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Congressional Control of U. S. Supreme Court Jurisdiction

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SENATE BILL No. 2646 proposed in the Congress is unprecedented in scope.[1] If it is enacted the Supreme Court will be reduced to a virtual nullity.[2] Displeasure with recent decisions of the Court has engendered an attack upon its status which strikes at its vitals. This article is an analysis of the bill and the types of cases over which the Supreme Court would no longer have appellate jurisdiction.

Appellate Jurisdiction in General

> The Supreme Court shall have no jurisdiction to review, either by appeal, writ of certiorari, or otherwise, any case where there is drawn into question the validity of. . . .

The Supreme Court was brought into being by the judiciary article of the Constitution and is invested with judicial power only. But its appellate jurisdiction is conferred "with such exceptions and under such regulations as Congress shall make." [3]

Apparently the first time Congress withdrew appellate jurisdiction from the Supreme Court in order to prevent a decision on the constitutionality of a particular act occurred in *Ex parte McCardle*. William McCardle, a southern editor, was arrested under the Reconstruction Act of 1867 and was held under military custody. An appeal was made to the Supreme Court for writ of habeas corpus. The cause was argued but not decided when Congress, fearing that the Reconstruction Acts might be declared unconstitutional, enacted legislation in 1868 which withdrew from the Court jurisdiction on appeal on habeas corpus which had been granted in the act of 1867. In the decision of the Court, the following was stated:

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[1] S. 2646 was introduced in the 85th Congress, 1st Session, by Mr. Jenner in the Senate of the United States.

[2] Sutherland, the Supreme Court, 1956 Term, 71 Harv. L. Rev. 85 (1957); Fairman, the Supreme Court, 1955 Term, 70 Harv. L. Rev. 83 (1956).

[3] Article 3, Section 2, U. S. Constitution.

> . . . the appellate jurisdiction of this Court is not derived from acts of Congress. It is strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as the Congress shall make." [4]

Through the years, the Court has taken further cognizance of the authority of Congress to grant and withdraw appellate jurisdiction. In 1952, the Court held that "When a law conferring jurisdiction is repealed without any reservations of jurisdiction over pending cases, all pending cases fall with the law." [5] Since the Constitution places no limit to the "exceptions" and "regulations" that Congress may make, that body could constitutionally deprive the Supreme Court of all its appellate jurisdiction, leaving it only its meager original jurisdiction.

Appellate Jurisdiction and Congressional Committees

The proposed measure would not deprive the Court of all appellate jurisdiction but would withdraw such jurisdiction over an appreciable body of fundamental law where there is drawn into question the validity of:

> (1) function or purpose, of, or the jurisdiction of, any committee or sub-committee of the United States Congress, or any action or proceeding against a witness charged with contempt of Congress;

The sweep of this proviso is seen in *Watkins v. United States.*[6] In that case, petitioner was convicted, under an Act of Congress, for "contempt of Congress," when he refused to tell a committee whether or not he knew certain persons to have been members of the Communist Party in the past. Watkins refused to answer on the basis that the question was beyond the authority of the committee. The Act of Congress under which he was convicted defined a crime as the refusal to answer "any question pertinent to the question under inquiry."

The Supreme Court, in reversing the conviction, held that Congressional power to investigate is not unlimited and that there is no general authority to expose the private affairs of individuals without justification in terms of the function of Con-

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[4] Ex parte McCardle, 7 Wall. 506 (1869).

[5] Bruner v. United States, 343 U. S. 112 (1952). Also see, The Assessors v. Osborne, 9 Wall. 567, 575 (1870); The Francis Wright, N. Y., 105 U. S. 386 (1882); Federal Radio Commission v. General Electric Co., 281 U. S. 464 (1939).

[6] 354 U. S. 174 (1957).

gress. Elaborating further, the Court explained that in conducting investigations, Congress is not a law enforcement or trial agency, and no inquiry is an end in itself, but the quest must be related to, and in furtherance of, a legitimate task of Congress. The witness must have knowledge of the subject to which the interrogation is deemed pertinent and the questions must be put "with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."

Furthermore, the Court held that under a statute penalizing one for contempt of Congress, the Courts must accord to the defendant every right guaranteed in all other criminal offenses. The Bill of Rights is applicable to all forms of governmental action, and a witness before a committee cannot be compelled to give evidence against himself, and is not subject to unusual search and seizure. The freedoms of speech, press, religion, political belief, and association secured by the First Amendment cannot be abridged by any Congressional Committee.

