Changes in Congressional Power

Inquire: What Power Does Congress Have?

Overview

The framers of the Constitution were specific and intentional. They felt that Congress, the legislative branch of the government, was most important. As such, they started with Congress in Article I of the Constitution. They also believed in the “social contract” theory espoused by Locke and Hobbes, that says a government draws its power from the people in a social contract where the people give the government certain specific, limited powers and in return, the government takes on certain specific, limited responsibilities. Wanting to ensure a government controlled by the people but with the authority to govern a large country effectively, the framers expressly set out the powers of Congress in Article I, Section 8. In this lesson, we will review powers of Congress and explore how they have changed, and even expanded, over the last 220-plus years.

Big Question: How has Congress’ power changed since the ratification of the Constitution in 1789?

Watch: Implied Powers and the Magic Wand of the Commerce Clause

The implied powers of Congress were ratified as constitutional in McCulloch v. Maryland, a case which revolved around the federal government’s power to open a bank. In the opinion authored by Chief Justice John Marshall, the Supreme Court ruled that while Congress had no expressed power to open a bank, the power to open a bank could be implied from Congress’ expressed powers to tax, control interstate commerce, and coin money. Since that time, Congress has expanded its powers through implying powers attached to almost every expressed power in Article I, Section 8.

But, nowhere has Congress found more power to regulate activities within the states than in the short clause in Article I, Section 8 which says Congress is empowered to “regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.” The Supreme Court’s broad interpretation of the commerce clause has greatly expanded the power and reach of Congress, and has become the magic wand Congress turns to to assert their authority.

The growing country, the demands of its expanding economy, and the way changes in technology and transportation contributed to the shrinking of space between the states demanded that Congress be able to function as a regulator. The court’s interpretation of the commerce clause swung to an even-broader direction in the mid-1900s. This change proved particularly important in the 1960s when Congress rolled back racial segregation throughout much of the South and beyond, and in the 1970s, as federal environmental regulations and programs took root.
But, in *United States v. Lopez*, a decision issued in 1995, the Court changed course and, for the first time in half a century, struck down a law as an unconstitutional overstepping of the commerce clause.

When the Patient Protection and Affordable Care Act (also known as the ACA, or Obamacare) came before the Supreme Court in 2012, many believed the Court would strike it down. Instead, the justices took the novel approach of upholding the law based on the Congress’ enumerated power to tax, rather than Congress’ power under the commerce clause. The decision was a shock to many. And, by not upholding the law on the basis of the commerce clause, the Court left open the possibility that it would continue to pursue a narrower interpretation of the clause in the coming years.

Has the Supreme Court decided Congress’ use of the magic wand has gone too far? Only time will tell.

**Read: The Trimodal Powers that Exist in Congress**

**Congressional Powers**

In general, congressional powers can be divided into three types: expressed (also called enumerated), implied, and inherent. An **expressed power** is a power explicitly stated in the Constitution. An **implied power** is one not specifically detailed in the Constitution but which can be reasonably deduced due to expressed powers and/or inferred as necessary to achieve the objectives of the expressed powers. Lastly, **inherent powers**, while not expressed or implied, are powers necessary in order to function as a national government.

We will discuss each of these powers in this section, and how have they have evolved over time.

**Expressed Powers**

Article I, Section 8, of the U.S. Constitution details the expressed powers of Congress. These include the power to levy and collect taxes, declare war, raise an army and navy, coin money, borrow money, regulate commerce among the states and with foreign nations, establish federal courts and bankruptcy rules, establish rules for immigration and naturalization, and issue patents and copyrights. Other powers, such as the ability of Congress to override a presidential veto with a two-thirds vote of both houses, are found elsewhere in the Constitution (Article II, Section 7, in the case of the veto override).

The first of these expressed powers, to levy taxes, is quite possibly the most important power Congress possesses. Without it, most of the others, whether expressed, implied, or inherent, would be largely theoretical. The power to levy and collect taxes, along with the appropriations power, gives Congress what is typically referred to as “the power of the purse,” which means Congress controls the money. Like several of the expressed powers, the power to tax was one of the weaknesses in the Articles of Confederation the framers specifically addressed in the Constitution.

Other expressed powers set forth in the Congress were included specifically to serve as checks on the other two branches of government. Congress has the sole power to introduce legislation which effectively limits the power of the president to develop the same laws he or she is empowered to enforce. It also has final say related to any treaties signed by the President, and must grant the President permission to declare wars and sue for peace. The House is granted the ability to impeach or formally accuse the president or other federal officials of wrongdoing (the first step in removing the person from office; the second step, trial and removal, takes place in the U.S. Senate). Though, removing a president from office who has been elected by the entire country should never be done lightly. Giving this responsibility to a large deliberative body of elected officials ensures it will occur only very rarely. The Senate also has the
exclusive power to give final approval for many of the president’s nominees, including cabinet members and judicial appointments. This compels the president to consider the needs and desires of Congress when selecting top government officials. While also granting Congress a check over the Judicial branch. Each of these powers also grants Congress oversight of the actions of the president and his or her administration — that is, the right to review and monitor other bodies such as the Executive and Judicial branches.

