed by Dickinson. There is, however, no direct evidence that this was the purpose of the exceptions clause when it was drafted. The problem was not highlighted at that stage as it would be in the ratification debates, after the addition of the "both as to law and fact" language. Indeed, Judge Pendleton expressed his wish during the Virginia ratification debates that the words "both as to law and fact" "had been buried in oblivion. If they had, it would have silenced the greatest objections against the section." 3 Elliott 519.

This suggests that the objection did not exist before the addition of the language, and that it therefore cannot explain the need for the exceptions clause. See also Goebel, supra, at 243 ("By one addition, a well-intentioned clarification of the scope of appellate authority, the convention unwittingly sowed seeds from which much trouble was soon to sprout"). (Emphasis supplied).

Proponents of ratification did point to the exceptions clause in response to criticisms that the Supreme Court possessed the power to violate the right to a jury trial by appellate review of questions of fact. It is a nonsequitur, however, to argue that the clause was therefore intended for this purpose alone. Even if the Framers were concerned about the vulnerability of jury determinations, the exceptions authority they provided went well beyond that particular problem. The fact that the clause provided a ready response to criticisms based on the right to a jury trial hardly supports the inference that it was intended to do nothing else. In this regard it is important to recognize that statements made by supporters of the Constitution concerning the exceptions clause, while perhaps directed to the problem of jury determinations of questions of fact, did not at all suggest a limited scope to Congress' power under the clause. As Professor Van Alstyne has put it, "the references . . . scarcely go so far as to suggest that that is all the clause would reach." Van Alstyne, supra, at 261 n. 99. See also Bator, Senate Hearings ("the evidence to support the proposition that the exceptions clause was to be reserved exclusively to issues of fact is weak"). For example, Hamilton noted that the clause would enable "the government to modify [appellate jurisdiction] in such a manner as will best answer the ends of public justice and security," and that appellate jurisdiction was "subject to any exceptions and regulations which may be thought advisable . . . " Federalist 81. Marshall himself discussed the exceptions clause in the following terms:
"What is the meaning of the term exception? Does it not mean an alteration or diminution? Congress is empowered to make exceptions to the appellate jurisdiction as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people." 3 Elliott 560.

As Governor Randolph of Virginia noted in connection with the exceptions clause, "it would be proper to refer here to anything that could be understood in the federal court. They [Congress] may except generally both as to law and fact, or they may except as to the law only, or fact only." 3 Elliott 572.

The most compelling argument against the Merry-Berger thesis is that the Judiciary Act of 1789, passed in the immediate wake of ratification and with the involvement of many of the Framers themselves, went far beyond fact questions in making exceptions to the appellate jurisdiction of the Supreme Court. Redish, Senate Hearings, 10. For example, the Supreme Court had no appellate jurisdiction over federal criminal cases, nor any jurisdiction over appeals from state courts in cases in which the state court struck down a state statute on federal constitutional grounds, or upheld the validity of a federal statute. As Chief Justice Marshall made clear in Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810), the failure explicitly to grant jurisdiction was an implicit exercise of the exceptions power. As noted, however, several of the implicit exceptions in the Judiciary Act of 1789 had nothing to do with excepting review of jury determinations of fact.

The Merry-Berger thesis is also difficult to reconcile with the existence of the Seventh Amendment. The Seventh Amendment provides, in part, that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The Seventh Amendment does everything that Professors Merry and Berger argue the exceptions clause was designed to permit Congress to do. It is difficult to see what happened in the short period between ratification of the Constitution and enactment of the Seventh Amendment that created a need for the Seventh Amendment if there was no such need at the time of ratification of the Constitution. Further, if the purpose of the exceptions clause was to protect jury determinations of fact, it is difficult to understand why the Framers did not take a direct approach as was soon done in the Seventh Amendment. Professor Berger is singularly unpersuasive in suggesting that the purpose of the Seventh Amendment was simply to make "doubly sure" of the protections already available through the exceptions clause. Berger, supra, at 288.
Finally, the language of the exceptions clause does not support an interpretation limiting the power to make exceptions to questions of fact. As Professor Redish has put it, "to construe the language of the Constitution to reach the conclusion that the clause modifies only the word 'fact' requires a most tortured, and probably impermissible, grammatical construction." Senate Hearings, 10.

III.

Judicial pronouncements on the exceptions clause also support Congress' power to divest the Supreme Court of appellate jurisdiction over certain classes of cases. Any discussion of case law in this area must begin with Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). McCardle, an unreconstructed Mississippi newspaper editor, was being held in the custody of United States marshals on the order of the military governor. He applied to the federal circuit court for habeas corpus relief, under the Habeas Corpus Act of 1867. This relief was denied, and McCardle thereupon appealed to the Supreme Court pursuant to the appellate review provisions of the Act of 1867. While the case was pending in the Supreme Court Congress enacted, over President Johnson's veto, an act which repealed the provisions of the Act of 1867 permitting an appeal to be taken to the Supreme Court. The legislative history of the repealer provision left no doubt that Congress' purpose was to prevent the Court from deciding the McCardle case and perhaps undermining the entire military reconstruction scheme. See Van Alstyne, supra, at 240-241.

A unanimous Court upheld the power of Congress to divest the Supreme Court of jurisdiction. The Court clearly based its decision on Congress' power under the exceptions clause. Chief Justice Chase began the opinion by recognizing that the appellate jurisdiction of the Court "is conferred 'with such exceptions and under such regulations as Congress shall make.'" 74 U.S., at 513. He noted that Congress, in explicitly conferring certain appellate jurisdiction, was considered to have implicitly excepted all other jurisdiction. In the McCardle case, however, Congress had not merely exercised its power to make exceptions to appellate jurisdiction by negative implication. It had done so expressly:

"The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the Act of 1867, affirming the appellate jurisdiction of this Court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception." Id., at 513-514.
Chief Justice Chase went on to note that the Court would not decline to recognize the effect of the repealer provision because of Congress' motive to avoid a possibly objectionable Supreme Court ruling on the merits. "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words." Id. at 514 (emphasis supplied). The opinion then concluded that the Court was without jurisdiction, and that "the only function remaining to the Court is that of announcing the fact and dismissing the cause." Id.

It is true, as has been pointed out by several commentators, that Ex parte McCordile did not involve a situation in which the Supreme Court was totally divested of jurisdiction over an entire class of cases. Jurisdiction remained over habeas corpus appeals under the Judiciary Act of 1789, as the Court soon made clear in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869). Indeed, if he had taken a different procedural route, McCordile himself could have had his case heard on the merits in the Supreme Court. This point was adverted to in the concluding paragraph of the McCordile opinion:

"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. The Act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the Act of 1867. It does not affect jurisdiction which was previously exercised." 74 U.S., at 515.

