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The Enumerated Powers Act: A First Step Toward Constitutional Government

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Last October, Congress passed the Emergency Economic Stabilization Act, creating the Troubled Asset Relief Program (TARP) that has since become the executive branch's slush fund for intervening in the economy.[1] At the time, many Members of Congress believed the legislation to be unwise; only a few, however, recognized that it was likely unconstitutional.

That is typical for a Congress that considers itself unconstrained by the Constitution's enumeration of its limited powers. Reversing that delusion is the goal of the Enumerated Powers Act (H.R. 450, S. 1319), introduced by Representative John Shadegg (R–AZ) and Senator Tom Coburn (R–OK).

The Act would require all legislation introduced in Congress to contain a concise explanation of the constitutional authority empowering Congress to enact it.[2] Failure to comply would make a bill subject to a point of order, a procedural device to delay consideration until the problem is corrected or the objection overruled.

This simple requirement would empower those few Members of Congress willing to stand up and call attention to Congress's routine disregard of the Constitution's division of powers, especially its limitations on federal power. No wonder, then, that the proposal, introduced each session by Shadegg since 1995, has gone precisely nowhere.

Though the Act could not guarantee the constitutionality of legislation, it would have a significant effect on Congress. Most clearly, when invoked it would shift debate to fundamental questions of the

Talking Points

- To protect individual liberty, the Framers of the U.S. Constitution carefully enumerated the powers to be vested in the national government, rejecting as dangerous any broader approach.
- This great limitation has been whittled away to almost nothing. Today, Congress routinely legislates without regard to the limits on its powers, and the courts only rarely act to enforce them.
- The Enumerated Powers Act would be a small step toward reviving the practice of constitutionally limited government. Although it would not stop Congress from passing unwise laws, the Act would empower those Members who take the Constitution seriously to force the House and Senate to at least consider constitutional norms in lawmaking.
- Considering its constitutional authority is the primary inquiry in determining whether any proposal is a legitimate and an appropriate use of federal power. Making this inquiry, as the Enumerated Powers Act would require, is the least that should be expected of those who have sworn to "support and defend the Constitution."

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rule of law. There is an educational value to this exercise that stands to attract additional Members, over time, to the "constitutional caucus."

Most importantly, requiring legislation to state the basis of its authority would reveal the hollowness of the constitutional doctrine underlying so much congressional action. Every bill would be an opportunity for Americans to think seriously about our constitutional order, the wisdom of its design, and the consequences of departing from its strictures.

Picking Powers

The Constitution—the font of all the federal government's powers—should play a leading role in the legislative process, but today it is conspicuous in the Capitol only for its absence from both chambers' debates. The Enumerated Powers Act would not force Members to confront constitutional issues head-on in every piece of legislation that they introduce—as they are duty-bound and take an oath to do[3]—but would provide a perch for constitutional considerations and an opportunity for Congress to consider how the aims of the legislation comport with the constitutional design.

Under the Act, any bill lacking "a statement of the constitutional authority relied upon" (or, in Senator Coburn's stronger formulation, an "explanation of the specific constitutional authority") could be delayed from proceeding.[4] When such a bill is called up for consideration in the House, any Member could raise a point of order to challenge consideration of the legislation, and the Speaker of the House would, after consulting the parliamentarian, rule the bill out of order unless the chamber voted to waive the point of order and proceed—a vote that many Members, for appearances' sake, may not wish to join. In the Senate, a Senator raising the point of order could compel up to several hours of floor debate with the chief supporter of the legislation on its constitutionality.[5] After that debate, the point of order would be put to a vote.[6]

The point of order would also be available in the case of bills that contain only perfunctory statements of their constitutional basis. For example, a bill to make jaywalking a federal crime might name the Commerce Clause or the Necessary and Proper Clause as the source of Congress's authority to enact it—a hollow justification. A Member could raise a point of order against such a bill to prevent its consideration. Whatever the outcome, Congress would be forced to consider the constitutional authorization for that legislation and seriously confront the limitations on its power.

