



Constitutionalism

Committees on Enumerated Powers: How Congress Can Revive the Constitution

By Joseph Baldacchino

Under new rules recently adopted by the House of Representatives, the authors of all legislation introduced in the House must identify “as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.” The purpose of requiring such citations is to impress upon the House the duty of each branch of government to police itself “and ensure that all their actions are constitutional.” While this requirement is in keeping with the admonition of George Washington in his Farewell Address that those entrusted with the administration of government “confine themselves within their respective constitutional spheres,” there is a danger that such statements of authority will become merely pro forma in practice. To guard against such empty formalism, lawmakers might establish Committees on Enumerated Powers in the House and Senate as described below. The following is excerpted from an article first published in January 1995, when the Republicans, assisted by their “Contract with America,” were assuming simultaneous control of the House and Senate for the first time since the election of 1952. The article has long been available at the NHI website.

Joseph Baldacchino is president of the National Humanities Institute and co-director of the Institute’s Center for Constitutional Studies.

The Framers were acutely sensitive to the fears of many that a new federal government would erode the independence and authority of the states and the people. To protect against that possibility, they stipulated that the federal government would have only a short list of powers that were explicitly enumerated in the Constitution. “The powers delegated by the proposed Constitution to the federal government are few and defined,” Madison explains in *Federalist* No. 45. “Those which are to remain in the State governments are numerous and indefinite.” Since federal jurisdiction extends “to certain enumerated objects only,” Madison stresses in *Federalist* No. 39, the Constitution “leaves to the several States a residuary and inviolable sovereignty over all other objects.”

The Constitution grants to the federal government all powers “necessary and proper” for executing its enumerated functions, but no authority whatever to rule on matters not explicitly delegated. The state and local governments, Madison explains, “are no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.” To underscore the broad-reaching residual sovereignty of the states, the Framers incorporated it in the Bill of Rights by

D. J. T. Sullivan, Editor

ds@nhinet.org

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reiterating in the 10th Amendment: “The powers not delegated to the United States by the Constitution . . . are reserved to the states respectively, or to the people.”

Having seen the British Parliament, which had begun as a means of checking the power of the monarchy, gradually expand its jurisdiction until its own power was virtually unlimited, the Framers built into the U.S. Constitution a variety of institutional checks and balances to help prevent Congress from usurping powers reserved to the states. At the federal level these include the presidential veto and the Supreme Court’s responsibility for impartially resolving controversies “relating to the boundaries between the two [federal and state] jurisdictions.”

The Constitution also provided checks against an overweening Congress at the state level, including (until overturned by the 17th Amendment) the direct election of senators by the state legislatures. The Framers were explicit, moreover, that, in extreme cases, the states were to resist despotic federal power by force of arms if necessary. The state legislatures, writes Hamilton in *Federalist* No. 26, “will always be . . . suspicious guardians of the rights of the citizens against encroachments from the federal government . . . and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.”

With this potential role in mind, Hamilton notes that the appointment of militia officers by the states “will always secure to them a preponderating influence over the militia” (*Federalist* No. 29), which in turn would allow them “to take measures for their own defense [against a tyrannical federal government], with all the celerity, regularity, and system of independent nations” (*Federalist* No. 28).

Yet, despite such institutional checks and balances, the federal government has ranged far beyond its legitimate authority and has precipitated an emerging constitutional crisis. The problem is that, vis-à-vis Congress, such institutional checks are external only and depend for their efficacy on countervailing force being exerted from without. But, alone, such external political checks can no more force Congress to respect constitutional limits than mere legal sanctions against mur-

der, rape, or robbery—unsupported by internal religious and moral restraints—can produce an honest or peaceful society.

Congress Needs an ‘Inner Check’

Needed in both instances is what Irving Babbitt termed the “inner check” of genuine morality: the obligation, before putting envisioned acts into practice, to weigh them against a higher standard. The Framers recognized, in line with the long Judaeo-Christian tradition of the West, that men and women are torn between opposing inclinations toward good and evil. Because human nature is dualistic, both exterior and interior controls are needed not only on the governed but—even more importantly—on those entrusted with the power to govern others.

As Madison observed in *Federalist* No. 51, “If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government that is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

Because government is peopled with flawed human beings, the Framers provided external checks and balances, up to and including—in *extremis*—the right of the states to rebel against federal tyranny. But these external checks are meant to strengthen, not replace, the obligation of federal lawmakers to bind themselves by the “chains of the Constitution.” To the degree that this constitutional morality is weakened or ignored—as it has been more often than not for many years—the Constitution becomes not a living force but a scrap of parchment; and freedom is diminished.

