

Legislative Powers of Congress: A Brief Reference Guide

George Costello
Legislative Attorney
American Law Division

April 3, 1997

LEGISLATIVE POWERS OF CONGRESS: A BRIEF REFERENCE GUIDE

SUMMARY

A House rule now requires that committee reports identify the constitutional source of power to enact the reported bill. This report is designed to assist in identification of Congress' legislative powers. It lists legislative powers, sets forth the constitutional text for each power, and provides brief commentary. Powers are grouped in the following broad subject matter categories: power to tax and spend, commercial powers, citizenship, civil rights and voting rights, elections, property and territory, war and related powers, federal-state relations, and checks on other branches. An introductory section is devoted to the scope of congressional powers.

TABLE OF CONTENTS

INTRODUCTION	1
SCOPE OF CONGRESSIONAL POWERS	1
Limited and Enumerated Powers	1
Broad and Elastic Powers	2
Supremacy -- Preemptive Scope of Federal Law	2
POWER TO TAX AND SPEND	2
COMMERCIAL POWERS	3
CITIZENSHIP	4
CIVIL RIGHTS AND VOTING RIGHTS	4
ELECTIONS	5
PROPERTY AND TERRITORY	7
WAR AND RELATED POWERS	7
FEDERAL - STATE RELATIONS	8
CHECKS ON THE OTHER BRANCHES	10
The Executive Branch	10
The Judicial Branch	11

LEGISLATIVE POWERS OF CONGRESS: A BRIEF REFERENCE GUIDE

INTRODUCTION

A House Rule now requires that a committee report on a bill "include a statement citing the specific powers granted to the Congress in the Constitution to enact the law proposed by the bill." House Rule XI, cl. 2(1). This report is designed to assist in the required identification and citation of congressional powers, and to that end catalogs and briefly describes such powers. The focus is on Congress' legislative powers, although certain of Congress' non-legislative powers (e.g., impeachment, and the power to judge elections and qualifications of members) are also cited. No effort is made to catalog all of the powers conferred on other branches, although these powers too can be of legislative significance due to the fact that Congress has the power to make all laws "necessary and proper" to carry into execution "all other Powers vested . . . in the Government of the United States, or in any Department or Officer thereof." Nor is any effort made to catalog the many limitations that the Constitution places on exercise of governmental power (e.g., those contained in Article I, section 9, and in the Bill of Rights); only limitations textually linked to grants of power are included. This report, therefore, can be useful only in helping to identify the source of congressional power to legislate in a particular area, and does not purport to offer additional guidance in determining the ultimate constitutional validity of specific legislation. For analysis of how particular powers or limitations have been interpreted, see *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document 103-6.

The selected congressional powers are grouped below under broad topical headings. Constitutional text is italicized.

SCOPE OF CONGRESSIONAL POWERS

Limited and Enumerated Powers

All legislative powers herein granted shall be vested in a Congress of the United States. Article 1, section 1.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Tenth Amendment.

Article I, section 1 does not grant to Congress "all legislative power," but rather grants to Congress certain specific powers, "herein granted" and enumerated in section 8 and elsewhere in the Constitution. The Tenth Amendment underscores this arrangement.

Broad and Elastic Powers

The Congress shall have power . . . 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. Article I, section 8, cl. 18.

That this clause enlarges rather than narrows the powers of Congress was established by Chief Justice Marshall's classic statement in *McCulloch v. Maryland* (1819): "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The clause has another important consequence: by authorizing Congress to enact legislation necessary and proper to carry into execution all powers vested in the United States, it gives Congress a share in the responsibilities of the other branches. In other words, legislation need not be limited to implementing powers that the Constitution confers directly on Congress; legislation also may implement powers conferred on the President and the courts.

Supremacy -- Preemptive Scope of Federal Law

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding. Article VI, cl. 2.

The "supremacy clause" directs that valid (constitutional) federal laws take precedence over conflicting state constitutional provisions and laws.

POWER TO TAX AND SPEND

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States. Article I, section 8, cl. 1.

No Capitation, or other direct Tax shall be laid, unless in Proportion to the Census of Enumeration Article I, section 9, cl. 4.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. Sixteenth Amendment.

