U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

MEMORANDUM

September 2, 1986

TO:
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File

FROM:
Donald B. Ayer
Deputy Solicitor General

Lowell V. Sturgill, Jr. LVS
Attorney-Advisor

SUBJECT: Litigation Strategy Working Group

The Litigation Strategy Working Group will meet this Thursday, September 4, 1986 from 11:00 - 12:00 a.m. in the Lands Division Conference Room, Room 2603. At that time, we will continue our discussion of how the LSWG can take a more active role in looking for particular cases in which the Department can present the Administration's views concerning various subjects. In that regard, please find attached case profiles relating to separation of powers issues, contracts clause issues, and religious liberty issues.

As time permits, we will, as usual, take up other matters of interest to the group. Particular issues that we have discussed in the recent past include:

1. How the LSWG can promote the development and implementation of consistent approaches to issues such as the standards for preliminary relief.

2. Whether the Department should participate in alternative dispute resolution procedures, and, if so, under what conditions.

3. Whether the LSWG should look into developing proposed revisions to the rules of civil and criminal procedure that the Department could offer on its own initiative.

We look forward to seeing you on Thursday.

Attachments

cc: All Assistant Attorneys General (Litigating Divisions)

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

September 2, 1986

TO: Litigating Strategy Working Group

FROM: Donald B. Ayer DBA

RE: Possible Separation of Powers Issues

I. Challenges to Executive Powers

1. Appointment Power

   Federal Open Market Committee

2. Removal Power over executive appointees

   Ticor

3. Pardon Power

4. Delegated Administrative Legislative Authority

5. Veto Power

   INS v. Chadha

   Burke v. Barnes

6. Military Powers and related emergency powers

7. Exclusive power to execute laws

   Bowsher v. Synar

8. Executive privilege

9. Power to enter into executive agreements (as distinct from treaties requiring consent of 2/3 of Senate) -- And disposition to executive discretion in foreign affairs and national security matters

American Cetaecean Society

Dames & Moore v. Regan, 453 U.S. 654 (1981)

II. Judicial Usurpation of Power

In general

1. Case or controversy
   a. Standing
   b. Advisory opinion vs. Declaratory Judgment
2. Judicial Activism re recognition of rights and liabilities, especially if constitutionally based, or involving refusal to give meaning to legislative enactments.

Against Executive Branch/United States

1. Sovereign immunity
2. Individual/immunity (Bivens)
3. Political questions
   a. Foreign relations
   b. Military management
   c. Approval of constitutional amendments
   d. Congressional membership

Against States (really primarily federalism issues)

1. Eleventh Amendment
2. State Court decisions -- S. Ct. review
   a. Exhaustion of state procedures
   b. Final question
   c. Federal question
3. Enjoining State Criminal Enforcement
4. Pending civil proceedings
5. Political questions

III. Interpretation of Legislative Powers

1. Commerce power
2. Taxing power
3. Military and war powers (See I, 6)
4. Investigatory power (See I, 8)
   a. Must be legitimate matter of legislative action
   b. Contempt power
5. Property power
   a. Competition with private business (Ashwander v. TVA, 297 U.S. 288 (1936)
6. Bankruptcy power
   a. Marathon Oil
7. Postal Power
8. Naturalization and Citizenship
9. Speech and debate immunity.

10. Eminent Domain (Implied)

11. Admiralty and Maritime Power (Implied)

    a. Jurisdiction defined by navigability.

U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

September 2, 1986

MEMORANDUM

TO: Litigation Strategy Working Group

FROM: John Harrison JH

SUBJECT: Contracts Clause Cases

We have discussed the usefulness of identifying the kinds of cases that, when they come to our attention, should be considered for amicus participation. I agreed to do some thinking about cases under the Contracts Clause. Since the Clause applies only to the States, its vindication will not require us to argue that any Act of Congress is unconstitutional.