None of this, however, detracts from the force of the analysis employed in the McCordile opinion. The Court considered the exceptions power to be plainly at issue, as did counsel in the case, see 74 U.S., at 511, and gave broad, indeed unlimited scope to that power. As Professor Bator has put it, "It has often been pointed out that McCordile is special and distinguishable; nevertheless, the language of the Court in McCordile plainly proceeded on the assumption that Congress' power is plenary and this is the only Supreme Court opinion squarely on point." Senate Hearings.

It is important to recognize that the concluding paragraph in the McCordile opinion had nothing to do with any reservation on the part of the Court concerning the scope of the exceptions power. The source of the concern, as was soon made clear in the Yerger opinion, was rather with the suspension clause, Article I, Section 9, which provides "the privilege of the writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." The Court went out of its way to
note that it was not totally divested of appellate jurisdiction in McCordle not because such action would have been improper under the exceptions clause, but rather because it would have been unusual insofar as habeas corpus jurisdiction was concerned. As the Court stressed in Yerger:

"That this Court is one of the courts to which the power to issue writs of habeas corpus is expressly given by the [Judiciary Act of 1789] has never been questioned. It would have been, indeed, a remarkable anomaly if this Court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all, the highest courts of England, had been denied, under a Constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess." 75 U.S., at 96.

Indeed, far from diminishing the impact of McCordle, Yerger actually fortifies its conclusions concerning the plenary scope of the exceptions power. Yerger concluded that in passing the repealer provision in 1868 Congress affected only habeas corpus appeals under the 1867 Act, not those under the 1789 Act. At several points in the opinion, however, the Court noted that Congress had the power to do this if it desired. The Yerger court explicitly noted that "appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make." 75 U.S., at 98. The Court noted that it had appellate power to review habeas corpus cases under the Judiciary Act of 1789 and subsequent acts, "except in cases within some limitations of the jurisdiction by Congress." Id. The Court explicitly recognized the power of Congress to deprive it of jurisdiction in habeas corpus cases, not only those arising under the Act of 1867, but also those arising under the Act of 1789. "It is proper to add, that we are not aware of anything in any Act of Congress except the Act of 1868, which indicates any intention to withhold appellate jurisdiction in habeas corpus cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the Act of 1789. We agree that it is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this Court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ . . . These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction." Id., at 102-103 (emphasis supplied). Because of what it perceived to be the oddity of Congress depriving the Supreme Court of
habeas corpus jurisdiction, when the Constitution specifically provided that the writ should not be suspended except in exigent circumstances, the Court in *Yerger* adopted a rule of construction and on the basis of that rule declined to hold that Congress had totally divested it of appellate jurisdiction in habeas corpus cases. There was never any doubt in the opinion, however, concerning the power of Congress to do this if it so desired. That power had been clearly established in the *McCardle* opinion. The holding in *McCardle*, together with statements in *Yerger* concerning congressional power, clearly indicate that the Court accepted the proposition that Congress could, if it desired, totally divest the Supreme Court of appellate jurisdiction in habeas corpus cases.

*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), is often cited as undermining the apparent import of *McCardle*. *Klein*, however, is actually a red herring so far as the present question is concerned. The President had decreed that any former rebels who took an oath of loyalty could regain their property confiscated during the Civil War. Congress passed a statute providing that once the Court determined that such an oath was taken it was not to award the property but rather to dismiss the suit for want of jurisdiction. Once again, as in *Yerger*, the Court in its opinion recognized Congress' power under the exceptions clause:

"If it [the Act] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient." *Id.*, at 145.

The Court struck down the statute, however, because it did not simply make an exception to appellate jurisdiction, but rather permitted the Court to exercise jurisdiction only to achieve a certain result. The Act was unconstitutional because it granted the Court jurisdiction but then limited the Court's consideration of relevant law. As the Court noted, "the Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction." *Id.*, at 146. The result was that "the Court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." *Id.*, at 147. Nothing of the sort is involved in the question presently under consideration.
McCardle is simply the most prominent in a long and consistent line of judicial opinions reading the exceptions clause as meaning exactly what it says. As early as 1796 the Supreme Court recognized that its appellate jurisdiction was not automatically vested by the Constitution but rather depended upon congressional legislation. The opinions establishing this fundamental principle referred expressly to the exceptions power. The theory was that in explicitly granting jurisdiction short of the full scope of Article III, Congress was implicitly exercising its power to make exceptions to appellate jurisdiction as to those areas not expressly granted. In Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796), Chief Justice Ellsworth explained:

"The appellate jurisdiction is . . . qualified; in as much as it is given 'with such exceptions, and under such regulations, as Congress shall make.' Here then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."

Chief Justice Marshall also drew the connection between an implicit exercise of the exceptions power and the theory that appellate jurisdiction is dependent on congressional action in United States v. More, 7 U.S. (3 Cranch) 159, 173 (1805): "as the jurisdiction of the Court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described." The point was made even more explicit five years later, in Marshall's opinion for the Court in Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-314 (1810): "when the first legislature of the union proceeded to carry the third Article into effect, it must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court . . . ."

Under this established theory, Congress has exercised the exceptions power in a substantive fashion from the outset, since Congress has never granted the Supreme Court appellate jurisdiction over the full Article III judicial power. Four years before McCardle the Court recognized that "it is for Congress to determine how far, within the limits of the capacity of this Court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law," Daniels v. Railroad, 70 U.S. (3 Wall.) 250, 254 (1865), and in The Francis Wright, 105 U.S. 381, 386 (1881), Chief Justice Waite wrote for a unanimous Court that "not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while
others are not." The Chief Justice specifically referred to "that the power to except from -- take out of -- the jurisdiction, both as to law and fact" and noted that "the general power to regulate implies power to regulate in all things." As the Court concluded in *Colorado Central Consolidated Mining Co. v. Turck*, 150 U.S. 138, 141 (1893), "It has been held in an uninterrupted series of decisions that this Court exercises appellate jurisdiction only in accordance with the acts of Congress upon the subject." Again, it bears emphasis that the basis for this theory is the implicit exercise by Congress of its exceptions power when it makes a limited grant of jurisdiction.