The Congress shall have Power . . . To borrow Money on the credit of the United States. Article I, section 8, cl. 2.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. Article I, section 9, cl. 7.

Direct taxes (property taxes and capitation taxes) must be apportioned among the States, and indirect taxes (all other taxes) must be "uniform." A holding by the Supreme Court invalidating an income tax law enacted pursuant to Article I, § 8, cl. 1 led to adoption of the Sixteenth Amendment. The purposes for which Congress may tax and spend are very broad; the "general welfare" is not limited by the scope of other enumerated powers under which Congress may regulate. On the other hand, Congress has no power to regulate "for the general welfare," but may only tax and spend for that purpose. Article I, § 9, cl. 7 enhances congressional control over the executive branch by restricting spending to that authorized by an appropriation.

COMMERCIAL POWERS

"The Congress shall have power . . .

To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes. Article I, section 8, cl. 3.

To establish ... uniform Laws on the subject of Bankruptcies throughout the United States. Article I, section 8, cl. 4.

To coin money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures. Article I, section 8 cl. 5.

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States. Article I, section 8, cl. 6.

To establish Post Offices and post Roads. Article I, section 8, cl. 7.

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. Article I, section 8, cl. 8.

The "commerce clause" (cl. 3 above) is one of the most far-reaching grants of power to Congress. Interstate commerce covers all movement of people and things across state lines, including communication and transportation. The Supreme Court recently summarized, in *United States v. Lopez* (1995), three broad categories of the commerce power. Congress may regulate the use of the channels of interstate commerce, may regulate and protect the instrumentalities of interstate commerce, and, in addition, may regulate those activities that substantially affect interstate commerce.

CITIZENSHIP

The Congress shall have power . . . To establish an uniform Rule of Naturalization. Article I, section 8, cl. 4.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. Fourteenth Amendment, section 1.

The power to establish uniform naturalization requirements means that Congress may define the circumstances under which immigrants may become citizens. The Fourteenth Amendment, adopted in 1868 as one of the Civil War Reconstruction amendments, had the effect of conferring citizenship on African Americans, and thereby reversing the Supreme Court's decision in the *Dred Scott* case (1857). Section 5 of the Fourteenth Amendment, reproduced in the next section, gives Congress explicit enforcement authority.

CIVIL RIGHTS AND VOTING RIGHTS

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Fourteenth Amendment, section 1.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. Fourteenth Amendment, section 5.

Both the due process clause and the equal protection clause have been interpreted broadly, and Congress' enforcement authority is correspondingly broad. The privileges and immunities clause, though it has been more narrowly construed by the Court, may nonetheless support (in conjunction with section 5) significant legislation. See, e.g., 42 U.S.C. § 1983. The due process clause has been interpreted by the Supreme Court as having substantive as well as procedural application, and as incorporating (i.e., applying to the states) most of the Bill of Rights. While the immediate impetus for the equal protection clause was to prohibit racial discrimination, the clause is not so limited by its terms, and applies across the board to all forms of discriminatory classifications by "state action."

Neither slavery nor involuntary servitude, except as punishment for crime . . . , shall exist within the United States. Thirteenth Amendment, section 1.

Congress shall have power to enforce this article by appropriate legislation. Thirteenth Amendment, section 2.

Congress has relied on the Thirteenth Amendment to legislate against slavery-like conditions, such as peonage.

The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Fifteenth Amendment, section 1.

The Congress shall have power to enforce this article by appropriate legislation.
Fifteenth Amendment, section 2.

Congress has relied on the Fifteenth Amendment for the several iterations of the Voting Rights Act. Nearly identical language extends the same protection to women, and to citizens who are at least 18 years of age:

The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
Congress shall have power to enforce this article by appropriate legislation.
Nineteenth Amendment.

The right of the citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. Twenty-sixth Amendment, section 1.

The Congress shall have power to enforce this article by appropriate legislation. Twenty-sixth Amendment, section 2.

ELECTIONS

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.
Article I, section 4, cl. 1.

While the Fifteenth Amendment and the other voting rights guarantees noted above protect only against state action, congressional authority under this clause includes protection of the electoral process against private interference. A variety of enactments can trace to this authority, including campaign finance laws and the Hatch Act (insofar as it applies to federal elections).