By precluding review by the Supreme Court, uniformity of law pertaining to the issues in question would be unlikely, for there could be eleven different sets of decisions, one for each of the separate federal appellate judicial districts. This is the antithesis of the purpose for which the Supreme Court was created.[7]

Appellate Jurisdiction and Federal Employment

> (2) any action, function, or practice of, or the jurisdiction of, any officer or agency of the executive branch of the Federal Government in the administration of any program established pursuant to an Act of Congress or otherwise for the elimination from service as employees in the executive branch of individuals whose retention may impair the security of the United States Government;

Three cases graphically illustrate this section. In *Peters v. Hobby*,[8] the petitioner was employed as a special consultant in a federal agency. After having been cleared twice by the agency's own loyalty board, the Civil Service Commission's Loyalty Review Board, established pursuant to an Executive Order, acted on its own motion and stated that it had reasonable doubt as to the petitioner's loyalty, and notified him that he was barred from all federal service for a period of three years.

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[7] The Federalist No. LXXX, by Alexander Hamilton.

[8] 349 U. S. 331 (1955).

On appeal the Supreme Court announced that the actions of the Commission's Loyalty Review Board were invalid in that it was guilty of an unwarranted assumption of power. It had no authority to review rulings which had been favorable to employees or to adjudicate individual cases on its own motion. Although loyalty proceedings may not involve the imposition of criminal sanctions, the limitations on the Board's power to review adverse determinations is in keeping with the deeply rooted principle of criminal law that a verdict of guilty is appealable while a verdict of acquittal is not.

In addition, the above mentioned Loyalty Review Board did not comply with the rule established for itself which debars employees from "the competitive service" within three years after a final determination "that he is disqualified on loyalty grounds." The Commission's order extended to *all* federal employment and became effective *before* the agency had made "final determination." Finally, the court held that the petitioner was entitled to have all the proceedings expunged from the records of the Civil Service Commission.

Similarly, in *Service v. Dulles*[9] the Court ruled that even though the Secretary of State was authorized by statute to discharge employees in his absolute discretion, it was unlawful for the Secretary to discharge an employee contrary to his own regulation limiting his discretion. In this case the Secretary acted "solely as a result of the finding of disloyalty of the Loyalty Review Board and as a result of [his] review of the opinion of that Board," which was in contravention of the regulations he had issued relating to loyalty and security which authorized discharge only after "unfavorable action in the employee's case by the Department Loyalty Review Board." Inasmuch as this statute had been reenacted without change subsequent to the establishment of the Secretary's self-imposed regulations for discharge, the Court concluded that so long as the Regulations remained unchanged he could not lawfully proceed without regard to them. Consequently, regulations established by the Secretary are binding upon him as well as all covered by their terms.

By an act of Congress in 1950, heads of certain governmental agencies were given power of summary suspension and unreviewable dismissal over civil-service employees. This power was to be used "in the interest of national security" and to extend to "all other departments and agencies of the Government"

[9] 354 U. S. 128 (1957).

by Executive Order. In *Cole v. Young,*[10] petitioner was suspended on charges of close association with alleged Communists and allegedly subversive organizations. Subsequently, he was dismissed from employment on the basis that his employment was not "clearly consistent with the interests of national security."

All was resolved in the following questions: What is the relation between the position held and "national security"? What is the risk to "national security" that the employees' retention would create? Under the act "national security" was not defined, but the import of the term refers to security of the nation from subversion or aggression, and not to general welfare. Before the power of suspension or dismissal is operative the Government must show the position held as being one affecting "national security." Such relation not being established, the Government failed to prove its case and the ambiguity must be resolved in favor of the petitioner.

Appellate Jurisdiction and Subversion

> (3) any statute or executive regulation of any State the general purpose of which is to control subversive activities within such State;

The Commonwealth of Pennsylvania enacted its own Sedition Act. The United States Supreme Court in *Pennsylvania v. Nelson*[11] announced that the Federal Government had preempted the field by the Smith Act.[12] Defendant was arrested and convicted in Pennsylvania as a member of the Communist Party under the terms of the Pennsylvania Sedition Act. But the Supreme Court of Pennsylvania held that the state Sedition Act was superseded by the Smith Act of 1940, as amended in 1948, which prohibits the knowing advocacy of overthrow of the Government by force and violence.

The United States Supreme Court declared that the scheme of federal regulation was so pervasive as to make reasonable the inference that the Congress left no room for the states to supplement it. The federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same

[10] 351 U. S. 536 (1956).

[11] 350 U. S. 497 (1956).

[12] The Smith Act of 1940; Security Act of 1950; and, Communist Control Act of 1954.

subject. Moreover, enforcement must be initiated by federal officials and not by individuals in their private capacity. In addition sporadic enforcement is prevented and the law cannot be used for purposes of personal spite and hatred. The defense of the nation is national in scope, and security must not be undertaken by private and local groups.