There have been several judicial expressions recognizing the plenary nature of Congress' authority under the exceptions clause in more recent opinions. Dissenting on other grounds in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1948), Justice Frankfurter noted that "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is sub judice." Also dissenting on other grounds, Justice Rutledge noted in *Yakus v. United States*, 321 U.S. 414, 472-473 (1944), that "Congress has plenary power to confer or withhold appellate jurisdiction." In *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943), the Court stated that Congress could have declined to create any inferior federal courts, leaving litigants to the state courts, "with such appellate review by this Court as Congress might prescribe." (emphasis supplied). *Ex parte McCardle* was cited with approval in *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962), as were Hamilton's assurances in Federalist 80 to those who thought the federal judicial power too extensive that "the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove [any] . . . inconveniences." Id. Justice Douglas objected to the citation of *McCardle*, id., at 605, but his objection apparently was based simply on the sub judice aspect of that case, since in *Plast v. Cohen*, 392 U.S. 83, 109 (1968) he wrote that "as respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III. See *Ex parte McCardle . . . ." (concurring opinion).

IV.

Those opposed to recognizing the power of Congress under the exceptions clause argue that the Constitution requires that the Supreme Court be capable of insuring the uniformity and supremacy of federal law. If the Court were divested of its jurisdiction over certain classes of cases, it would be prevented from exercising these assertedly "essential functions" in those
areas. With no appellate review in the Supreme Court, state courts could refuse to uphold the supremacy of federal law, and reach different conclusions on identical questions of federal law. See Ratner, supra. The primary support for this argument is drawn from statements by the Framers and Supreme Court opinions in cases such as Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1806) and Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821).

In justifying the establishment of one Supreme Court, the Framers did indeed point to the virtues of uniformity and the need to secure the supremacy of federal law. Hamilton, for example, wrote that "if there are such things as political axioms, the propriety of the judicial power of the 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 having 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." Federalist No. 80. Rutledge noted that "the right of appeal to the supreme national tribunal" was sufficient "to secure the national rights and uniformity of judgments." 1 Farrand 124.

It is also true that the use of Supreme Court appellate jurisdiction as a means of securing the supremacy of federal law and uniformity in its interpretation figures as a prominent theme in significant Supreme Court cases. In Martin v. Hunter’s Lessee, Justice Story upheld the power of the Supreme Court to review state court decisions, noting that "the Constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." Story went on to note:

"A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself: if there were no revising authority controlling these jarring and discordant judgments, and harmonizing them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states."
Chief Justice Marshall reiterated these themes in Cohens v. Virginia. Noting that many state judges were dependent for their office and salary on the will of the legislature, Marshall reasoned: "when we observe the importance which the Constitution attaches to the independence of judges, we are less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of Congress." He also stated that "the 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." 19 U.S., at 387, 416.

The argument which is based on the foregoing statements, however, confuses a permissive grant of constitutional authority with a constitutional requirement. The question presented in Martin v. Hunter's Lessee and Cohens v. Virginia was whether Congress acted constitutionally when it conferred appellate jurisdiction on the Supreme Court over decisions of state courts in the Judiciary Act of 1789. The question was whether Congress could constitutionally provide for such review, not whether such review was required by the Constitution. Story and Marshall stressed the policy arguments concerning supremacy and uniformity which persuaded the Framers to permit Congress to provide for Supreme Court appellate review, and which also persuaded Congress in the Judiciary Act of 1789 to authorize such review. None of this suggests that such review is constitutionally required. That this is the proper reading of Martin v. Hunter's Lessee and Cohens v. Virginia is made clear by examination of the opinions, discussed above, which establish the principle that the Supreme Court's exercise of appellate jurisdiction is entirely dependent upon an act of Congress.

Indeed, in Martin v. Hunter's Lessee, Justice Story noted that the appellate jurisdiction of the Supreme Court was "subject . . . to such exceptions and regulations as Congress may prescribe." In the very next sentence he noted that the appellate jurisdiction was "therefore capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction." The appellate jurisdiction was "capable" of embracing every case in the Constitution, and did not simply do so, because of Congress' power to make exceptions to the appellate jurisdiction. Cohens v. Virginia considered as a separate point whether jurisdiction was conferred by the Judiciary Act of 1789. This clearly indicated that the Court did not consider such jurisdiction to be required by the Constitution, even in the pursuit of the identified goals of federal supremacy and uniformity in the interpretation of federal law. Rather the matter was one for Congress to decide on policy grounds, in light of these considerations.
Hamilton's Federalist No. 80, with its statements concerning supremacy and uniformity, also contained full recognition of the exceptions power. Indeed, the essay concluded with these words:

"From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences."

The removal of appellate jurisdiction from the Supreme Court does not, in any event, relieve courts from an obligation to respect the supremacy of federal law. Under Testa v. Katt, 330 U.S. 386 (1947), state courts cannot discriminate against the enforcement of federal rights. Under Article VI, state court judges are "bound by oath" to support the Constitution, including the supremacy clause. That Congress has available the stronger guarantee of supremacy and uniformity of vesting appellate jurisdiction in the Supreme Court does not mean that Congress is required to employ this device.

It is also significant to note that the Nation has in fact experienced and survived situations in which exceptions to Supreme Court appellate jurisdiction prevented that Court from guaranteeing uniformity in the interpretation of federal law. These exceptions were not limited to review of questions of fact, nor were they simply regulations of procedures. As Professor Gunther has put it, "They were not simply procedural matters as to when you file a case or how you prepare a case or how you raise the issues. I think they were of great substantive significance in the sense that a very large bulk of potential Supreme Court material did not get to the Supreme Court because of the congressional failure to vest the whole jurisdiction." Hearings, supra, at 17.

A leading illustration is the fact that, from the Judiciary Act of 1789 until the Act of December 23, 1914, 38 Stat. 790, the Supreme Court had no appellate jurisdiction of any kind over state court decisions interpreting the Federal Constitution and striking down state laws on the basis of the Federal Constitution. Thus, an interpretation of the Federal Constitution by a state Supreme Court, even if considered erroneous by
the United States Supreme Court, and even if in direct conflict with prior decisions of the highest courts of other states (or, for that matter, a prior decision of the United States Supreme Court), could not be reviewed. The United States Supreme Court could not guarantee uniformity in such cases.

This fact was clearly demonstrated in the early years of the 20th Century. In Ives v. South Buffalo Railroad Co., the highest court of the state of New York struck down the first American workmen's compensation law, finding it "a deprivation of liberty and property under the Federal and State Constitutions." 201 N.Y. 271, 294 (1911). Although the decision was roundly criticized as an outrage, and contrary to what the Supreme Court of the United States would have done, "under the existing appellate jurisdiction there was no way of reviewing the Ives result by the Supreme Court." Frankfurter and Landis, The Business of the Supreme Court 195 (1928). Later in 1911 the Supreme Court of Washington upheld the constitutionality of a statute similar to that which was struck down in Ives, State v. Clausen, 65 Wash. 156 (1911), and soon thereafter the New Jersey Supreme Court also upheld a workmen's compensation statute, Sexton v. Newark District Telegraph Co., 84 N.J. 85 (1915). The confusion over the impact of the Federal Due Process Clause on workmen's compensation laws led to reform of Supreme Court appellate jurisdiction. As the House Judiciary Committee reported, "The Fourteenth Amendment meant one thing on the east bank of the Hudson and the opposite thing on the west bank." H.R. Rep. 1222, 63d Congress, 3d Sess., serial number 6766, 2. It was not suggested that this state of affairs was unconstitutional, simply bad policy. It was remedied by the Act of 1914. See Frankfurter and Landis, supra, 192-198.