Contracts Clause cases come in two broad categories: those involving alleged impairments of the obligation of contracts between individuals, and those where the State is impairing the obligation of one of its own contracts. The Clause most likely was designed with the former situation in mind, but the Court held in Dartmouth College that it likewise applies to the latter. Indeed, the contemporary wisdom is that statutes affecting contracts with the State are more suspect than those involving contracts between individuals. The State, it is argued, is more likely to be neutral when it is not a party.

Such a doctrine is especially ironic when applied to the Contracts Clause, the archetypal anti-rent-seeking constitutional provision. In my view, we should prefer cases involving private parties on both sides. The balder the redistribution, the better. In particular, situations where it is possible actually to trace the factional politics underlying the enactment will make it easier to deal with the suggestion that, although redistributional means have been adopted, they are being used to a public purpose. Landlord tenant laws where a tenant group has captured the local government might be appropriate.

Also, we should look for state or local laws that act on existing contracts. As long as we have to deal with Blaisdell, it is too early to do anything about Ogden v. Saunders. The best situation is one where we can tell a story about raw politics getting someone out of an otherwise binding (and not oppressive) contractual obligation.

Two classes of interest of the United States seem likely to arise. First, and probably best, is the case where we have an economic relation to the party who is challenging the state law. For example, legislation that aided the sub-contractor of a federal contractor would clearly implicate our commercial interest.

Second, there may be times when relief legislation applies to persons we regulate. For example, a State might alter the obligation between securities broker and buyer, or between toxic waste generators and transporters. Of course, in cases of this sort there also may be a preemption issue that could obscure the Contracts Clause challenge. Perhaps the best case would be one where Congress has specifically declined to preempt some class of state laws. There, our interests as a regulator would be affected but the State would be free to do anything that is consistent with the Constitution

These are preliminary thoughts. I am sure we can enrich and refine them substantially.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

September 2, 1986

MEMORANDUM

TO : Litigation Strategy Working Group

FROM: Michael A. Carvin DKF for MAC
Deputy Assistant Attorney General
Civil Rights Division

RE : Profiles of Religion Cases

The following are profiles of the kinds of cases in which the Department of Justice has a particular interest

1. Establishment Clause Cases:

   A. Government voluntarily chooses to accomodate religious needs in a manner that does not either discriminate among religions or coerce the exercise of religion.

      ° moment of silence statutes (i.e. May v. Cooperman (3rd Circuit) (pet. for cert. filed)

      ° Title VII cases - i.e. Amos (religious preference, religious exemption)

      ° Federal Chaplains in Military

      ° Funding cases - i.e. tuition tax credits, government aid to education

2. Free Exercise Clause Cases:

   A. Non-prohibitory Laws: Laws that burden, but do not either forbid or prevent the exercise of religion.

      ° anytime the government denies benefits to a religious claimant because the claimant cannot meet religiously neutral statutory requirements - i.e. Hobbie, Heckler v. Roy (Little Bird of the Snow-SSN issue)

B. Compelling State Interest Cases:

o Cases in which the government has a compelling state interest

- national defense/sovereignty (Goldman, sanctuary cases)

- protection of property (Abeyta case: Lands Division)
- protection of physical health

° Cases in which there is no compelling state interest.

- general welfare regulations: post-elementary education - Wisconsin v. Yoder; sex discrimination, Rayburn case (pet. for cert. filed)

- oath cases (Gay Rights Coalition of Georgetown U. case

C. Government's prohibition of free exercise of religion is not the least religion-restrictive means of pursuing its interests.

° alternative readers in public schools (Mozart case - Nebraska)

° state laws requiring photographs on drivers licences for identification purposes (Qualing v. Peterson)

° state teacher certification and minimum curriculum requirements. (Isn't testing less restrictive and reasonably as effective?) Michigan case, Massachusetts case (Braintree Baptist Church).

° solicitation/proselytization laws which require identification badges etc. to prevent fraud (e.g. Scientology case in Clearwater, Florida) (Aren't criminal prosecutions less restrictive and reasonably as effective?)

3. Free Speech Clause Case:

A. Where government discriminates against religious speech based on its content -- Williamsport and Mergens (Mergens is a current case; U.S. is amicus in federal district court).