

THE POWER OF CONGRESS UNDER THE CONSTITUTION TO DEFINE, LIMIT,
OR CURTAIL THE APPELLATE JURISDICTION OF THE SUPREME COURT AND
THE JURISDICTION OF FEDERAL COURTS INFERIOR TO IT

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Judicial Power

The Judicial Department of the United States is created by Article III of the Constitution. Courts are ordained to exercise judicial power alone. Indeed, they are denied all other power.

The judicial power is the power which courts exercise in hearing and determining cases or controversies before them of which they have jurisdiction.

In commenting on jurisdiction, the text writer in Corpus Juris Secundum (Vol. 50, page 1090) says:

The word "jurisdiction is derived from the Latin "juris" and "dico", and means "I speak by the law. . . ." The word "jurisdiction" implies a court or tribunal with judicial power to hear and determine a cause, and such tribunal cannot exist except by authority of law. Jurisdiction always emanates directly and immediately from the law; it is a power which nobody on whom the law has not conferred it can exercise.

Jurisdiction may be either original or appellate. Original jurisdiction is the power of a court to try and decide a case or controversy in the first instance; and appellate jurisdiction is the power of a superior court to review the ruling of an inferior court on the record made in the inferior court, and to affirm, reverse, or modify such ruling. A particular court may have original jurisdiction in some cases or controversies, and appellate jurisdiction in others. 20 American Jurisprudence, 2d, Courts, section 98, page 459.

The Supreme Court made these sound observations on this subject in Osborn v. U. S. Bank, 9 Wheat. 738, 6 L.Ed.204:

The judicial power, as contradistinguished from the power of the law, has no existence. Courts are mere instruments of the law, and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exercised in determining the course prescribed by law; and when that is discerned, the duty of the court is to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, the will of the law.

The Constitution Means What It Says

Although some politicians, judicial activists, and other biased individuals seek to twist awry words displeasing to them, the Constitution means what it says. In expounding this truth, Chief Justice John Marshall, America's wisest jurist of all times, said in his famous opinion in Gibbons v. Odgen, 9 Wheat. 1, 188, 6 L.Ed. 23:

As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

What Chief Justice Marshall said is beyond rational dispute. If they did not intend for the Constitution to mean what it says, George Washington, John Dickinson, Benjamin Franklin, Nathaniel Gorham, Alexander Hamilton, Rufus King, James Madison, Gouverneur Morris, Robert Morris, William Patterson, Charles Cotesworth Pinckney, Roger Sherman, James Wilson, and their compatriots in the Constitutional Convention of 1787 indulged in unprecedented hypocrisy or idiocy when they drafted the Constitution and submitted it to the States for ratification or rejection.

The Power of Congress Under the Constitution

Provisions of Articles I and III of the Constitution clearly reveal that Congress has the legislative power to define, limit, or curtail the appellate jurisdiction of the Supreme Court and the jurisdiction of the federal courts inferior to it. They are as follows:

1. Article I, Section I, declares "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

2. Article I, Section VIII, clauses 1 and 18, prescribe "the Congress shall have the 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."

3. Article III, Section I, provides, in pertinent part, "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."

4. Article III, Section II, clause 1, stipulates "the judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, and the laws of the United States, and treaties made, or which shall be made, under their authority; . . . to all cases affecting Ambassadors, other public Ministers and Consuls; . . . to all cases of admiralty and maritime jurisdiction; . . . to controversies to which the United States shall be a Party; . . . to controversies between two or more States; . . . between a State and citizens of another State; . . . between citizens of different States; . . . between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects."

5. Article III, Section II, Clause 2, states "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."

As a result of dissatisfaction engendered by the decision of the Supreme Court in Chisholm v. Georgia, 2 Dall. 419, 1 L.Ed. 440, Article III, Section II, Clause 1, was altered in part by the Eleventh Amendment. This Amendment specifies "the Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by citizens of another State, or citizens or subjects of any foreign state."

Another Amendment, the Seventh, applies to the appellate jurisdiction of the Supreme Court in respect to facts determined by juries in civil cases.

It must be noted that Article III, Section II, Clause 1, does not actually confer jurisdiction on any court of the United States. On the contrary, it merely enumerates the cases or controversies in which Congress has the legislative power to confer jurisdiction upon them if it sees fit to do so.

Inferior Federal Courts Established By Congress under Article III

Acting under Article III, Section I, Congress has established United States District Courts as courts of general jurisdiction to try and decide federal civil and criminal cases in the first instance, and United States Courts of Appeal to review on appeal most rulings of the District Courts.

To aid in the administration of federal criminal justice generally, Congress has created United States magistrates to try and determine petty federal criminal cases, and to conduct preliminary hearings in federal criminal cases of which the District Courts have original jurisdiction. These magistrates do not enjoy life tenure.

Acting under provisions of the Constitution other than Article III, Congress has established certain special courts of limited jurisdiction and courts for territories. These courts are not subject to the requirements of Article III. For the sake of clarity, I employ the term federal courts inferior to the Supreme

Court in this statement to signify only those inferior courts created by Congress under Article III, such as the District Courts, the Courts of Appeals, and the Court of Claims.