Founding Principles

Those limitations are far greater than Congress's actions today may indicate. Put plainly, "The Constitution creates a federal government of enumerated powers,"[7] not one of general power, such as those of the states.[8] Whereas the states may legislate in nearly any area, save for those foreclosed by federal exclu-

1. *See* Andrew Grossman & James Gattuso, *TARP: Now a slush fund for Detroit?*, Heritage Foundation WEBMEMO No. 2170, December 12, 2008, *available at* http://www.heritage.org/Research/Economy/wm2170.cfm.
2. Enumerated Powers Act, H.R. 450, 111th Cong. § 2(b) (2009); S. 1319, 111th Cong. § 2(b) (2009). Senator Coburn's version of the legislation is identical to Representative Shadegg's but for an additional subsection concerning Senate procedure.
3. U.S. CONST. art. VI, cl. 3; 5 U.S.C. § 3331 (2008).
4. H.R. 450, 111th Cong. § 2(b) (2009).
5. Under the provision and Senate procedure, the debate time would be no more than three hours. The Senator raising the point of order would have 1.5 hours to make his case, and the floor manager of the bill would have the same amount of time to rebut it. Because both could yield their time, the debate could last from 10 minutes up to three hours.
6. These additional Senate procedures are specified only in S. 1319.
7. U.S. v. Lopez, 514 U.S. 549, 552 (1995); U.S. v. Morrison, 529 U.S. 598, 607 (2000); Marbury v. Madison, 5 U.S. (Cranch) 137, 176 (1803) (Marshall, C. J.) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").
8. *See, e.g.,* THE FEDERALIST No. 45, at 241 (James Madison) (Gideon ed., 2001) ("The powers *reserved* to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.") (emphasis added).

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sivity and the natural rights of the people, the federal government is limited to those few powers that it was expressly granted in the Constitution.[9]

The purpose of this grand limitation is the protection of individual liberty. Constitutional architect James Madison identified the absence of a grant of general power, along with the separation of powers among the branches, as central to the design of a government that would be strong enough to defend and preserve itself but not so strong that it would overpower its own citizens.[10] Surveying the powers conferred on the federal government by the Constitution, Madison was adamant that "no part of this power is unnecessary or improper, for accomplishing the necessary objects of the union."[11] The Framers took care, in other words, to enumerate only those powers absolutely necessary to the survival of the union, keenly aware that any more generous grant could lead the federal government to improper and illegitimate ends—to tyranny.

This premise is neither hidden in the interstices of the Constitution's provisions nor afloat in emanant "penumbras"—the location of what some regard as inviolable constitutional commands[12]—but plainly apparent in the strictures and grants of the Constitution's first three articles that establish the legislative, executive, and judicial branches. The grant of power in Article I establishing the Congress is far more specific and bounded than those in Article II and Article III. Article I vests "All legislative powers *herein granted*"—that is, the power to make law—"in a Congress" and then proceeds to enumerate the specific powers granted.[13] This is done primarily in Section 8, beginning with "the power to lay and collect taxes, duties, imposts, and excises." Most of the powers enumerated are precise—for example, the power "To establish post offices and post roads"—and the list itself is long. By contrast, Article II states simply that "The executive power"—there is no "herein granted" or other limitation—"shall be vested in a President of the United States of America."[14]

That the federal government's powers are ultimately limited by their enumeration in the Constitution is affirmed in the Tenth Amendment.[15] It states that "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." The drafters of the Bill of Rights feared that an enumeration of positive rights including ones that the federal government did not even have the power to infringe would allow the courts to infer such power to give those rights operative effect.[16] The Tenth Amendment does not confer any right, but expressly sets forth the theory of enumeration as limitation and confirms that the federal government's powers were not expanded by the Bill of Rights.[17]

The virtue of enumeration, and thereby limitation, is the subject of Federalist No. 45, in which James Madison addressed the arguments of anti-federalists that the Constitution granted the federal government powers sufficient to usurp or displace the states' general power to legislate:

9. *Id.*
10. THE FEDERALIST No. 44, at 235 (James Madison) (Gideon ed., 2001).
11. *Id.* at 237.
12. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.")
13. U.S. CONST. art. I, §§ 1, 8 (emphasis added).
14. *Id.* at art. II, § 1, cl. 1.
15. *See* Charles Cooper, *Reserved Powers of the States*, in THE HERITAGE GUIDE TO THE CONSTITUTION 371 (Edwin Meese III ed., 2005).
16. The FEDERALIST No. 84, at 445–46 (Alexander Hamilton) (Gideon ed., 2001) ("I go further, and affirm that bills of rights… are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted.").
17. Cooper, *supra* note 15.

