Congress and the Constitution

by Gary Benoit

Each report of a committee on a bill or joint resolution of a public character shall include a statement citing the specific powers granted to the Congress in the Constitution to enact the law proposed by the bill or joint resolution.

— From the Rules of the House of Representatives

If most members of Congress were to stand by their oath to "support and defend the Constitution of the United States against all enemies foreign and domestic" and to "bear true faith and allegiance to the same," big government would disappear. It could not be otherwise, since all of the powers granted to the federal government by the Constitution are enumerated, and those enumerated powers do not allow for either the Welfare State or the Warfare State. Yet most congressmen do not grasp this fundamental principle, imagining instead an ambiguous and expansive grant of power never intended by the Founding Fathers. Apparently, most don't even use the Constitution as a guide for the performance of their congressional duties, for if they did they would surely know the true scope of their powers — as well as those of the other branches of government.

This lack of interest in the Constitution was vividly displayed early last year when a group of "experts" appealed to the House International Relations Committee to support the U.S. Agency for International Development's Population Assistance Program. As recounted by a congressional aide who was present, Congressman Ron Paul's (R-TX) press secretary asked for the section of the Constitution that authorized this foreign assistance program, at which point "the room went dead — one, two, three, four, five seconds. Then one of the 'experts,' dazed and confused, asked, 'The … Con…sti…tu…tion?' More silence. Another 'expert' cautiously came to her rescue. 'Just to make a stab at this, the Constitution authorizes the federal government to raise money to deal with foreign affairs.' Another 'expert' quoted some U.S. Code that 'authorized' their legal plunder. Then, they pounced, 'What office are you from?' The man replied, 'Congressman Ron Paul from the 14th District of Texas.' Then he thanked them and sat down. His question had been answered by their initial silence."

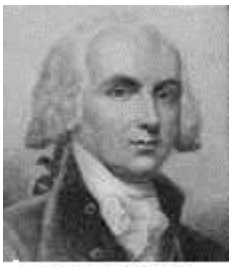
Most congressmen on the House International Relations Committee are no better informed on constitutional matters than the "experts" — or they would presumably not support international welfare without the proper constitutional authorization — an authorization which, of course, does not exist.

The House rule cited at the beginning of this article (Rule XI, Clause 2[l], Subparagraph [4]) was adopted at the start of the current 105th Congress as a means of reintroducing the Constitution to lawmakers and their staffs. Because the House committees are now required to cite the specific constitutional powers justifying the legislation they submit to the full House, they supposedly must read the Constitution and satisfy themselves that the powers are really contained therein. Also, any congressman is now able to refer to the committee's constitutional authorization prior to voting on a particular bill and to decide whether or not he agrees that the bill is constitutional. That is not a lot to ask, of course, of lawmakers who have taken an oath to uphold the Constitution.

Presuming that lawmakers would apply this constitutional litmus test in an honest way, the Rules Committee analysis of this requirement stated that "it is expected that committees will not rely only on the so-called 'elastic' or 'necessary and proper' clause and that they will not cite the preamble to the Constitution as a specific power granted to the Congress by the

Constitution." This "expectation" notwithstanding, since the adoption of the rule in January 1997, committees have on a number of occasions cited only the "necessary and proper" clause as the constitutional basis for legislation. They have similarly stretched the meanings of the "general welfare" and "interstate commerce" clauses, enabling them to justify virtually any social-welfare or regulatory program imaginable. And they have at times vaguely referenced Article I, Section 8 of the Constitution, the principal section enumerating congressional powers, without bothering to cite any particular power. In short, they have interpreted the Constitution not as a binding document authorizing specific powers, but as a blank check.

Of course, if lawmakers can legislate any law they want, then we have a democracy instead of a republic and there is no need for a written constitution limiting the powers of government. Moreover, if lawmakers can interpret the Constitution based on whatever liberal theory is in vogue at the moment, then the Constitution is an evolving document that holds no meaning as a fixed set of fundamental laws.


