The Power of Congress to Curb the Courts

Original Intent Studies of Robert Welch University

By Don Fotheringham (7-17-09)

In recent decades there have been many proposals for amending the Constitution in an attempt to overturn federal and Supreme Court decisions. All of these efforts have failed to gain the necessary support. Moreover, the amendment process is not the proper route to correct a problem with perceived judicial abuse of interpretation when the Constitution itself is not at fault.

However, a much more effective, but little know process is immediately at hand. We are referring to the clause found in Article III, Section 2, providentially written as follows: ***"...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."***

It was never the intention of our founders to create an all-powerful, unaccountable Supreme Court. Each department of government has clearly defined bounds, but each also has oversight power that we call checks and balances. Most everyone is familiar with the president's power to veto legislation, and the offsetting power of Congress to override it. Also well known are certain checks on power through the nomination and confirmation process, and the ultimate check of impeachment, or at least the threat thereof.

So it is with the Supreme Court. Congress has a way to prevent its perverse rulings on appellate cases. The history of our country, even before the Constitution was ratified, confirms that there never was any misunderstanding about the meaning and viability of the exceptions clause of Article III. In 1796 Oliver Ellsworth, Chief Justice of the United States recognized not merely the option, but the essence of congressional limits on the Court's appellate jurisdiction.[1] This view was confirmed again by Chief Justice John Marshall in 1805[2] and has been affirmed by all Supreme Court justices who have commented on the subject.

The constitutional power of Congress to check the Court is alive today and remains one of the most timely and compelling mechanisms available to the American people through Congress. Lower court cases find their way to the Supreme Court by the appeal process. Cases generating objectionable decisions — either individually or as a group — can be singled out by Congress and excluded from review by the Supreme Court.

Among landmark cases presumably corrupted by the Supreme Court are the denial of Bible reading in public schools, prohibition of school prayer, the legalizing of abortion, banning religious displays in public places, legalizing sodomy, and defending pornography. Congress clearly has the power to make exceptions to those kinds of cases and block their review by the higher court.

A good question arises: If Congress acts to restrain the Supreme Court, what can it do to restrain the federal district courts? For certain, many of the lower courts have exceeded their authority to interpret the law. But control of the two court systems entails two different legal routes:

The Supreme Court and the inferior federal courts cannot be limited by Congress in the same way because the two levels of the federal judiciary came into being through different levels of power. The power creating the Supreme Court was structural. It was created by the Convention of 1787, along with the mode of controlling it. On this constitutional basis, Congress may limit the Supreme Court without asking permission and without passing a pertaining law. The lower courts, on the other hand, are an entirely different breed. These district courts were created by Congress, and their jurisdiction can thus be limited only by enacting a law for doing so.

Notice that no new laws are needed to execute the work of a department when its operations and options are established by the Constitution. The president, for example, may propose a budget, nominate ambassadors, or grant pardons without asking permission or without any new laws. Congress can make its own rules without any new laws, and the Supreme Court can try its original jurisdiction cases without asking permission. Similarly, Congress may exercise its constitutional power over the appellate jurisdiction of the High Court without asking permission or without any new laws. Exceptions to this rule are constitutional provisions that require implementing legislation. But otherwise, no department of government need hesitate or ask permission to act within its established bounds. Thus Congress may limit the kinds of cases to be heard by the Supreme Court without any new laws or supplemental authority. Obviously, the exercise of an original structural power by any branch of government is not subject to a veto by the president. This is the avenue we propose for controlling the Supreme Court.

How then, if not by passing a bill, does Congress notify the Supreme Court of new limits on its jurisdiction? This may be done by issuing a Concurrent Resolution, approved by a simple majority of the House and the Senate. That's all. It is not a law, it is a statement through which Congress may assert a pre-existing constitutional authority, and by which the other departments of government are bound. A recent example of the use of such a resolution is H.Con.Res.5, which affirms the pre-existing constitutional power of Congress to declare war. It was introduced in the House of Representatives in the 1st Session of the 111th Congress (with the Senate concurring) expressing that, according to Section 8 of Article I of the Constitution of the United States, Congress has the sole and exclusive power to declare war. Under this heading the "Whereas" clauses state the reasons and applications of the resolution.

A Concurrent Resolution to limit the Supreme Court would follow the same form, expressing that, "Pursuant to Section 2 of Article III of the Constitution of the United States, Congress has the sole and exclusive power to make regulations and exceptions to the appellate jurisdiction of the Supreme Court. Accordingly, effective this date, the Congress of the United States denies the Supreme Court appellate jurisdiction over cases relating to public or private religious expression, definitions of marriage, sexual practice, and abortion."

Significantly, this Concurrent Resolution would accomplish the intended purpose while safely circumventing the desk of the president.

The simplicity of this route, and the independence of Congress in following it, should be a great advantage over previously defeated efforts. All such attempts have failed to get through the Senate, where reticence to face a veto by the president — any president — is most common. The Concurrent Resolution process bypasses that particular obstacle.

Okay, that should curb the Court's passion for new decisions that distort the Constitution, but what about its past decisions? How can Congress nullify the existing immoral burdens imposed by former Supreme Courts? How for example does Congress, if so inclined, reverse *Roe v. Wade* and *Lawrence v. Texas*?

There is no instant route. The Constitution does not provide Congress the means for nullifying past Court decisions. Therefore, each overturned case will have to be taken back to the court of its origin and re-tried. Unfair? Yes, but the second time around the lawyers fighting the abuse of original intent will have a slight advantage, which will include the same files, proven arguments, decent-thinking judges, and local juries. Under these circumstances, and knowing their work will not be overturned, the lawyers can move their cases quickly through the lower courts.

---

[1] In *Wiscart v. Daushy* (1796) Chief Justice Oliver Ellsworth said, "Even [the court's] appellate jurisdiction is qualified inasmuch as it is given 'with such exceptions, and under such regulations, as Congress shall make.' ... 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." Ellsworth's opinion is especially weighty, as he had been a delegate to the Federal Convention and had served on the very Committee of Detail that had drafted the Exceptions Clause.

[2] John Marshall was a delegate to the Virginia convention that ratified the Constitution. During the debates he said, "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 [Congress] may think proper for the interest and liberty of the people." Later, as Chief Justice of the United States, he reaffirmed that view. In *United States v. More* (1805) he said, "As the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its power must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described." In *Durousseau v. United States* (1810) Marshall said, "When the first legislature of the union [Congress] proceeded to carry the third article into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court."