

## **POWERS OF CONGRESS**

Congress is an immensely powerful organization. It has so many powers, in fact, that those powers have to be split up into three separate categories. The first are the expressed powers, those explicitly named in the Constitution as belonging to the Congress. There are 27 of these enumerated in Article I, Section 8, ranging from the basic power to levy taxes to the rather unusual power to hire pirates (known as a Letter of Marque) to attack the nation's enemies. (Seriously—that's in there.) The second are the implied powers, those not explicitly named in the Constitution but still agreed to be "necessary and proper" to exercise the expressed powers. These include things like the power to set rules for railroad safety, which is justified on the basis that such regulations are necessary for Congress to exercise its expressed power to regulate interstate commerce. The implied powers are often controversial because they are not written down and are thus subject to constant reinterpretation. And the third are the inherent powers, those held to belong to all world governments and thus also to the Congress, even if they're not explicitly listed in the Constitution. There aren't many of these, but they include things like the power to control the nation's borders or expand its boundaries.

### **EXPRESSED POWERS OF CONGRESS**

The 27 expressed powers of Congress listed in Article I, Section 8 of the Constitution grant the legislative branch a huge amount of authority over American national policy, both foreign and domestic.

The most important powers include the power to tax, to borrow money, to regulate commerce and currency, to declare war, and to raise armies and maintain the navy. These powers give Congress the authority to set policy on the most basic matters of war and peace.

Congress's other expressed powers are wide-ranging, including:

- The power to establish rules to allow foreign-born immigrants to become citizens of the United States
- The power to make rules for bankruptcies
- The power to punish counterfeiters
- The power to set up a national post office
- The power to provide for copyrights and patents to protect the work of inventors and artists
- The power to organize all federal courts below the Supreme Court
- The power to punish pirates
- The power to hire pirates to attack foreign enemies
- The power to make rules to regulate the conduct of the armed forces
- The power to call out the militia to defend the country from invasions or insurrections
- The power to organize and discipline the militia
- The power to govern the federal capital (Washington, DC)
- The power to acquire lands from the states for use by the federal government

And, last but definitely not least:

The power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers...."

## **IMPLIED POWERS OF CONGRESS**

This last power is enshrined in Article I, Section 8, Clause 18—one of the most important and controversial clauses in the entire Constitution. This "Necessary and Proper Clause" (sometimes also called the "Elastic Clause") grants Congress a set of so-called implied powers—that is, powers not explicitly named in the Constitution but assumed to exist due to their being necessary to implement the expressed powers that are named in Article I.

But what the heck does that mean, exactly?

We know that Congress has the power to regulate interstate commerce. (It says so right there in Article I, Section 8, Clause 3.) But does Congress have the power to, say, make a rule setting a national minimum wage? Is that minimum-wage law really "necessary and proper" for Congress to exercise its authority to regulate interstate commerce?

Today, most people would say yes. We do have a national minimum-wage law, and very few people now argue that the law should be considered unconstitutional. We interpret the commerce clause pretty loosely, assuming that Congress has the legitimate authority to pass all kinds of economic rules and regulations as a "necessary and proper" part of exercising its broad commerce powers.

But this wasn't always the case. Throughout the late nineteenth century and well into the 1930s, the Supreme Court insisted that such laws were unconstitutional, that they were not a "necessary and proper" part of regulating interstate commerce at all and thus the government had no right to enforce them.

What changed? Not the Constitution. But our understanding of what's "necessary and proper" today simply isn't the same as what it was a century ago. Now you can see why Article I, Section 8, Clause 18 is sometimes called "the Elastic Clause"—the definition of "necessary and proper" can be stretched pretty far in one direction or the other, depending upon the dominant political trends of the moment.

And because the definition of "necessary and proper" is so subjective, the implied powers that derive from the Necessary and Proper Clause have often been extremely controversial and subject to ferocious political disagreement. And this has been the case since at least George Washington's presidency, if not even before.

## **STRICT CONSTRUCTIONISM VS. BROAD CONSTRUCTIONISM**

Almost immediately following the creation of the Constitution, the Founding Fathers split into two opposing camps over the question of how loosely or strictly to interpret the Necessary and Proper Clause.

One faction, the strict constructionists, was led by Thomas Jefferson. Arguing that "that government is best which governs least," the strict constructionists desired a small federal government, one that would leave most power to the states and to the people. Thus they argued that Congress should only be allowed to exercise those expressed powers specifically listed in the Constitution, recognizing few or any other implied powers as legitimate. Jefferson wanted to ensure that government would charge few or no taxes, mostly leaving the people at liberty to pursue their own objectives free from government interference. Only a very strict reading of the Necessary and Proper Clause, he thought, would prevent the government from giving itself more and more unnecessary power over citizens' lives.