James Madison

But lawmakers who subscribe to any such radical reconstruction are wrong, as can be readily demonstrated by referring to the Founders' own writings, such as *The Federalist Papers*. As James Madison, father of the Constitution, explained in *The Federalist*, No. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined" and "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce." Its jurisdiction, he explained in *The Federalist*, No. 14, "is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any." All other powers are retained by the states or the people, a principle that was well understood at the time and was later reaffirmed in the Tenth Amendment.

Because federal powers are "few and defined," Congress does not have *carte blanche*. "No legislative act … contrary to the Constitution can be valid," Alexander Hamilton noted in *The Federalist*, No. 78. "To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."


Alexander Hamilton

In *The Federalist*, No. 83, Hamilton added that since congressional powers are enumerated, "This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd as well as useless if a general authority was intended."

Let us now consider specific clauses which House committees have cited in their constitutional authorization statements in order to justify their supposed "general legislative authority."

Article I, Section 8, Clause 1 of the Constitution, also known as the "general welfare" clause, states: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." House committees have cited this clause to justify legislation relating to vocational education, literacy programs, job training, charter schools, student loans,

housing programs, welfare reform, foreign aid, crime control, child support, etc. Their rationale is that Congress has an open-ended power to pass whatever legislation it deems appropriate to provide for the general welfare, including the transfer of funds from taxpayers to private individuals and organizations.

But this broad interpretation makes no sense whatsoever, since the general statement in Clause 1 is immediately followed by a list of specific powers that Congress can exercise to provide for the general welfare. Condemning this broad interpretation in *The Federalist*, No. 41, Madison asked: "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity...."

Addressing this subject during congressional debate on February 7, 1792, Madison warned that "if Congress can employ money indefinitely to the general welfare, and are the sole and supreme judges of the general welfare, they may take the care of religion into their own hands; they may appoint teachers in every state, county, and parish, and pay them out of their public treasury; they may take into their own hands the education of children establishing in like manner schools throughout the Union; they may assume the provision for the poor; they may undertake the regulation of all roads other than post-roads; in short, everything, from the highest object of state legislation down to the most minute object of police, would be thrown under the power of Congress...."

In a letter on January 21st of the same year, Madison warned: "If Congress can do whatever in their discretion can be done by money, and will promote the General Welfare, the Government is no longer a limited one, possessing enumerated powers, but an indefinite one, subject to particular exceptions."

Of course, the Founders' intent with regard to the general welfare clause has been ignored and distorted, causing Madison's dire warnings to come true. But the modern-day interpretation was not yet in vogue in December 1831, when Madison wrote: "Beginning with the great question growing out of the terms 'common defense and general welfare,' my early opinion expressed in *The Federalist*, limiting the phrase to the specified powers, has been adhered to on every occasion which has called for a test of it."

Madison's understanding of the general welfare clause was echoed by many other Founding Fathers, including Thomas Jefferson, who in 1817 stated that Congress does not possess "unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated...."

The phrase "general welfare" is often misunderstood by present-day Americans because of the development of the Welfare State. But at the time the Constitution was written, the phrase did not refer to giving taxpayer money to the poor, but to the general welfare of the nation. On May 3, 1854, President Franklin Pierce vetoed a bill that (in his words) concerned "the constitutionality and propriety of the Federal Government assuming to enter into a novel and vast field of legislation, namely, that of providing for the care and support of all those … who by any form of calamity become fit objects of public philanthropy." Continued Pierce: "I cannot find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my

judgment, be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded."

On February 16, 1887, President Grover Cleveland vetoed a bill to appropriate money to provide seeds to drought-stricken counties of Texas because "I can find no warrant for such an appropriation in the Constitution, and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit."

Even Franklin D. Roosevelt, father of the modern Welfare State, acknowledged while still governor of New York that the federal government did not have constitutional authority to provide social welfare. "As a matter of fact and law," he said in a March 2, 1930 address, "the governing rights of the states are all of those which have not been surrendered to the national government by the Constitution or its amendments." After noting that Prohibition was constitutional due to the 18th Amendment, he said that "this is not the case in the matter of a great number of other vital problems of government, such as the conduct of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare, and of a dozen other important features. In these Washington must not be encouraged to interfere." No one can properly accuse FDR of installing statist policies out of ignorance of constitutional principles!