Throughout the 19th Century, the Supreme Court also interpreted the Judiciary Act of 1789 as withholding authority to review state court decisions upholding the validity of a federal statute. See, e.g., Baker v. Baldwin, 187 U.S. 61 (1902). This created a situation in which federal laws could be upheld in some jurisdictions, although struck down in others. Although the Court eventually abandoned this restrictive interpretation of the Judiciary Act, there was no suggestion that the prior interpretation was unconstitutional. Cf. Ratner, supra, at 185.

To take one more prominent illustration, until 1889 the Supreme Court could exercise no appellate jurisdiction over federal criminal cases. United States v. More, 7 U.S. (3 Cranch) 159 (1805). This made possible conflicts in the interpretation of federal criminal laws, conflicts which could not be resolved by resort to Supreme Court appellate review. Professor Ratner has argued that some review was
available, since there could be review upon a certificate of
division of opinion filed by the circuit court, and in habeas corpus cases. See Ratner, supra, at 195-196. Habeas corpus review, however, hardly covered the whole range of questions which could arise under the federal criminal laws, see Van Alstyne, supra, at 262 n. 103, and review through certificate of division of opinion by the circuit court was a slender reed on which to rest the "essential functions" of the Supreme Court. Indeed, it became the practice for a single judge to hold circuit court, and, barring a rather severe case of judicial schizophrenia, this restricted the availability of review through certificate of division of opinion. See Carroll v. United States, 354 U.S. 394, 401 n. 9 (1957). As Frankfurter and Landis put it:

"For a full hundred years there was no right of appeal to the Supreme Court in criminal cases. Until 1889 even issues of life or death could reach that Court only upon a certificate of division of opinion. As the practice became more prevalent for a single judge to hold circuit court (until in the '80's it became the rule rather than the exception), the finality of power of the single judge became particularly open to criticism in criminal cases." Frankfurter and Landis, supra, at 109.

Here again there was no suggestion that the lack of Supreme Court appellate review somehow unconstitutionally interfered with the essential functions of the Supreme Court. See Bator, Senate Hearings, at 36 ("For 100 years Federal criminal cases were not reviewable in the Supreme Court. That, of course, greatly prejudices the argument that the power to render uniform judgments is an essential fundamental of the constitutional plan").

At the Senate Hearings Professor Redish disposed of the "essential functions" argument in these terms:

"The major difficulty with the 'essential functions' theory, however, is that it finds no basis in either the language or history of the Constitution. Certainly the explicit wording of the provision says nothing about it, and the history of the 'Exceptions' Clause is not of significant assistance to those urging the 'essential functions' thesis. Therefore as attractive as the theory may seem as a matter of policy, it does not appear to find support in the Constitution. To turn the words of Professor Hart, one of the thesis' leading advocates, against him, '[w]hose Constitution are you talking about--Utopia's or ours?'"
It has been argued that uniformity in the interpretation of federal law, imposed through Supreme Court appellate review, may no longer constitute sound policy. Until the scope of the due process clause of the Fourteenth Amendment was expanded far beyond the intent of the Framers, protections against state as opposed to federal action varied depending on local circumstances. At the A.E.I. Conference, Professor Scalia pointed out that Congress could make exceptions to Supreme Court appellate review in those areas where uniformity was not necessarily desired. Non-uniformity and diversity depending on local conditions can be viewed as desirable goals, and the exceptions clause provides a possible means to that end. Scalia recognized that non-uniformity in the interpretation of federal law could be criticized as "sloppy", but asked: compared to what? Given the choice between non-uniformity and the uniform imposition of the judicial excesses embodied in Roe v. Wade, Scalia was prepared to choose the former alternative.

A general argument is made that permitting Congress to make exceptions to the Supreme Court's appellate jurisdiction would put Congress above the judicial branch and undermine the entire structure of checks and balances established by the Constitution. As Professor Bator has noted, however, "Arguments which derive from 'structural' notions are . . . weak, primarily because they are so vague particularly in the face of a text which is not at all vague." Senate Hearings. The structural arguments also overlook the fact that the exceptions clause itself is part of the structure of the Constitution:

"True, there is evidence that the Framers generally contemplated Supreme Court review of state court judgments. But they also contemplated Congressional regulation of this jurisdiction, and nothing in the 'structure of the document' serves in any powerful way to distinguish between regulations which are valid and those which are invalid." Id.

Professor Wechsler has criticized arguments that seek to limit the scope of the exceptions clause as themselves "antithetical to the plan of the Constitution for the courts -- which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power, or, stated differently, how far judicial jurisdiction should be left to the state courts . . . ." The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1005 (1965).

A short answer to the arguments that use of the exceptions power would undermine the system of checks and balances is that in divesting the Supreme Court of appellate jurisdiction, Congress is not attempting to dictate any particular result.
Other courts of competent jurisdiction, either lower federal courts or state courts, would still exist and have the capacity to declare acts of Congress unconstitutional. The state courts "are not free to refuse enforcement" of a federal right, Testa v. Katt, 330 U.S. 386, 394 (1947).

It is argued, however, that divesting the Supreme Court of jurisdiction over a particular class of cases would undermine the constitutional role of the Court as the ultimate arbiter of constitutional questions. The Constitution, however, does not accord such a role to the Court. The authority of the Court to interpret the Constitution derives from the necessity of its doing so in the course of discharging its judicial responsibility to decide those cases and controversies properly presented to it. As put in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803):

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. ... In some cases, then, the Constitution must be looked into by the judges." (Emphasis supplied).

If the necessity of interpreting the Constitution is removed, as it would be if the Court were divested of jurisdiction, the basis for the Court's role as final arbiter of the Constitution is removed. As Professor Wechsler has recognized:

"Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what Marbury v. Madison was all about." Wechsler, supra, at 1006.
Furthermore, the vision of a wholesale divesting of the Supreme Court's appellate jurisdiction is unfounded. Although many divestiture bills have been proposed, no bill which would have divested the Supreme Court of appellate jurisdiction in response to a decision of the Supreme Court has ever been enacted. There are serious institutional restraints which inhibit Congress' exercise of the exceptions power. See Van Alstyne, supra, at 289; Wechsler, supra, at 1006-1007. The vociferous opposition which has been raised to the more recent proposals bears witness to these institutional restraints. If Congress were to divest the Supreme Court of appellate jurisdiction, as contemplated by the bills pending in Congress, it would not undermine the entire system of judicial review. Rather, Congress would simply be exercising its "ample authority to make such exceptions" as are necessary to remove the "partial inconveniences" which have developed in the system. Hamilton, Federalist No. 80.