Implied Powers

Despite the fact that the Constitution outlines specific expressed powers, most of the actions Congress takes on a day-to-day basis are not actually included in this list. This is because the Constitution not only gives Congress the power to make laws but also gives it some general direction as to what those laws should accomplish, and in McCulloch v. Maryland, the Supreme Court ruled that the federal government did have implied powers in addition to the expressed powers.

These implied powers must flow from the expressed powers — they must be implied from something — and from the “necessary and proper clause” (also called “the elastic clause”) located in Article I, Section 8. This clause directs 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.”

It is important to remember the Constitution sets up a limited government with the powers granted in and through the Constitution, but no more. The need for the implied powers to flow from the expressed powers relates back to this idea. This American government is based on the social contract between the people — who give the government its limited powers in return for the government performing certain responsibilities — and reflects the truth that rights and powers are a zero sum game. Whatever the government has, the people lose. As such, how these implied powers are deduced from the expressed powers is one of the most important decisions.

If the implied powers can simply be “implied” for anything, there is no real limitation to the national government’s potential powers. Tying the implied powers to the expressed powers ensures a limitation of the potential powers of Congress.

As one might guess, it is here, in the implied powers, that the arguments over Constitutional Interpretation are always centered. The Federalist/Constitutional Activist argument — first espoused by John Adams, Alexander Hamilton, and the Federalists — was that the powers of Congress and the federal government included: 1) the powers expressed in the Constitution; and 2) those powers which could be reasonably implied from the Constitution.

The Anti-Federalists/Constitutionalist argument — originally set forth by Thomas Jefferson, James Madison, and the Anti-Federalists — was that the powers of Congress and the federal government included: 1) the powers expressed in the Constitution; and 2) those powers which were absolutely necessary to carry out the expressed powers. This difference of definition has framed the major political disagreements in all of American history and continues to be the basis of many of the differences in the Democrat and Republican parties today.

It is impossible to minimize the importance of the implied powers. Laws that regulate banks (as in the McCulloch case), establish a minimum wage, and allow for the construction and maintenance of interstate highways are all possible because of the implied powers granted by the necessary and proper clause. They are not specifically expressed in the Constitution, but are implied from an expressed power. Today, the overwhelming portion of Congress’ work is tied to the necessary and proper clause.
The Inherent Powers

Finally, Congress' inherent powers are unlike either the expressed or the implied powers. Inherent powers are not mentioned in the Constitution, and they are not tied to the expressed powers. Instead, they are powers Congress has determined it must assume if the government is going to work at all. The general assumption is that these powers were deemed so essential to any functioning government that the framers saw no need to spell them out. Such powers include the power to build buildings, to provide staff and resources for the elected officials, even the ability to maintain buildings, equipment, resources, etc. These powers are not granted to the Congress, or to any other branch of the government for that matter, but they exist because the country exists.

Reflect: Which Power is Most Important?

Poll: Below is a list of five powers of Congress other than the power to make laws. Which of these five do you think gives Congress the most control over the government?

- The Senate’s power to confirm or reject all presidential appointments (including justices).
- The House’s power to initiate impeachment proceedings against federal officials (including the president).
- Congress’ power to control the federal budget.
- Congress’ power to investigate events and issues of national importance.
- The oversight powers allowing Congress to regulate and oversee the actions of all executive agencies.


Discover

At its creation in 1789, the legislative branch was the most innovative.

Rule by kings and emperors was an old style of government, and the legislature in many ways represented the new. Almost certainly, the founders intended Congress to have more important powers than the president and the Supreme Court. However, they placed many checks and balances on the legislature that have prevented absolute power in the hands of one branch in an effort to avoid the type of authoritarian actions Parliament had exercised over the Colonies. The founders controlled this power not only by checks from the other branches, but by creating a bicameral, or two house, Congress — the Senate and the House of Representatives. The powers of Congress, then, are both constitutional and evolutionary.

Constitutional Powers

The Constitution specifically grants Congress its most important power: the authority to make laws. A bill, or proposed law, only becomes a law after both the House of Representatives and the Senate have approved it in the same form. The two houses share other powers, many of which are listed in Article I, Section 8. These include the power to declare war, coin money, raise an army and navy, regulate commerce, establish rules of immigration and naturalization, and establish the federal courts and their jurisdictions.
The Constitution also gives each house of Congress some special, exclusive powers. Such powers given to the House of Representatives include the following:

1. **Revenue bills** must originate in the House of Representatives. Although this power is still honored today, it tends to have blurred over the years. Often budget bills are considered simultaneously in both houses, and in the executive branch as well.

2. **Impeachment power**, the authority to charge the president and other "civil officers" with wrongdoing, is given to the House. A simple majority vote can impeach an elected official.