The House Appropriations Committee routinely cites Article I, Section 9, Clause 7 as the constitutional authorization for its mammoth and often unconstitutional spending bills, including appropriations for foreign aid, agricultural programs (including food stamps), and the Departments of Labor, Health and Human Services, and Education. Clause 7 states: "No money shall be drawn from the Treasury but in consequence of appropriations made by law...." Of course! But the intent behind this requirement, as well as the power to "lay and collect taxes" to provide for "the general welfare," was that the money could be used only for constitutional purposes.

A report on the 1799-1800 Virginia Resolutions drafted by Madison explains: "[S]ubjoined to this authority [is] an enumeration of the cases to which their [Congress'] powers shall extend. Money cannot be applied to the general welfare, otherwise than by an application of it to some particular measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it. If it be not, no such application can be made. This fair and obvious interpretation coincides with and is enforced by the clause in the Constitution which declares that 'no money shall be drawn from the treasury but in consequence of appropriations made by law.'"

Few if any congressmen on the House Appropriations Committee apply any such standard to the legislation they draft. At the beginning of the 105th Congress, one congressman who would have applied this standard was denied a promised seat on the committee when he made known, in response to a question from the leadership, that he would not vote for any foreign aid appropriations.

Article I, Section 8, Clause 18, also known as the "necessary and proper" clause, authorizes Congress to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." In spite of the Rules Committee's "expectation" that this clause would not be used as the sole basis for satisfying

the constitutional authorization rule, House committees have nonetheless used it as their sole basis for funding unconstitutional agricultural research programs, dairy support payments, and small business programs.

Coming as it does after a list of specific congressional powers, this clause was obviously intended not as an undefined grant of "sweeping" powers, but as a simple declaration that Congress can make such laws as are "necessary and proper for carrying into execution" its enumerated powers. "Without the *substance* of this power," Madison wrote in *The Federalist*, No. 44, "the whole Constitution would be a dead letter." Yet this so-called "elastic clause" has been stretched to include virtually anything Congress deems "necessary and proper."

During Virginia's deliberations on whether or not to ratify the Constitution, George Nicholas correctly observed that "this clause only enables them [Congress] to carry into execution the powers given to them, but gives them no additional power." And during North Carolina's deliberations, Archibald Maclaine concluded, "This clause specifies that they [Congress] shall make laws to carry into execution *all the powers vested* by this Constitution; consequently, they can make no laws to execute any other power. This clause gives no new power, but declares that those already given are to be executed by proper laws."

This narrow definition made perfect sense since, as Maclaine also reasoned, "If they can assume powers not enumerated, there was no occasion for enumerating any powers." A report on the Virginia Resolutions drafted by Madison stated that this clause "is not a grant of new powers to Congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant."

But what "means" should be employed? On February 15, 1791, Thomas Jefferson argued that "the Constitution allows only the means which are 'necessary,' not those which are merely 'convenient,' for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to everyone, for there is not one which ingenuity may not torture into a convenience in some instance or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed ["that of instituting a Congress with power to do whatever would be for the good of the United States"]."

Article I, Section 8, Clause 3, also known as the interstate commerce clause, states that Congress has the power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Over the years the federal government's "interstate commerce" power has been expanded to include everything from the regulation of wetlands (deemed to be part of the navigable waters of the United States), to whom a restaurant must serve, to what or how much a farmer can grow, to wage and price controls. During the 105th Congress, House committees have cited this clause to justify legislation relating to underground storage tanks, homeowner's insurance protection, the U.S. Export-Import Bank, the Securities and Exchange Commission, energy policy, wildlife refuges, motor vehicle consumer protection, and labor standards.