Those who truly believe that the exercise of this exceptions power threatens the system of checks and balances should pursue the remedy suggested by Justice Roberts, namely amendment of the Constitution to remove Congress' exceptions power. Roberts, Now Is The Time: Fortifying The Supreme Court's Independence, 35 ABA J. 1 (1949). The American Bar Association supported such an amendment, see 34 A.B.A. J. 1072-1073 (1948), and the Senate actually passed one, S.J. Res. 44, 83d Cong., 1st Sess. (1953), but it was tabled by the House. In light of the foregoing it is perhaps not unfair to criticize those who argue against the power of Congress under the exceptions clause as the ones who are circumventing the amendment process.

It has even been suggested that the existence of the exceptions power aids the Court in the discharge of its functions by securing the legitimacy of judicial review.

"Could it not be argued that, politically and psychologically, the legitimacy of judicial review is enormously buttressed by the continuing existence of Congressional power to curtail jurisdiction? That the continuing existence of this power, rather than being a threat to judicial independence, is one of its important (though subtle) bulwarks?" Hart and Wechsler, The Federal Courts and The Federal System 364 (2 ed. 1973).

Professor Bator reiterated this theme in his recent Senate testimony, stating that "a powerful case can be made that such a plenary power [to make exceptions to the appellate
jurisdiction of the Supreme court] may be essential to
making the institution of judicial review tolerable in a
democratic society."

Along the same lines Professor Mishkin, participating at the
A.E.I. Conference, recognized Congress' power under the exceptions
clause and argued that the clause served the "important purpose"
of providing a direct channel for expression of congressional
discontent with the activity of the judicial branch, even if
no legislation was ever actually enacted under the clause. He
had made this same point thirteen years earlier during the
hearings before Senator Ervin's subcommittee:

"When the Butler constitutional amendment was
proposed which would have taken constitutional
cases out of the exceptions clause, I opposed it
then on the ground that there ought to be the
opportunity for Congress to direct itself to ques-
tions of jurisdiction, indeed as a response to
Court decisions. . . . It would be a very, very
unusual set of circumstances -- I am not sure
there are any -- which would seem to me sufficient
to actually abrogate the jurisdiction, but the
possibility of it, and the existence of the power,
seem to me to be healthy parts of the system."
Senate Hearings, supra, at 202.

There would also be significant institutional restraints
preventing the Court from declaring a law divesting it of juris-
diction unconstitutional. As three justices pointed out
just last Term:

"The exercise of jurisdiction over a case which
Congress has provided shall terminate before
reaching this Court . . . is a serious matter.
The imperative that other branches of government
obey our duly-issued decrees is weakened whenever
we decline, for whatever reason other than the
exercise of our own constitutional duties, to
adhere to the decrees of Congress and the Execu-
tive." Jeffries v. Barksdale, 101 S. Ct. 3149,
3150 (1981)(Rehnquist, J., joined by Burger,
C.J., and Powell, J., dissenting from denial of
certiorari).

V.

Once the power of Congress to make substantive exceptions
to the appellate jurisdiction of the Supreme Court is recognized,
particular proposals must be considered to determine if they
comport with other constitutional protections. The exercise
by Congress of its power under the exceptions clause is as subject
to the due process clause, and the equal protection component
of the due process clause, as the exercise of any other constitutional grant of power. See Van Alstyne, supra, at 263-266. At the same time, however, the due process and equal protection constraints on the exercise of the exceptions power cannot be interpreted so stringently as to vitiate the clause and incorporate by the back door the more restricted constructions previously rejected. "If the exceptions clause meant to permit Congress to 'check' the court specifically in the exercise of substantive constitutional review, then the categorical exception of any group of cases made by Congress for that very reason cannot possibly be deemed offensive to the Fifth Amendment's equal protection concern: the exceptions clause itself would provide the source for the government's argument that that reason is both licit and compelling enough." Van Alstyne, supra, at 264 (emphasis in original).

The pending proposals to divest the Supreme Court of appellate jurisdiction do not seem to present a serious due process problem, since they all provide for at least some judicial forum, either the lower federal courts or state courts, to hear any claims. Due process does not require judicial review in a federal court or final review by the Supreme Court. See Hart, The Power of Congress To Limit The Jurisdiction of Federal Courts: An Exercise In Dialectic, 66 Harv. L. Rev. 1362, 1363-1364, 1401 (1953); Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("Congress could have declined to create any [inferior federal] courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe"); Yakus v. United States, 321 U.S. 414, 444 (1944) ("There is no constitutional requirement" that the "test of the validity of a regulation be made in one tribunal rather than another, so long as there is an opportunity for judicial review which satisfied the demands of due process"). As Professor Redish noted in his Senate testimony, "the Supreme Court has made clear that there is no due process right to any form of appellate review, and as long as some independent forum -- whether state or lower federal courts -- is available to review the constitutionality of federal legislation, the due process right is technically satisfied."

Equal protection challenges would seem to present the most serious hurdle for the pending bills to divest the Supreme Court of appellate jurisdiction. The argument would be that the bills in question classify in such a way as to affect fundamental rights, such as the right to an abortion, or classify on the basis of suspect criteria, such as race in the case of bills divesting the Supreme Court of appellate jurisdiction over school desegregation cases. Strict scrutiny would therefore be applied, demanding that the decision to "except" the specific classes of cases from Supreme Court appellate jurisdiction be closely related to the achievement of a compelling governmental purpose. It seems un-
likely that any of the bills could withstand this extremely heightened standard of review.

In response it should first be noted that not all of the pending bills affect fundamental rights or classify on the basis of suspect criteria. H.R. 2365 and H.R. 2791, for example, would divest all federal courts of jurisdiction to review claims of sex bias in the selective service system. There is no fundamental right to be drafted, nor is gender a suspect criterion calling for heightened judicial review. See Rostker v. Goldberg, 101 S. Ct. 2646 (1981). These bills would therefore be tested under more relaxed equal protection standards.