The other faction, the broad constructionists led by Alexander Hamilton, argued for a much more powerful federal government and a much broader reading of the Necessary and Proper Clause. Hamilton, unlike Jefferson, wanted to use the federal government to pursue an aggressive strategy of industrialization and economic development. Hamilton's vision called for the government to organize banks, build roads, and invest in other useful infrastructure, all in the interest of transforming the young United States from a country of farmers into a thriving economic powerhouse. But the Constitution did not expressly grant the government the power to do most of those things; only a liberal interpretation of the Necessary and Proper Clause would allow Hamilton's vision to be considered constitutional. Hamilton and the broad constructionists argued that the national interest could be best served by creating a powerful government able to exercise a wide variety of implied powers, all justified by a loose reading of "necessary and proper."

The argument that began with Jefferson and Hamilton split George Washington's government, leading to the formation of the very first American political parties—Jefferson's Democratic-Republicans opposing Hamilton's Federalists. And the argument has continued, in one form or another, all the way to the present. Should the government be large and strong, able to exercise powerful influence over many areas of American life? Or should it stay small and restrained, leaving the people free to manage their own affairs? Does the Constitution require sharply limited government, or does it allow government to gain broad new powers as needed to deal with new challenges as the world changes?

It all depends on what your definition of "necessary and proper" is.

The strict constructionists have won plenty of victories over the years. Jefferson won the election of 1800 by promising to limit the size and scope of government. The Supreme Court enforced a very narrow reading of the commerce clause from the 1870s through 1937, blocking many federal attempts to regulate economic activity. However, the general trend in American history has been toward the broad constructionist view. In times of war, economic upheaval, and other crises, most people have tended to favor granting the government wide powers of action; over the decades, those gradual expansions of power have led to a government much larger—and an interpretation of the Necessary and Proper Clause much broader—than anything Jefferson or Hamilton could have ever imagined. Almost all of us now accept that the federal government has a huge array of implied powers—powers to impose environmental rules, labor regulations, educational policies, and a hundred other kinds of interventions into American life, even though those powers are explicitly mentioned nowhere in the Constitution. Perhaps our definition of "necessary and proper" will change again in the future, but for now, there seems to be a broad consensus in favor of broad constructionism among most Americans.

### **INHERENT POWERS OF CONGRESS**

Beyond the expressed and implied powers of Congress, the legislative branch possesses a third type of powers—the so-called inherent powers of government. These powers, like the implied powers, are not explicitly listed in the Constitution, but they are said to be inherent to the very idea of national government. Because the United States is a sovereign nation in the world, it can be assumed to possess certain powers that all sovereign nations possess and always have possessed. The Founding Fathers, the argument goes, surely took for granted that the United States government would have these inherent powers as well. These powers exist, in essence, simply because the United States exists. There are not many of these inherent powers, but some are quite important; they include the

power to control the country's borders, to give or refuse diplomatic recognition to other countries, to acquire new territories for national expansion, and to defend the government from revolutions.

### **NON-LEGISLATIVE FUNCTIONS**

As if the expressed, implied, and inherent powers don't already give Congress plenty with which to keep itself busy, the Constitution also assigns the legislative branch several important non-legislative functions—that is, powers and responsibilities not directly related to the process of making new laws.

Most of these are used only in special circumstances. For example, Congress has important electoral powers, but they are only used if the regular electoral practices fail to produce clear results. Most famously, the House of Representatives gets to choose the president anytime no candidate is able to win a majority in the Electoral College. (Luckily, this has only happened twice, and not recently; the House elected Thomas Jefferson in 1801 and John Quincy Adams in 1825.) Along the same lines, the Senate has the responsibility for electing the vice president if no candidate for VP is able to win an electoral-college majority.

Congress also has the power of impeachment—that is, the power to remove from office any federal official deemed to have committed what the Constitution called "Treason, Bribery, or other high Crimes and Misdemeanors." The Constitution gives the House the sole power to impeach—that is, to bring charges against government officials. If a simple majority of the House votes to impeach, then the Senate is required to serve as judge and jury, with a two-thirds supermajority vote needed to convict. So far in our history, only two presidents—Andrew Johnson in 1868 and Bill Clinton in 1998—have been impeached by the House. Both won acquittal from the Senate, however, and remained in office to complete their terms.

The Constitution also grants the Senate the unique non-legislative power to confirm or deny all major appointments made by the president. The Constitution requires that the president seek the "advice and consent" of the Senate when appointing federal judges, cabinet officers, and major officials of executive agencies. In practice, that means that a majority of the full senate must vote to confirm the president's nominees in order for them to take office. In recent years, Senate opposition has stymied presidential choices for a wide variety of federal appointments, including crucial appointments to the Supreme Court.

The Constitution also requires that the president seek the Senate's "advice and consent" on all international treaties, demanding a two-thirds vote of the Senate for any treaty to acquire the force of law.