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[18]

Even the several of the enumerated powers that may appear to be broad—such as taxing for the "general welfare" and making "all laws which shall be necessary and proper for carrying into execution the foregoing [enumerated] powers"—are, according to the Constitution's Framers, tempered by the surrounding text and traditional doctrines of statutory and constitutional interpretation.[19] Among those doctrines are reliance on the plain meanings of the words at the time they were ratified, *noscitur a sociis* (determining meaning by reference to context), and the direction to "give effect, if possible, to every clause and word"[20] and to thereby "avoid rendering superfluous" any words.[21]

An example: Based on these principles, Congress's power to "regulate commerce…among the several states" is not an infinite reservoir of authority, as some would have. Rather, that grant is limited by its own language and the other enumerated grants (e.g., the power to construct post roads) that, if read broadly, it would encompass and so render "mere surplusage."[22] Justice Clarence Thomas states the argument well in his famous concurrence in *Lopez*:

> [I]f Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, [Art. I, § 8,] cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.
>
> Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.[23]

Indeed, the Framers specifically rejected a narrow but less specific grant of power to Congress that was proposed by Virginia: "to legislate in all

18. THE FEDERALIST No. 45, at 241 (James Madison) (Gideon ed., 2001).
19. THE FEDERALIST No. 41, at 213–14 (James Madison) (Gideon ed., 2001) ("But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon?").
20. Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).
21. Astoria Fed. Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).
22. *Marbury*, 5 U.S. (1 Cranch) at 174 (reasoning "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").
23. *Lopez*, 514 U.S. at 588–89 (1995) (Thomas, J., concurring).

cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by exercise of individual legislation."[24] While that proposal may reflect, more or less, the federal government's legitimate scope of power, and does reflect the rationale for the specific powers enumerated in the Constitution, the Framers abandoned this plenary approach in favor of the more precise enumeration that passed the Constitutional Convention.

Thus, the Framers' Constitution guards the powers of the people and their state governments jealously. It gives up to the federal government precisely those powers the Framers considered necessary to correct the shortcomings of its predecessor confederation and to effect the limited ends of the federal government. Those powers, in turn, are *further* limited by the provisions of the Bill of Rights—a concession to those who feared that the federal government would break the bounds of enumeration. Their fear was, unfortunately, quite prescient.

The Missing Constitution

For all the Framers' attention to the question of the federal government's powers, Congress only rarely considers the Constitution's checks on its authority and the prudential limits of federal power. The result: scores of laws that fall outside of Congress's constitutional authority, as originally understood, and a nation adrift ever further from the constitutional norms that supported its greatest achievements.

The Commerce Clause, in particular, has become a *carte blanche* for federal regulation of nearly any activity, from maintaining a home garden to growing small amounts of marijuana for medical use.[25] Congress has abused the clause to muscle in on states' police power, federalizing a variety of crimes traditionally handled at the state level, such as violent crimes, and reducing the effectiveness of state law-enforcement efforts in the process.[26] More recently, Congress and the executive branch have relied on the commerce power to support unprecedented interventions in the U.S. economy and the trampling of individual property rights.[27]

Congress regularly shirks its duty to uphold the Constitution by failing to seriously consider whether even its most far-reaching proposals are authorized. For example, Senators Edward Kennedy (D-MA) and Christopher Dodd (D-CT) recently proposed a radical health care "reform" that would "transfer enormous power over health care to Washington, including regulatory power traditionally exercised by the states over the rules governing health insurance."[28] In current drafts, the constitutional basis for this expansion of federal control is unspecified—probably because there is none.[29]

24. James Madison, Notes of Debates in the Federal Convention of 1787 31 (1987).
25. Wickard v. Filburn, 317 U.S. 111, 125–29 (1942); Gonzales v. Raich, 545 U.S. 1, 57–58 (Thomas, J., dissenting) ("Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.").
26. *See, e.g.,* Erica Little & Brian Walsh, *The Gang Abatement and Prevention Act: A Counterproductive and Unconstitutional Intrusion into State and Local Responsibilities*, Heritage Foundation WebMemo No. 1619, September 17, 2007, *available at* http://www.heritage.org/Research/Crime/wm1619.cfm.
27. *See* Andrew Grossman, *Protecting Property Rights to Preserve Freedom and Prosperity: A Memo to President-elect Obama*, Heritage Foundation Special Report No. 40, January 6, 2009, *available at* http://www.heritage.org/Research/LegalIssues/sr0040.cfm; *Consequences of the Automaker Bankruptcies: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Andrew Grossman, Senior Legal Policy Analyst, The Heritage Foundation), *available at* http://www.heritage.org/Research/Economy/tst052209a.cfm.
28. Robert Moffit & Stuart Butler, *Why the Kennedy Health Bill Would Wreck Bipartisan Reform*, Heritage Foundation WebMemo No. 2481, June 12, 2009, *available at* http://www.heritage.org/Research/HealthCare/wm2481.cfm.
29. Affordable Health Choices Act, H.R. __, 111th Cong. (2009), *available at* http://help.senate.gov/BAI09A84_xml.pdf (last visited June 16, 2009).

