P.S. to the NEWS
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WITHDRAWING FEDERAL COURT JURISDICTION

The move to withdraw jurisdiction from all the federal courts may become a reality in the new Congress. The new conservative Democrat-Republican coalition will probably have the votes for this action which has failed so many times in the last decade.

Strenuous efforts have been made in recent years to withdraw jurisdiction from the federal courts on subjects on which the U.S. Supreme Court handed down highly unpopular decisions such as busing, pornography, internal security, or prayer in the public schools. Although those efforts failed, the issue that may spell success would be a Supreme Court decision on drafting women.

In 1972, the effort led by Senator Robert Griffin to withdraw jurisdiction on busing failed by only one vote. In 1980, the Jesse Helms Amendment to withdraw jurisdiction over prayer in public schools passed the Senate but failed to come to a vote in the House only through the legislative chicanery practiced by Speaker Tip O'Neill.

The Supreme Court ruled that abortions are legal, but it did not make you get an abortion. The Court ordered forced busing, but you can move your child to a private school. The Court unleashed the vilest pornography, but it did not make you read the smut. The Court banned prayer from public schools, but it cannot prohibit you from praying.

But the draft is a compulsory matter. If the Supreme Court rules that young women must be drafted any time men are drafted, then unwilling 19- and 20-year-old girls (or perhaps girls age 18 to 26) will be rounded up by federal marshals, forced into basic training, taught to kill, and sent into battle (or to jail as draft evaders).

If, in the now-pending case of Rostker v. Goldberg, the Supreme Court pretends to discover a new constitutional right of men -- the right not to be drafted into the armed services unless women are also drafted -- this issue will probably provide the margin in Congress to take the entire matter of conscription out of the hands of all the federal courts. The tremendous human impact of such a decision is simply more powerful than any other Supreme Court decision, no matter how unprecedented or offensive.

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The power of Congress to withdraw jurisdiction from the federal courts comes from the U.S. Constitution, Article III. Section 1 gives Congress total power over all federal courts except the Supreme Court, including the power to create them, to define their jurisdiction, and to abolish them altogether (thereby leaving judicial remedies to state courts).

Section 2 of Article III gives Congress the power to make "exceptions" and "regulations" to the Supreme Court's appellate jurisdiction. This is known as the Exceptions Clause.

Liberal Congresses have often withdrawn jurisdiction from the federal courts on subjects and in periods when the liberals did not trust the federal courts. Examples include the Norris-LaGuardia Act of 1932 (which withdrew jurisdiction over injunctions in labor disputes), the Hiram Johnson Acts of 1934 (which withdrew jurisdiction to enjoin the collection of state taxes and to interfere with the enforcement of state public utility rates), and the Emergency Price Control Act of 1942 (which withdrew jurisdiction over certain civil actions).

The Supreme Court ruled on Congress' power to withdraw Supreme Court jurisdiction in Ex parte McCardle (1868) stating, "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."

Congress' power to withdraw jurisdiction is an essential part of the unique American system of checks and balances. Withdrawing jurisdiction from the Supreme and other federal courts is the proper check by which Congress can balance the system when the judicial branch assumes too much power.

Some have argued that Congress' power to withdraw jurisdiction should not extend to the area of Supreme Court interpretation of "constitutional rights." But this argument is ridiculous when applied to "rights" which the Supreme Court itself invented.

To argue that the Supreme Court can invent a new "right" of men not to be drafted unless women are also drafted, then declare this a "fundamental right", and then use that as a shield to deny Congress' constitutional power to withdraw jurisdiction, would be "bootstrap jurisprudence." Even worse, it would give the Supreme Court legislative powers, and that would be clearly contrary to the words and intent of the U.S. Constitution.

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