At the time of hearing by the Supreme Court there were forty-two states, plus Alaska and Hawaii, with sedition laws, and these were not uniform. Some laws were without any safeguards for a defendant, some punished an individual for membership only, and there were conflicting rules of procedure which produced incompatible results.

If the forty-eight or forty-nine states and territories were permitted to have their own statutes on security there could be as many different enactments with rules for procedure and safeguards or the lack of them, as there are areas in addition to the federal law. There could be about 50 different sets of interpretations on this vital issue. The likelihood of uniformity of laws would be reduced to the minimum, making possible different and conflicting results. An additional danger would be present in the multiple punishments possible under the same set of circumstances.

Appellate Jurisdiction and Education

> (4) any rule, bylaw, or regulation adopted by a school board, board of education, board of trustees, or similar body, concerning subversive activities in its teaching body;

In *Wieman v. Updegraff*[13] the Court faced the following issue. The State of Oklahoma required a loyalty oath of all state officers and employees. Under the statute, the fact of membership in certain organizations alone was sufficient to disqualify one from employment. A professor of Oklahoma Agricultural and Mechanical College failed to take the oath in the time required and Updegraff brought a taxpayers' suit to prevent payment of wages to the professor. The legislation was attacked on the ground that it was a bill of attainder; that it was an *ex post facto* law; and, that it impaired the obligation of an employee's contract with the state and violated the Due Process Clause of the Fourteenth Amendment.

The Supreme Court held that the applicability of the act solely on the fact of membership in certain organizations was

[13] 344 U. S. 183 (1952).

unconstitutional. Membership could be innocent and the classification of innocent and guilty together was arbitrary. Consequently, a state, in attempting to bar disloyal individuals from its employment, solely on the basis of organizational membership, regardless of knowledge concerning the organization to which they had belonged, is prohibited by the Due Process Clause of the Fourteenth Amendment.

In *Slochower v. Board of Education*[14] an issue of equal interest was posed. According to the Charter of the City of New York, any employee of the city who utilized the privilege against self-incrimination to avoid questions relating to official conduct was subject to the following regulation: "His term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Plaintiff, an employee in Brooklyn College, invoked the privilege before hearings of the Internal Security Sub-Committee held in New York City. The Chairman of the Committee announced that the hearings were limited to "considerations affecting national security, which are directly within the purview and authority of the sub-committee." Plaintiff was willing to testify on matters of his association, or his beliefs since 1941, but not concerning his membership during 1940 and 1941. To do so, he affirmed, might tend to incriminate him. He declared that he was not a member of the Communist Party. Summary dismissal was the result of the plaintiff's action. While plaintiff argued that he was entitled to notice, and to a hearing with the opportunity to explain his actions, the New York courts held that notice was not required because the invocation of the Fifth Amendment was "equivalent to resignation."

The Supreme Court held that the provision in question was unconstitutional. The provision abridged a privilege or immunity of a citizen of the United States since it imposed a penalty on the exercise of a federally guaranteed right in a federal proceeding. Due Process was also violated in that the use of the Fifth Amendment was not a proper basis for a state to terminate employment.

Under this section of Senate Bill No. 2646, not only could there be different rules in each state for state regulated schools, but separate regulations for the various public and private

[14] 350 U. S. 551 (1956).

schools, colleges and universities. All of this with no appeal from the various state supreme courts.

Appellate Jurisdiction and Admission to the Bar

> (5) any law, rule or regulation of any State, or of any board of bar examiners, or similar body, or of any action or proceeding taken pursuant to any such law, rule, or regulation pertaining to the admission of persons to the practice of law within such State.

In *Konigsberg v. State Bar of California*[15] and *Schwarz v. Board of Examiners of New Mexico*,[16] the Supreme Court held that "the mere fact of . . . [a person's] past membership in the Communist Party . . . standing alone (and confronted by uncontradicted testimony of high moral character) is not an adequate basis for concluding that he is disloyal or a person of bad character" and that a State denial of admission to the bar based on a finding of bad moral character, resting on such evidence, is arbitrary and without rational support and violates the Due Process Clause of the Fourteenth Amendment.

In the New Mexico case, the State supported its refusal on the grounds that applicant had been a member of the Communist Party for several years before 1941, had used aliases, had been arrested in 1934 for suspicion of criminal syndicalism, and had been arrested and indicted in 1940 for recruiting for Spanish Loyalists. Upon examination, the Court found that applicant withheld no information from the Board of Bar Examiners but acted in the highest good faith in answering all questions and submitted unimpeached testimony as to his good character including a fine war record, good family, law school, and community relations. The aliases were used, declared the applicant, to avoid anti-Semitism in seeking employment.