The original intent, however, was not to manage the American economy, but to prevent the states, which were then operating almost as separate countries in a loose confederation, from inhibiting the interstate flow of goods through tariffs or other barriers. James Madison reaffirmed this intent when he wrote in a letter dated February 13, 1829 that "it is very

certain that [the commerce clause] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government...."

Thomas Jefferson echoed the same sentiment on February 15, 1791 when he wrote that this clause "does not extend to the internal regulation of the commerce of a State (that is to say, of the commerce between citizen and citizen) … but to its external commerce only, that is to say, its commerce with another State, or with foreign nations, or with the Indian tribes."

But Franklin D. Roosevelt expressed a radically different view when he argued in a May 31, 1935 press conference that the commerce clause was written "in the horse-and-buggy age" and that "since that time … we have developed an entirely different philosophy." "We are interdependent, we are tied in together," he claimed. "And the hope has been that we could, through a period of years, interpret the interstate commerce clause of the Constitution in the light of these new things that have come to the country. It has been our hope that under the interstate commerce clause we could recognize by legislation and by judicial decision that a harmful practice in one section of the country could be prevented on the theory that it was doing harm to another section of the country. That was why the Congress for a good many years, and most lawyers, have had the thought that in drafting legislation we could depend on an interpretation that would enlarge the constitutional meaning of interstate commerce to include not only those matters of direct interstate commerce, but also those matters which indirectly affect interstate commerce." That is, change the meaning of the clause to fit the changing times — and don't worry about the intent of the Founders.

In his statement, Roosevelt was responding to a Supreme Court decision that defined the commerce clause narrowly enough to interfere with his statist schemes, including the regulation of farm products. "Are we going to take the hands of the federal government completely off any effort to adjust the growing of national crops," he complained, "and go right straight back to the old principle that every farmer is a lord of his own farm and can do anything he wants, raise anything, any old time, in any quantity, and sell any time he wants?" Certainly no such freedoms could be tolerated in the brave new world, which is why Roosevelt dealt with the justified judicial response by audaciously attempting to pack the Supreme Court.

Since that time the Supreme Court has interpreted the commerce clause much more broadly. Yet in its 1995 *Lopez* decision, the Court served notice that there are limits to this broad interpretation. In that landmark case the Court found unconstitutional a federal law that relied on the interstate commerce clause for prohibiting firearms in school zones. Justice Clarence Thomas, who joined the majority, correctly noted that "our case law has drifted far from the original understanding of the Commerce Clause" and has, in fact, "swallowed Art. I, Section 8."

Although the *Lopez* decision should have served as a shot across the bow, it is hard to detect any lessons learned on the part of interventionist congressmen who continue to pilot our ship of state through unconstitutional waters.

So far as this writer could determine, the House committees, abiding the expectation of the Rules Committee, have at least resisted the temptation to cite the Preamble in their constitutional authorization statements. Nor should they have cited the Preamble, since it

was intended to be a statement of the ends to be achieved through the exercise of powers enumerated in the main body of the document. The Preamble states: "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

"Had the states been despoiled of their sovereignty by the generality of the preamble," declared Virginia's General Assembly on January 23, 1799, "and had the Federal Government been endowed with whatever they should judge to be instrumental towards the union, justice, tranquility, common defense, general welfare, and the preservation of liberty, nothing could have been more frivolous than an enumeration of powers."

As we have already seen, of course, the same observation could be made with regard to liberal interpretations of the "general welfare," "necessary and proper," and "interstate commerce" clauses.

Jefferson observed in 1803 that "our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Most congressmen, with the willing participation of like-minded presidents and Supreme Court justices, have treated the Constitution as a blank piece of paper. And the people have not only allowed this radical reconstruction to occur, but have often encouraged it because of their own lack of understanding. But because the Constitution still exists and still constitutes the sole body of powers possessed by the federal government, all of the non-enumerated powers now exercised by the federal government fall in the category of usurpations that can be ended as soon as the understanding is created.