The Republicans gained majority control of both houses of Congress in 1994 on the strength of their solemn pledge to restrain the heavy hand of the federal leviathan. Even President Bill Clinton, who came to Washington as a Democratic liberal, has declared that “the era of big government is over.” To assure that these pledges are more than empty rhetoric, Congress must breathe new life into the Constitution by making its restrictions once again an integral component of the legislative process. Change of this magnitude cannot be achieved piecemeal; it will require de-

liberate, systematic—and sustained—action.

To provide strength and staying power, Congress should institutionalize the new constitutionalism by creating in each chamber a Committee on Enumerated Powers. For these panels to work effectively, they should be granted jurisdiction to consider all bills before they are sent to the full House or Senate, much as the House Rules Committee now enjoys.

The mandate of the new committees would be simple but important: to determine, and to specify in writing, whether a legislative measure is authorized by one or more of the enumerated powers of the federal government. Like other committees, those on enumerated powers would act by majority vote. But, in accordance with the spirit of constitutional restraint, it would be the responsibility of each member to rule according to the letter of the Constitution and to justify his or her affirmative votes by specific reference to that document.

In keeping with the intent of the Framers, the burden of proof ought always to be on those who want to expand federal power. Normally, therefore, a vote by the committee that a bill does not pass constitutional muster should be sufficient to prevent its going to the floor. The rules might provide for an exception, to be used sparingly, that allows bills not favorably reported by the Committee on Enumerated Powers to be debated on the floor of the full House or Senate. However, in such instances, passage should require a supermajority—perhaps a two-thirds—vote. Moreover, before their affirmative votes are counted, each lawmaker should be required to cite—in writing for the permanent record—the specific article(s) and section(s) that authorize those federal actions specified in the bill.

To assist committee members with the profound constitutional responsibilities that would be theirs, staff members well-steeped in knowledge of constitutional law, theory, and history should be engaged to catalog and chart all of the Constitution's enumerated powers by article and section. Secondary materials such as the *Federalist* papers, records of the constitutional and ratifying conventions, congressional debate on amendments, etc., might also be catalogued, but only for the purpose of illuminating the explicit clauses of the Constitution itself. The Framers were insis-

tent that the letter of the Constitution must be followed in all cases and that “construction”—i.e., changing the meaning of the Constitution over time through elaborate interpretative schemes—would destroy its purpose.

Fortunately, the adherence to the constitutional text mandated by the Framers should minimize the need for staff even at the outset, and that need will diminish even further after the initial cataloguing is completed, probably during the first few years. Though the administrative cost of such committees would be small, the good to be served would be enormous. First, they would make the Constitution institutionally effective by bringing its provisions to bear on every piece of legislation considered by the U.S. Congress. Not only committee members but each and every representative and senator would be forced, before proposing legislation, to consider seriously the limits placed on the federal government by the Constitution.

In addition, these committees would serve a priceless educational and civic function. House Speaker Newt Gingrich has asked his colleagues to read the *Federalist* papers, but what better way to rejuvenate interest in those papers and the document they elucidate than for Congress to prove by its actions that the Constitution again matters? Similarly, it is a national disgrace that America's schoolchildren have been taught next to nothing about the Constitution and its history. But the schools will be compelled to remedy this deficiency, once it becomes obvious that the national charter, far from being a merely ceremonial document or a historical curiosity, again serves as the bedrock of our national polity.

Perhaps most importantly, Congress—by taking seriously its legal and ethical responsibilities to adhere to the Constitution as written, not as each member would like it to be—would set an invaluable example for the Supreme Court. When measured against Congress's new standard of constitutional restraint, Supreme Court justices—and courts in general—would find it harder to put forth their arbitrary personal desires in the guise of constitutional interpretation.

A Republic, If We Can Restore It

In short, by focusing serious nationwide attention on the literal requirements of the Consti-

tution—attention that has been absent for more than a century—the Committees on Enumerated Powers would bid fair to make the United States again what Americans now pretend it is each Fourth of July—a constitutional Republic.

Given the unruliness of human nature, self-imposed limitations such as these committees would enforce are not easily institutionalized in Congress or anywhere else. But this may be one of those rare historical moments when it can be accomplished. For the first time in years, states' rights are politically *in* right now, as evidenced by the rebellions against unwarranted federal

interference now being waged by many state governors and legislatures. Before constitutionalism can exist in fact and not just in name, Congress, the states, and the American public must regain the habit of thinking of the Constitution as having a direct, practical bearing on their day-to-day actions. Committees on Enumerated Powers would institutionalize this requirement.

To be real, a Constitution must be lived, not honored in the breach. For without constitutional morality, there is no Constitution. And down that road, much hard experience already has taught us, lies tyranny.