In a sop to doctors, President Obama has proposed that the bill also take aim at medical malpractice liability, a creature of state law alone.[30] But with what constitutional authority? None of the powers enumerated in Article I, Section 8, allows the federal government to abrogate state tort law as it applies to wholly intrastate conduct. Indeed, the proposal quite clearly runs afoul of the vertical separation of power—that is, federalism—inherent and explicit in the constitutional structure.[31] Doctors, as well as conservatives, should especially beware of this encroachment. The power to limit state tort claims now could be used to expand them in the future.

Another example is a recent bill that would federalize gang crime. It contains myriad congressional "findings" but no explanation of how the federal government gained police power over common street crimes, something it surely did not have around the time of the Framing.[32] In an attempt to sidestep this concern, the bill's drafters added an incantation to each of its provisions defining offenses: "occur in or affect interstate or foreign commerce."[33] But no magic words, sprinkled however liberally on a piece of legislation, can bring an act within the scope of the Commerce Clause power. In other cases where constitutional concerns arise, Congress usually leaves the question of constitutionality to the courts, denying that it has any duty to verify that it acts within the limits of the law. Several supporters of the McCain–Feingold campaign finance reform bill, for example, acknowledged that parts of it were likely unconstitutional but nonetheless voted for its passage.

In a few cases, the courts have struck down overreaching statutes, but in many more, laws of questionable constitutionality go unchallenged or are upheld based on decades of loose precedent. The Rehnquist Court, for example, touched off a "federalism revolution"[34] by striking down just two particularly egregious abuses of the Commerce Clause power: one creating a federal tort for crimes "motivated by gender" and another prohibiting the possession of guns near schools.[35] Despite those cases and strong social science evidence that local crime is most effectively fought at the state and local level (a conclusion prefigured by the Framers), Congress routinely flexes its "tough-on-crime" muscles to take on things like local criminal gangs and ordinary prostitution.[36] In this way, the constitutional design, and the wisdom it embodies, has been all but abandoned.

Conclusion

As every schoolchild learns in civics class, the national government is one of limited powers, and any legislation that would exceed those powers is unconstitutional. Rather than attempt to place limits on a grant of absolute power—an endeavor that the Framers recognized as doomed to failure—the original constitutional text goes to the trouble of conveying *specific* and *narrow* grants of authority to the federal government. Every act of Congress must fall within some enumerated power or else it

30. Sheryl Gay Stolberg & Robert Pear, *Obama Open to Reining in Medical Suits*, N.Y. TIMES, June 15, 2009, at A1.

31. U.S. CONST. amend. X.

32. Many are amusingly perfunctory—e.g., "gangs commit acts of violence or drug offenses for numerous motives, such as membership in or loyalty to the gang, for protecting gang territory, and for profit." Gang Abatement and Prevention Act of 2009, S. 132, 111th Cong. § 3(5) (2009).

33. *Id.* at § 101 ("It shall be unlawful for any person to knowingly commit, or conspire, threaten, or attempt to commit, a gang crime for the purpose of furthering the activities of a criminal street gang, or gaining entrance to or maintaining or increasing position in a criminal street gang, if the activities of that criminal street gang *occur in or affect interstate or foreign commerce*") (emphasis added).

34. Erwin Chemerinsky, *The Rehnquist Court's Federalism Revolution*, 41 WILLIAMETTE L. REV. 827 (2005).

35. *Lopez*, 514 U.S. at 552; *Morrison*, 529 U.S. at 607.

36. Brian Walsh & Andrew Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, Heritage Foundation LEGAL MEMORANDUM No. 21, February 14, 2008, *available at* http://www.heritage.org/ Research/LegalIssues/lm21.cfm.

is illegitimate, a usurpation of the power retained by the people and their states and a threat to individual liberty.

Congress has lost sight of this imperative. Though all Members of Congress pledge to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and "bear true faith and allegiance to the same,"[37] rarely if ever do sponsors of legislation, or those voting for it, take the time to identify the authority to enact it. There are severe consequences to this fecklessness, as Americans have witnessed again and again over the past year.

Finding constitutional authority for an act should not be an afterthought and cannot be accomplished by adding special incantations to the bill text, but is the primary inquiry in determining whether a proposed act is legitimate and an appropriate use of federal power. In a better world, the Enumerated Powers Act would be superfluous and the constitutional design a regular topic of congressional debates. That is not, however, the world in which Congress legislates today.

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37. 5 U.S.C. § 3331.