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. Article I, section 5, cl. 1.

The House and the Senate act as judicial tribunals in resolving contested election cases.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States. Article II, section 1, cl. 4.

Congress has exercised this authority to specify the day on which presidential elections are held (i.e., the day on which electors are chosen), the day on which electors gather to vote, and the day on which electoral ballots are counted.

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President

equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State Twenty-third Amendment, section 1.

The Congress shall have power to enforce this article by appropriate legislation. Twenty-third Amendment, section 2.

Congress may implement the Twenty-third Amendment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State Fourteenth Amendment, section 2.

The actual enumeration shall be made . . . in such manner as they [Congress] shall by law direct. Article I, section 2, cl. 3.

Congress fixes by law the total number of Representatives, and provides for apportionment among the states in accordance with the Constitution's requirements. Congress also makes statutory provision for the taking of the decennial census.

. . . Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected Twentieth Amendment, section 3.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them. Twentieth Amendment, section 4.

These provisions supplement the Twelfth Amendment, which calls for selection of a President by the House, and selection of a Vice President by the Senate, in the event that no one receives a majority of electoral votes.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the president pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President. Twenty-fifth Amendment, section 4.

Congress performs other important, non-legislative functions under this Amendment by voting on confirmation of the President's nomination to fill a vacancy in the office of Vice President, and by resolving disputes over the President's fitness to discharge the powers and duties of his office.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or

by any State by reason of failure to pay any poll tax or other tax. Twenty-fourth Amendment, section 1.

The Congress shall have power to enforce this article by appropriate legislation. Twenty-fourth Amendment, section 2.

At the time of adoption of the Amendment in 1964, the poll tax, a remnant of Reconstruction era legislation in the South, was maintained by five states.

Note: other Amendments relating to the subject of elections have been set forth above under the heading "Civil Rights and Voting Rights."

PROPERTY AND TERRITORY

The Congress shall have power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings. Article I, section 8, cl. 17.

This clause enables Congress to govern the District of Columbia, and also to govern forts and other places obtained from states for the federal government's purposes.

The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States Article IV, section 3, cl. 2.

This is the authority by which Congress regulates the public lands and governs acquired territories such as Puerto Rico, the Virgin Islands, Guam, and American Samoa.

[N]or shall private property be taken for public use, without just compensation. Fifth Amendment.

Implicit in the Fifth Amendment's requirement that just compensation be paid for private property that is taken for a public use is the existence of the government's power to take private property for public use. The Supreme Court has called this power an "attribute of sovereignty." The power resides in Congress, and may be delegated to private as well as public entities so long as its exercise is limited to public purposes.

WAR AND RELATED POWERS

The Congress shall have power . . .

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations. Article I, section 8, cl. 10.

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. Article I, section 8, cl. 11.

To raise and support Armies Article I, section 8, cl. 12.

To provide and maintain a Navy. Article I, section 8, cl. 13.

To make rules for the Government and Regulation of the land and naval Forces. Article I, section 8, cl. 14.

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions. Article I, section 8, cl. 15.

To provide for arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress. Article I, section 8, cl. 16.

No State shall, without the consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay. Article I, section 10, cl. 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. Article III, section 3, cl. 1.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted. Article III, section 3, cl. 2.

Congress' war powers, Article I, § 8, cls. 11-14 above, are underscored by the power to declare war. Congress can also exercise control over military ventures through its power of the purse (see especially Art. I, § 8, cl. 1 and Article I, § 9, cl. 7 below). Under Article II, section 2, the President is Commander in Chief of the armed forces. The right of the states to maintain a militia -- now the National Guard -- is subject to control by Congress pursuant to clauses 15 and 16, above. The crime of treason is defined by the Constitution, but Congress has the power, as limited by the language of Article III, § 3, cl. 2, to declare the punishment for treason.

FEDERAL - STATE RELATIONS

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding. Article VI, cl. 2.

The "supremacy clause," also set forth above under "Scope," directs that valid federal laws preempt conflicting state constitutional provisions and laws.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Tenth Amendment.