As to the other bills a strong argument against the application of strict scrutiny can be made by focusing on the nature of the classification the bills would make. For example, the bills to divest federal courts of jurisdiction in school desegregation cases do not classify on the basis of the suspect criteria of race. A bill that did would provide that the Supreme Court shall have no jurisdiction to hear cases brought by blacks. The pending school desegregation bills rather classify on the basis of the type of case involved, and although blacks are a "suspect class", school desegregation cases are not. The classification involved does not operate on the basis of race, and affects both black and white litigants. The point is clearest so far as exceptions to Supreme Court appellate jurisdiction are concerned. For example, if the highest court of a particular state were to rule in favor of a black group seeking school desegregation on the basis of the federal constitution, the school board or a white group could not, if one of the pending bills were enacted, obtain review in the Supreme Court. It is therefore difficult to see why that group whose cases are excepted from Supreme Court review -- a group which includes both black and white litigants, both those in favor of and opposed to any particular desegregation order -- are entitled to the extraordinary protection of strict scrutiny judicial review. The same is true of that aspect of the pending bills excluding such cases from the lower federal courts as well as from Supreme Court appellate review. Both whites and blacks and both those opposing and seeking relief alleged to promote desegregation sue in the federal courts, raising claims going both ways on the merits.

As to bills alleged to affect the exercise of a fundamental right, it can be argued that strict scrutiny should not be required simply because the bills classify on the basis of cases involving the exercise of such a right. Previous cases calling for strict equal protection scrutiny in the area of fundamental rights involved legislation directly burdening the exercise of the fundamental right. For example, in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966),
the requirement of payment of a poll tax before becoming eligible to vote was a direct restriction on the fundamental right to vote. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the one-year residency requirement before eligibility for welfare benefits directly penalized the fundamental right to travel. None of the pending bills concerning jurisdiction in abortion or school prayer cases directly burden the exercise of any fundamental rights. Once again the distinction between laws going to the merits and laws simply regulating jurisdiction to hear claims on the merits must be stressed.

Any proper application of fundamental rights equal protection analysis would have to be based on an asserted fundamental right of access to federal court, rather than any fundamental right to an abortion or the exercise of First Amendment freedoms. The pending bills would of course burden the "right" of access to federal court, although they do not burden the exercise of the right to an abortion or free speech. Access to federal court, however, has never been identified as a fundamental right. The fundamental right involved in this area is the right to due process, and that right can be satisfied by access to state courts.

VI.

Congress may derive additional authority in regulating Supreme Court appellate jurisdiction over Fourteenth Amendment cases by virtue of §5 of that Amendment. This provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." Congress could invoke the authority of this section in divesting the Supreme Court of appellate jurisdiction over specified Fourteenth Amendment claims and providing that such claims shall receive final enforcement in the state courts. As the Court noted in the *Katzenbach v. Morgan*, 384 U.S. 641 (1966), "section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." It is certainly within the broad scope of §5 for Congress to determine that in certain cases, such as abortion and school desegregation cases, the guarantees of due process and equal protection are more appropriately enforced by state courts.

The history of the Fourteenth Amendment strongly supports the authority of Congress to advance its view of the appropriate means of enforcing the guarantees of due process and equal protection under §5. The Fourteenth Amendment was drafted and passed in an atmosphere of great hostility to the Supreme Court.
Those who were triumphant in the Reconstruction Congress and drafted and passed the Civil War Amendments had suffered great defeats at the hands of the High Court in the Dred Scott and Fugitive Slave decisions. A court which would render such decisions was certainly not to be entrusted with securing the protections of the Thirteenth through Fifteenth Amendments. In the view of the Framers of the Civil War Amendments, therefore, Congress was to have primary responsibility for providing for the enforcement of the guarantees of due process and equal protection. See generally Berger, Government by Judiciary 222-223 (1977); Berger, Congressional Contraction of Federal Jurisdiction, 1980 Wis. L. Rev. 801.

It is of course true that the Supreme Court has long since assumed a dominant role in enforcing the Fourteenth Amendment. This does not, however, detract from the authority of Congress to enter the field under section 5 as originally contemplated. In Katzenbach v. Morgan, the Court upheld a congressional enactment striking down New York's English literacy requirement for voting because the Court could "perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause." This was so even though the Court itself had ruled in Lassiter v. North Hampton Election Board, 360 U.S. 45 (1959), that English literacy requirements did not violate the Equal Protection Clause. The activity of Congress in divesting the Supreme Court of appellate jurisdiction over certain Fourteenth Amendment claims is far less intrusive, since the legislation does not purport to "correct" previous Supreme Court decisions but simply provides a different final forum for resolution of the issues.

In Katzenbach v. Morgan, Justice Brennan, in response to Justice Harlan's criticism that the majority was giving Congress the power to define the substantive scope of the Fourteenth Amendment, declared that §5 gave Congress no authority to restrict, abrogate, or dilute the guarantees of the Fourteenth Amendment. This so-called ratchet theory, permitting Congress under §5 to expand but not contract the protections of the Fourteenth Amendment, has been roundly criticized by commentators. One commentator, for example, has argued that the ratchet theory "does not satisfactorily explain why Congress may move the due process and equal protection handle in only one direction." There is also "difficulty in determining the direction in which the handle is turning." Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975). See generally Buchanan, Katzenbach v. Morgan and Congressional Enforcement Power Under the Fourteenth Amendment: A Study In Conceptual Confusion, 17 Houston L. Rev. 69 (1979). Although
substantive legislation purporting to define the parameters of the Fourteenth Amendment may encounter difficulty with the ratchet theory, legislation simply governing court jurisdiction over Fourteenth Amendment claims, which is neutral on its face, cannot be said to contract the guarantees of the Fourteenth Amendment.

It should be noted that §5 of the Fourteenth Amendment can be considered to give Congress the power to divest the Supreme Court of appellate jurisdiction over Fourteenth Amendment claims even if Congress is considered to lack this power under Article III. It is not enough to argue that Article III and the structure of judicial review established by that Article prevents Congress from exercising such power. The Fourteenth Amendment, including §5, limits Article III. Cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)("the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . is necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment"). In this regard it is important to remember that the Framers of the Fourteenth Amendment intended it to be enforced primarily by Congress, and not the federal courts. Whatever validity "structural" arguments concerning the role of the federal judiciary may have in other contexts, these arguments are considerably weakened in the area of Fourteenth Amendment claims.

John Roberts
Special Assistant to
the Attorney General

cc: The Attorney General
Edward C. Schmults
Deputy Attorney General
Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel
Kenneth W. Starr
Counselor to the
Attorney General
December 14, 1981

TO: Attorney General
   Ted Olson
   Ken Starr
   John Roberts

FROM: Ed Schmult

Attached is a report by the Committee on Federal Legislation of the Association of the Bar of the City of New York entitled, "Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review." In Footnote 5 the following two sentences appear: "...The Reagan Administration, so far as we are aware, has not yet taken an official position. A Justice Department spokesman has said that the Justice Department 'will not be announcing' its position on the bills."