Ruling upon these issues, the Court declared that neither the aliases and arrests of over 15 years past, nor the old membership in the Communist Party at a time when Communists were lawfully placed candidates on the ballot, constituted support for a current finding of bad moral character. Summarizing the law, the Court found as follows: "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment. A

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[15] 353 U. S. 252 (1957).

[16] 353 U. S. 232 (1957).

state can require high standards of qualifications, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of the State cannot exclude an applicant where there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

In the California case, the following facts prevailed. Konigsberg, although willing to state flatly that he did not and would not advocate the overthrow of the United States Government by force and violence, refused to answer questions put by the Committee of Bar Examiners concerning membership in the Communist Party, editorials, and beliefs, on the ground that to require such answers illegally intruded upon his constitutionally protected freedoms of speech, association, and belief. Finding that the State of California had not based Konigsberg's exclusion on his failure to answer, the Court proclaimed that the evidence in the record did not "support any reasonable doubts about Konigsberg's good character or his loyalty to the governments of State and Nation" which doubts had been made the only basis for California's denial of his admission to the bar.

The substance of both cases is that the practice of law is not a subject of a state's grace.

Conclusion

What is the ostensible purpose of this proposed legislation? It has been argued variously that there are three prime objectives to be attained. First, to reassert the authority of Congress over matters which have been regarded as its indisputable prerogative; second, to protect the constitutional status of other branches of the government; and, third, to protect the rights of the states from further encroachment by the federal government.

These positions are inapposite. There is no authority for Congress or the Executive to reassert. All branches of the federal government are subject to the limitations of the Constitution. Under American jurisprudence, litigation of necessity augments the role of the judiciary. Judicial interpretation has added to the expanse of Congressional as well as of Executive authority. And yet, the fountainhead of judicial review of acts of Congress arose when the Supreme Court refused to assume

jurisdiction over matters not conferred upon it by the Constitution but over which the Congress attempted to give it jurisdiction.[17] The Court has had to ascertain if Congressional, State, and Executive authority have evolved in conformity with principles proclaimed in the Constitution and by prior decisions of the Court. In *Gibbons v. Ogden*,[18] Chief Justice Marshall defined "regulate," "commerce," and "among," as taken from the interstate commerce clause,[19] with such scope as to encompass the enormous growth made possible for subsequent federal control over matters within states which involve interstate commerce. Here the Court enlarged these words in such a manner that Congress enhanced its surveillance to the present status. And, one might add, Congress accepted this position willingly, not by force. Similarly, the Executive has had its authority expanded, as in the use of troops to enforce federal law[20] and by judicial interpretation the same is true regarding the breadth of control over foreign affairs which resides in the Executive.[21]

Alexander Hamilton urged in *The Federalist*[22] that the judiciary was incontestably the weakest of the three departments of government. The judiciary has 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. Proceeding in this vein, Hamilton relates that it can never attack with success either of the other two departments of government; and that all possible care is requisite to enable it to defend itself against their attack.

As for the final argument, was not the American Revolution achieved in order to secure to the American people peace, liberty, and safety? Was not this the lesson adroitly stated by James Madison in *The Federalist?*[23] Indeed, Madison exclaimed that as far as the sovereignty of the states cannot be reconciled with the happiness of the people, let the former be sacrificed to the latter. Madison believed that the states would be more apt to disrupt the balance in the State-Federal relation than the reverse.

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[17] Marbury v. Madison, 1 Cranch 137 (1803).

[18] 9 Wheaton 1 (1824).

[19] Article I, Section 8, Clause 3, U. S. Constitution.

[20] G. H. Faust, The President's Use of Troops to Enforce Federal Law, 7 Clev.-Mar. L. R., 362 (1958).

[21] United States v. Curtiss-Wright Export Corporation, 299 U. S. 304 (1936).

[22] No. LXXVIII.

[23] No. XIV.

Underlining this, there are the constitutional guarantees of individual rights for the people of the United States and those subject to its laws. However, our Constitution only guarantees trial by jury[24] and not the right of appeal. Under the prevailing system of law, our system promotes uniformity of application of the law. This precept is denied under the proposed legislation. Furthermore, it is doubtful if the whole of the Bill of Rights, as well as the Due Process Clause of the Fourteenth Amendment and other constitutional safeguards, could be used as avenues of appeal to the Supreme Court under the types of cases contemplated within the proposed legislation.

[24] Article III, Section 2, and the Sixth Amendment, U. S. Constitution.