The understanding that is necessary includes a recognition that ours is a government of laws and not of men, a republic and not a democracy. Enough Americans must be brought to an understanding that Congress, acting in the name of the people for some greater good, cannot execute any non-enumerated powers, no matter how popular or tempting — unless the power in question is first granted to the Congress through the amendment process.

Of course, this does not mean that other levels of government cannot — or, for that matter, should not — execute any powers not embodied in the U.S. Constitution. Only the federal government cannot do so; the state governments can exercise powers authorized by their own state constitutions, and county and local governments can perform other functions allowed by law. But this concept of federalism, along with the concept of enumerated powers, has been largely forgotten, allowing a dangerous concentration of powers on the federal level that threatens not only the rights of the states, but the freedom of the individual.

The House rule requiring a constitutional authorization statement in committee reports could be a useful tool for building understanding among both lawmakers and constituents. What constitutional power is cited as authorization for a particular piece of legislation? Does the cited power truly authorize the legislation, or is the citation an embarrassing attempt to provide a fig leaf of cover for naked usurpation? Lawmakers should have no problem providing the claimed constitutional power(s) authorizing any bill or joint resolution when challenged, and informed constituents should not only ask such challenging questions, but inform others as to how the Constitution is being circumvented through misinterpretation.

As understanding grows, more Americans will recognize that the problem is not the Constitution or the government it created, but lack of adherence to the Constitution. And as they hear from a growing number of informed constituents, more busy congressmen will surely find the time to learn about the document they have sworn to uphold.

The Enumerated Powers of Congress

The very first sentence of the first Article of the Constitution states, "All legislative powers herein granted shall be vested in a Congress of the United States" — making that body the most powerful of the three branches of government. Neither the Presidency nor the Judiciary can make laws — except by usurpations tolerated by Congress. Congress could, for example, prohibit the federal judiciary from issuing usurping rulings in such cases as the infamous *Roe v. Wade* (abortion) decision simply by exercising its enumerated power to limit the jurisdiction of the federal courts (see Article III, Section 2). Also, Congress could employ its impeachment power in order to tame a corrupt and imperial President.

In the June 1997 issue of *The John Birch Society Bulletin*, constitutional analyst Don Fotheringham created an invaluable reference by listing all of the enumerated powers and duties of Congress. That list, which should be at the fingertips of every congressman, follows.

- Levy taxes.
- Borrow money on the credit of the United States.
- Spend.
- Pay the federal debts.
- Conduct tribunals inferior to the Supreme Court.
- Declare war.
- Raise armies, a navy, and provide for the common defense.
- Introduce constitutional amendments and choose the mode of ratification.
- Call a convention on the application of two-thirds of the states.
- Regulate interstate and foreign commerce.
- Coin money.
- Regulate (standardize) the value of currency.
- Regulate patents and copyrights.
- Establish federal courts lower than the Supreme Court.
- Limit the appellate jurisdiction of the federal courts, including the Supreme Court.

- Standardize weights and measures.
- Establish uniform times for elections.
- Control the postal system.
- Establish laws governing citizenship.
- Make its own rules and discipline its own members.
- Provide for the punishment of counterfeiting, piracy, treason, and other federal crimes.
- Exercise exclusive jurisdiction over the District of Columbia.
- Establish bankruptcy laws.
- Override presidential vetoes.
- Oversee all federal property and possessions.
- Fill a vacancy in the Presidency in cases of death or inability.
- Receive electoral votes for the Presidency.
- Keep and publish a journal of its proceedings.
- Conduct a census every ten years
- Approve treaties, Cabinet-level appointments, and appointments to the Supreme Court (Senate only).
- Impeach (House only) and try (Senate only) federal officers.
- Initiate all bills for raising revenue (House only).

These are the powers of Congress; there are no non-enumerated powers. Leaving nothing to inference, the Constitution even specifies that Congress may pass the laws "necessary and proper" for executing its specified powers. Congressmen have simply to study and apply the Constitution in order to restore sound government. That most fail to do so is not the fault of the Founders, but of the people who elect the congressmen and send them to Washington.