Attachment
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By the Committee on Judicial Legislation

Constitutional Review
Congress: The Trietal to Judicial Jurisdiction
Supreme Court Jurisdiction

Footnotes
OVER CONSTITUTIONAL CLAUSES

1. PENNING OUTLINES TO RESTRICT FEDERAL COURT TRANSDITION

III of the Constitution (p. 119, Part I). The Constitution grants power to the Federal Courts under Article III of the Constitution (p. 119, Part I) and the exercise of its power by the Federal Courts under Article III of the Constitution (p. 119, Part I) are subject to the restrictions imposed by the individual states on the exercise of such power.

Suffrage clause

The effect of the second sentence of the first paragraph of Article III of the Constitution is to provide a foundation for the exercise of the judicial power of the Federal Court under Article III of the Constitution.

Support measures

The effect of the second sentence of the first paragraph of Article III of the Constitution is to provide a foundation for the exercise of the judicial power of the Federal Court under Article III of the Constitution.

THE RECORD

We are not here to write the history of the Federal Court.

The Constitution of the United States (p. 119, Part I) does not grant the power of the Federal Court under Article III of the Constitution.

Support measures

The effect of the second sentence of the first paragraph of Article III of the Constitution is to provide a foundation for the exercise of the judicial power of the Federal Court under Article III of the Constitution.

Support measures

The effect of the second sentence of the first paragraph of Article III of the Constitution is to provide a foundation for the exercise of the judicial power of the Federal Court under Article III of the Constitution.
A. Prayer

"Voluntary prayer in public schools, compulsory prayer in public buildings," is the key to the Supreme Court's decision in the case of....

B. Abortion

The Supreme Court has held that certain types of cases involving abortion are not within the Court's jurisdiction. These cases are:....

The Court has also held that the Constitution guarantees the right to privacy, including the right to decide whether to have an abortion. However, the Court has not clearly defined the boundaries of this right. The Court has stated that, in general, the right to abortion is protected by the Constitution, but only in those cases where the state's interest in regulating abortion is not unduly burdensome. The Court has also held that, in cases where the state's interest in regulating abortion is unduly burdensome, the state's action may be struck down as unconstitutional.

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D. Final Proposal

The purpose is to delineate and clarify the specific parameters and procedures for the establishment and operation of the proposed court. The court will be structured to ensure that its jurisdiction and authority are clearly defined and that it operates within the framework of existing legal and constitutional provisions. Furthermore, it will be designed to address the unique challenges and circumstances encountered in the field of international law and jurisdiction.

The court will be composed of a panel of judges, appointed by the relevant international bodies, with expertise in international law and diplomacy. The judges will be responsible for interpreting and applying international law, and will be guided by the principles of fairness, impartiality, and due process. The court will be headquartered in a neutral location, with a mandate to hear cases from countries around the world.

The court will have jurisdiction over cases involving disputes between states, as well as cases involving international organizations. It will have the power to hear cases related to the interpretation and application of international treaties and agreements, and will be equipped to handle cases involving complex legal and factual issues.

The court will be empowered to issue binding decisions, which will be binding on the parties involved and will serve as a precedent for future cases. The court will also be responsible for the development of new legal instruments and guidelines to further develop the field of international law.

The court will operate independently of any political or governmental influence, and will be committed to upholding the principles of justice and fairness. The court will be guided by a code of conduct and ethical standards, ensuring that its decisions are impartial and just.

The final proposal for the establishment of the proposed court will be presented to the relevant international bodies for consideration, with a view to establishing a new mechanism for resolving international disputes and promoting international cooperation and stability.
11. The power of Congress to enact laws that affect the federal courts as an institution may be exercised in two ways. First, Congress may enact laws that create federal courts or modify their jurisdiction, powers, or procedures. Second, Congress may enact laws that affect the judicial officers of the federal courts, such as the Supreme Court justices, or the Congress itself may exercise control over the judiciary through its power of impeachment.

E. Review of State Court Decisions

H.R. 14 would deny to any court other than the Supreme Court the power to review state court decisions. This provision would be subject to a writ of certiorari by the Supreme Court, which would be subject to the judgment of the highest court of the United States or other court of competent jurisdiction.

F. Implementation

The implementation of this provision would require the federal courts to ensure that their decisions are consistent with the provisions of this act. The federal courts would be required to make decisions that are consistent with the provisions of this act and to ensure that their decisions are consistent with the decisions of the Supreme Court. The federal courts would also be required to ensure that their decisions are consistent with the decisions of the federal courts of appeals and the district courts.

G. Conclusion

This provision is necessary to ensure that the federal courts are consistent with the provisions of this act and to ensure that the federal courts are consistent with the decisions of the Supreme Court. The federal courts would be required to make decisions that are consistent with the provisions of this act and to ensure that their decisions are consistent with the decisions of the federal courts of appeals and the district courts.

H. Jurisdiction

This provision would give the federal courts the power to review state court decisions. This provision would be subject to a writ of certiorari by the Supreme Court, which would be subject to the judgment of the highest court of the United States or other court of competent jurisdiction.

I. Enforcement

The enforcement of this provision would require the federal courts to ensure that their decisions are consistent with the provisions of this act and to ensure that their decisions are consistent with the decisions of the Supreme Court. The federal courts would also be required to ensure that their decisions are consistent with the decisions of the federal courts of appeals and the district courts.

J. Conclusion

This provision is necessary to ensure that the federal courts are consistent with the provisions of this act and to ensure that the federal courts are consistent with the decisions of the Supreme Court. The federal courts would be required to make decisions that are consistent with the provisions of this act and to ensure that their decisions are consistent with the decisions of the federal courts of appeals and the district courts.
J. A dual review and the separation of powers

A fundamental and enduring principle of our Constitution is the separation of powers. The Constitution was drafted in the wake of the American Revolution to establish a government that would be as different as possible from the British system. The three branches of government—executive, legislative, and judicial—were each given distinct responsibilities and powers to prevent any one branch from becoming too powerful and oppressive. The Framers believed that a balanced system of government would promote liberty and limit the potential for tyranny.

The Framers designed the Constitution to ensure that no one branch could dominate the others. The President, as head of the executive branch, is elected separately from the Congress, which is elected by the people. The Supreme Court, as the ultimate interpreter of the Constitution, is appointed by the President and confirmed by the Senate. This separation of powers is intended to prevent any one branch from becoming too powerful and to ensure that the Constitution is protected from any one branch that might seek to expand its power.

The separation of powers is also evident in the structure of the government. The President is responsible for enforcing the laws, while Congress is responsible for making the laws. The Supreme Court reviews the actions of both the President and Congress to ensure that they are consistent with the Constitution. This system of checks and balances is intended to prevent any one branch from becoming too powerful and to ensure that the Constitution is protected from any one branch that might seek to expand its power.