Special, exclusive powers given to the Senate include the following:

1. **Major presidential appointments** must be confirmed by the Senate. The Senate offers "advice and consent" to the president by a majority vote on the appointments of federal judges, ambassadors, and Cabinet positions.

2. **Treaties** with other nations entered into by the president must be approved by a **two-thirds vote** by the Senate. This provision is an illustration of checks and balances, and it has served as a very important restriction to foreign policy powers of the president.

3. An **impeachment trial** occurs in the Senate. If the House votes to impeach an elected official, the accused party gets a hearing in the Senate. A two-thirds majority can convict the individual and remove him or her from office.

**Important Constitutional Differences Between the House and the Senate**

<table>
<thead>
<tr>
<th>House</th>
<th>Senate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initiates all revenue bills</td>
<td>Must confirm many major presidential</td>
</tr>
<tr>
<td></td>
<td>appointments</td>
</tr>
<tr>
<td>Initiates impeachment</td>
<td>Tries impeachment officials</td>
</tr>
<tr>
<td>procedures and passes articles of impeachment</td>
<td></td>
</tr>
<tr>
<td>Two-year terms</td>
<td>Six-year terms (one-third up for reelection every two years)</td>
</tr>
<tr>
<td>435 members (apportioned by population)</td>
<td>100 members (two from each state)</td>
</tr>
<tr>
<td></td>
<td>Approves treaties</td>
</tr>
</tbody>
</table>

**Evolutionary Powers**

The necessary and proper (elastic) clause gives Congress the implied powers authority to pass laws it deems "necessary and proper" to carry out its enumerated functions. Many Congressional powers that have evolved over the years are based on this important clause. Here are a couple.

1. **Oversight of the budget**. Congress reviews and restricts the **annual budget** prepared by the executive branch. When a law is passed setting up a government program, Congress must pass an authorization bill that states the maximum amount of money available. When the nation's budget is set, only Congress can set the appropriations — the actual amount available in a fiscal year — for each program that it has authorized.

2. **Investigation**. Congress may investigate both issues that warrant study and wrongdoings by public officials. Through **committee hearings**, Congress examines issues such as crime,
consumer safety, health care, and foreign trade. Although Congress must abide by protected individual rights, their committees examine many allegations against elected officials. Famous recent investigations include the *Whitewater*, the Clinton-Lewinsky hearings and the probe into Russian involvement in the 2016 presidential election.

The Constitutional brilliance of having a legislative branch with powers that are limited and controlled, and yet which can change and evolve as society changes and evolves, is what allows the effective governing of America possible under a document which is over 220 years old.

The American Congress has more power than any legislature among the world's modern democracies. The parliaments of Europe are often "arena" legislatures that provide a forum for debate on policies proposed by a powerful prime minister or president. Only the American democracy enables its legislature not only to make the laws, but also gives its legislature the critical role of actually setting the lawmaking agenda.

**Article I of the Constitution of the United States**

http://www.ushistory.org/documents/constitution.htm

**Lesson Toolbox**

**Additional Resources and Readings**

**Title:** Powers of Congress

- **Description:** A video discussing powers of Congress
- https://www.youtube.com/watch?v=95Oz0_KUh8w

**Title:** Powers of Congress CC Version

- **Description:** A quick video talking about the types of powers in Congress
- https://www.youtube.com/watch?v=vJ-0f3Z5nLc

**The Bicameral Congress: Crash Course Government and Politics #2**

- A Crash Course video explaining the roles of the bicameral Congress
- https://www.youtube.com/watch?v=n9defOwVWS8

**Lesson Glossary**

*expressed power*: also known as enumerated powers; the powers given explicitly to the federal government by the Constitution to regulate interstate and foreign commerce, raise and support armies, declare war, coin money, and conduct foreign affairs

*implied power*: the powers not specifically detailed in the U.S. Constitution but inferred as necessary to achieve the objectives of the national government

*inherent powers*: the powers neither enumerated nor implied but assumed to exist as a direct result of the country's existence

*oversight*: the right to review and monitor other bodies such as the executive branch

**Check Your Knowledge**

1. True or False: Members of the Senate must confirm any major presidential appointments.
A. True
B. False

2. True or False: The Constitution sets up a limited government with the powers granted in and through the Constitution, but no more.
   A. True
   B. False

3. ___________ is the right to review and monitor other bodies such as the executive branch.
   A. Investigation
   B. A search warrant
   C. Oversight
   D. Omission

Answer Key:

Citations
Lesson Content:
Authored and curated by Jay Reynolds, J.D. for The TEL Library. CC BY NC SA 4.0

Adapted Content:
Title: American Government – 11.1 The Institutional Design of Congress – Congressional Powers, OpenStax CNX. License: CC BY 4.0
http://cnx.org/contents/5bcc0e59-7345-421d-8507-a1e4608685e8@15.8

Title: The Powers of Congress ; Source: American Government Online Textbook. License: CC BY 4.0
http://www.ushistory.org/gov/6a.asp