The Tenth Amendment, also set forth above under "Scope," reflects the fact that federal powers are enumerated and defined, and hence not all-encompassing; governmental powers not delegated to the Federal Government are reserved to the States.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress. Article I, section 10, cl. 2.

This clause complements the congressional power under Article I, section 8, cl. 1 to impose impost and duties on imports and exports.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War unless actually invaded, or inn such imminent Danger as will not admit of delay. Article I, section 10, cl. 3.

Here again, Congress may consent to States exercising powers otherwise prohibited. Clauses 2 and 3 of section 10 contrast with clause 1, which prohibits altogether specified actions by states and contains no provision for congressional consent. Interstate compacts are relatively common; under Supreme Court interpretations, congressional consent may take a variety of forms, express or implied, before or sometimes after the fact.

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof. Article IV, section 1.

This "Full Faith and Credit Clause" gives Congress what amounts to enforcement authority over the required recognition by each state of the judgments, records, and legislation of other states.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress. Article IV, section 3.

Congress by legislation may admit new states on an equal footing with existing states.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence. Article IV, section 4.

Exercising this authority, Congress has authorized Presidents to send federal troops into a state to guarantee law and order.

CHECKS ON THE OTHER BRANCHES

The Executive Branch

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors. Article II, section 4.

The House of Representatives . . . shall have the sole power of Impeachment. Article I, section 2, cl. 5.

The Senate shall have the sole Power to try all Impeachments. . . . And no person shall be convicted without the Concurrence of two thirds of the Members present. Article I, section 3, cl. 6.

Judgment in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law. Article I, section 3, cl. 7.

The President . . . shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment. Article II, section 2.

Congress may remove from office the President, Vice-President, and other "civil officers" (other executive officers and judges). The House initiates the impeachment process, and the Senate conducts a trial to determine whether to convict or acquit. Convicted persons can be barred from holding federal office in the future, and may be subject to criminal trial in the courts. The President's otherwise unlimited pardon power does not extend to impeachment convictions.

. . . [N]o Person holding any Office of Profit or Trust under [the United States] shall, without the consent of Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State. Article I, section 9, cl. 8.

This restriction complements denial to Congress of the power to grant titles of nobility. By statute, Congress requires that federal officials turn over to the government all but minimal gifts from foreign nations.

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . Article II, section 2.

The Senate's advice and consent role in treaties is one of several means by which Congress may influence foreign policy, the principal others being the war powers and the appropriations power noted above, and the confirmation authority listed below.

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. Article II, section 2.

The requirement that the President obtain Senate approval of appointment of ambassadors, judges, and executive branch officers is an important check on the President's authority. Also significant are Congress' powers to create (and by implication abolish) offices (including executive departments and agencies), and to specify who shall have the appointment authority for "inferior" officers.

The Judicial Branch

Note: the impeachment power, set forth above as a check on the executive branch, applies as well to judges.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. Article III, section 1.

The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court. Article I, section 8, cl. 9.

Congress may create inferior courts, and first did so in the Judiciary Act of 1789. By implication Congress may also abolish inferior federal courts, although in doing so Congress presumably must reassign judges, who have lifetime tenure.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, 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. Article III, section 2, cl. 2.

The appellate jurisdiction of the Supreme Court, unlike its original jurisdiction, is subject to "exceptions" and "regulations" prescribed by Congress. Whether and to what extent Congress may deprive the Court of jurisdiction to hear constitutional issues is unsettled. Congress' authority to create and abolish "inferior" federal courts includes implicit authority to control jurisdiction of such courts.

The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. Article III, section 2, cl. 3.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law Sixth Amendment.

Congress' broadest authority over the location of trials for federal crimes relates to crimes "not committed within any State" -- i.e., crimes committed on the high seas, in territories of the United States, or at forts or other federal enclaves that are under the exclusive legislative jurisdiction of the United States.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. Article I, section 9, cl. 2.

The power of Congress to suspend the writ of habeas corpus in cases of rebellion or invasion is generally conceded. The President's authority to do so is disputed; after initially suspending the writ on his own motion during the Civil War, President Lincoln sought and received congressional authorization.