The separation of powers is not just a theoretical concept; it is reflected in the actions of the government on a daily basis. The President, for example, is responsible for enforcing the laws, while Congress is responsible for making the laws. The Supreme Court reviews the actions of both the President and Congress to ensure that they are consistent with the Constitution. This system of checks and balances is intended to prevent any one branch from becoming too powerful and to ensure that the Constitution is protected from any one branch that might seek to expand its power.

The separation of powers is a fundamental principle of our Constitution that is intended to prevent any one branch from becoming too powerful and to ensure that the Constitution is protected from any one branch that might seek to expand its power. It is a system of checks and balances that is designed to promote liberty and limit the potential for tyranny.

The separation of powers is a fundamental principle of our Constitution that is intended to prevent any one branch from becoming too powerful and to ensure that the Constitution is protected from any one branch that might seek to expand its power. It is a system of checks and balances that is designed to promote liberty and limit the potential for tyranny.
In the context of judicial review, the Supreme Court is constrained by the necessary independence of the federal judiciary. To that end, the Court's jurisdiction, as defined by the Constitution, is limited to cases in which one party is a state and the other party is a person, firm, or corporation. This limitation ensures that the Court's decisions are not influenced by political considerations and that it remains an impartial arbiter of the law.

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whether there are any conflicts between the Constitution of Federal Law. in
section, the Supreme Court, which may be observed against the
through the express power, Congress has passed an enabling
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Simultaneously, Justice Frankfurter, while a professor of law at Harvard University, expressed his views on the role of the press in the protection of individual rights in his book "The Federalist Papers." He argued that the freedom of the press is essential to safeguard the rights and liberties of individuals under the Constitution.

The Supreme Court has acknowledged the importance of the press in protecting individual rights. In the case of "New York Times Co. v. United States," the Court held that the press has a constitutional right to publish information, even if it may be critical of the government. This right is crucial in ensuring a free and open society.

The Court has made it clear that the press has a responsibility to report accurately and fairly on matters of public concern. It has also recognized the importance of the press in holding the government accountable for its actions. As Justice Brandeis noted in "The Right to Know," the press is the "fourth estate" and its role is vital in safeguarding the public interest.

In conclusion, the protection of individual rights is vital to the health of a democracy. The freedom of the press is a cornerstone of this protection, and it is essential that the government respect this right and not restrict it unnecessarily.

And as Justice Frankfurter wrote much earlier:

"The press is the great national self-correcting mechanism, the self-appointed and self-constituted guardian of the public interest and public morality who exercises upon the public its influence as the conscience of the country."

The protection of individual rights is a constant struggle, and the press plays a critical role in that fight. As Justice Brandeis said so eloquently, "Without the press, no government can be a true democracy."
The Constitution is a framework for government. It is the supreme law of the land, setting the limits of what the federal government can do and in whom it can act.

It does not grant or in any way affect the exercise of power in the States, but it guarantees the people of the United States certain fundamental rights and freedoms.
Correspondence Files of Ken
RG 60 Department of Justice
Acc. #60-88-0498 Box 6

In the Supreme Court of the United States

United States v. John Doe

Defendant

Argument:

The defendant raises several objections to the constitutionality of the statute. He argues that the statute is too vague and gives police officers too much discretion.

The government argues that the statute is clear and provides a fair and reasonable standard.

In our view, the statute is constitutional. It provides a clear and specific standard that will guide police officers in their discretion.

We therefore overrule the defendant's objection to the constitutionality of the statute.

**End of Argument**

The defendant's objection is overruled.
on the other hand, it is a matter of fact that the very existence
of the exception is thwarted by the action of the court.

The exception to the rule of exclusion of evidence is
not a mere technicality or a procedural nicety, but has
far-reaching consequences for the defendant.

The defendant is deprived of the opportunity to
cross-examine the witness, and this could lead to a
incorrect verdict. Therefore, the defendant has the
right to a fair trial, and the court must consider
whether the exception applies in this case.

The court must also consider the impact of excluding
evidence on the defendant's rights. If the evidence is
relevant and material, the defendant may be
prejudiced.

In conclusion, the court must weigh the interests of
equity and fairness against the public's right to a
fair and impartial trial. If the court determines that
the exception applies, the evidence will be excluded
from the trial.

[Further discussion on the implications of the
exception and the procedures for handling evidence]

[End of draft - additional content not shown]
and as Justice Douglas once observed, "Three to a section are not...
The power claimed in the present bill to alter the Supreme Court's jurisdiction was limited to decrying power, where number.

The present Court has already obtained information under the new law, a provision thereof, for that power, the Supreme Court's jurisdiction over fine cases with the exception was limited to Excise and Internal Revenue.

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THE RECORD

The Supreme Court has historically played a vital role in shaping constitutional law and doctrine. The Court's decisions have been instrumental in ensuring the uniformity of the federal courts' interpretation of federal laws. As a result, the Court's role in providing a uniform framework for the federal courts has been essential in maintaining the integrity of the judicial system.

In recent years, the Court has been faced with the challenge of interpreting the Constitution in the context of new technologies and social issues. The Court's decisions have often been the subject of intense debate and scrutiny, as they often have significant implications for individual rights and freedoms.

The Court's decisions have also played a crucial role in the development of federalism. The Court has been called upon to reconcile the powers of the federal and state governments, and its decisions have often been the subject of political and legal controversy.

In conclusion, the Supreme Court is an essential institution in the American legal system. Its decisions have a profound impact on the lives of all Americans, and its role in interpreting the Constitution will continue to be a central issue in American law for years to come.
We have already discussed how instrumental limitations of the
basic idea of separation of powers, which will impact our
analytical theory of government institutions, and how
these developments may affect the separation of powers in
practice. One important factor is the size of the
executive that we are dealing with. The larger the executive,
the more important our separation of powers. The smaller
the executive, the more important our separation of powers.
It seems to me that there are two possible solutions to
this problem. One is to create more executive agencies
and increase their responsibilities. The other is to reduce
the size of the executive and make it more effective.

(b) Scope of Constitutional Rights

The Constitution's protection of the
scope of constitutional rights is
more important than the separation
of powers, which is also important.
The Constitution guarantees the
right to freedom of speech, the
right to bear arms, and the right
to privacy. These rights are
protected by the Constitution, but
they can be overridden by the
executive. The executive can
claim that these rights are
necessary for national security.

In practice, the "right to privacy"
has been interpreted to mean the
right to keep certain things private.
In fact, there has been a debate
about whether the Constitution
protects the right to privacy.

In conclusion, the separation of
powers is important, but the
scope of constitutional rights is
more important. The two are not
mutually exclusive and can coexist.

The record

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CONCLUSION

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THE RECORD

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