Original Jurisdiction of the Supreme Court

Article III, Section II, clause 2, defines in specific terms the original jurisdiction of the Supreme Court, and Congress is without power to increase or decrease it. Marbury v. Madison, 1 Cranch 137, 24 L.Ed. 60; Gordon v. United States, 117 U.S. 697, Appx. 76 L.Ed. 347.

The Supreme Court has adjudged, however, that Congress may confer on inferior federal courts concurrent jurisdiction with the Supreme Court over cases or controversies within the original jurisdiction of the Supreme Court, subject to the review of their rulings by the Supreme Court. Ames v. Kansas, 111 U. S. 449, 28 L.Ed. 482, 4 S.Ct. 437; Bors v. Preston, 111 U.S. 252, 28 L. Ed. 419, 4 S.Ct. 407.

The Appellate Jurisdiction of the Supreme Court and the Jurisdiction of the Federal Courts Inferior to it.

It is otherwise with respect to the appellate jurisdiction of the Supreme Court and the jurisdiction of the federal courts inferior to it. One of America's most profound constitutional scholars, Edwin S. Corwin, had this to say on this subject in the 1974 edition of his famous book The Constitution And What It Means Today (pages 167-168):

The "cases" and "controversies" here enumerated fall into two categories; first, those over which jurisdiction "depends on the character of the cause", that is to say, the law to be enforced; second, those over which jurisdiction "depends entirely on the character of the parties." (Cohens v. Virginia, 6 Wheat 264, 378, 5 L.Ed. 257) In both instances, however, the jurisdiction described is only potential, except as to the original jurisdiction of the Supreme Court. Thus the lower federal courts derive all their jurisdiction immediately from Acts of Congress, and the same is true of the Supreme Court as to its appellate jurisdiction.

As has been noted, Article III, Section II, Clause 2 declares in plain words that the Supreme Court has "appellate jurisdiction, both as to Law and Fact, with such exceptions, and under such regulations, as the Congress shall make."

The Supreme Court has rightly adjudged in multitudes of sound decisions that under this provision it can exercise no appellate jurisdiction except in the cases or controversies prescribed by Acts of Congress.

Wiscart v. Dauchy, 3 Dall. 321, 1 L.Ed.619; Clarke v. Bazadone, 1 Cranch 212, 2 L.Ed. 85; United States v. More, 3 Cranch 159, 2 L.Ed. 397; Ex Parte Bollman, 4 Cranch 75, 2 L.Ed. 554; Durrouseau v. United States, 6 Cranch 307, 3 L.Ed. 232; United States v. Goodwin, 7 Cranch 108, 3 L.Ed. 284; United States v. Gordon, 7 Cranch 287, 3 L.Ed. 347; United States v. Nourse, 6 Pet. 470, 8 L.Ed. 467; Barry v. Mercein, 5 How. 103, 12 L.Ed. 70; Forsythe v. United States, 9 How. 571, 13 L.Ed. 362; Re Kaine, 14 How. 103, 14 L.Ed. 345; Ex Parte Vallandigham, 1 Wall. 243, 17 L.Ed. 589; Daniels v. Chicago & R. I. R. Co., 3 Wall. 250, 18 L.Ed. 224; Walker v. United States, 4 Wall. 163, 18 L.Ed. 319; Edmonson v. Bloomphire, 7 Wall. 306, 19 L.Ed. 91; Ex Parte McCardle, 7 Wall. 506, 19 L.Ed. 264; Re Yerger, 8 Wall. 85, 19 L.Ed. 332; French v. Shoemaker, 12 Wall. 86, 20 L.Ed. 270; United States v. Klein, 13 Wall. 128, 20 L.Ed. 519; Merrill v. Petty, 16 Wall. 338, 21 L.Ed. 499; Murdock v. Memphis, 20 Wall. 590, 22 L.Ed. 429; Butterfield v. Usher, 91 U.S. 246, 23 L.Ed. 318; United States v. Young, 94 U.S. 258, 24 L.Ed. 153; United States v. Sanges, 144 U.S. 310, 36 L.Ed. 445, 12 S.Ct. 609; National Exch. Bank v. Peters, 144 U.S. 570, 36 L.Ed. 545, 12 S.Ct. 767; American Const. Co. v. Jacksonville, T. & K.W. R. Co., 148 U.S. 373, 37 L.Ed. 486, 13 S.Ct. 158; Colorado Cent. Consol. Min. Co. v. Turck, 150 U.S. 138, 37 L.Ed. 1030, 14 S.Ct. 35; Maynard v. Hecht, 151 U.S. 324, 38 L.Ed. 179, 14 S.Ct. 353; Chapman v. United States, 164 U.S. 436, 41 L.Ed. 504, 17 S.Ct. 76; Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co., 344 U.S. 178, 97 L.Ed. 204, 73 S.Ct. 196.

In commenting on what he calls the power of Congress over the appellate jurisdiction of the Supreme Court and the jurisdiction of the federal courts inferior to it, Edwin S. Corwin made these observations in the 1947 edition of The Constitution And What It Means Today (page 127):

Moreover, through its unlimited control over the Supreme Court's appellate jurisdiction, as well as of the total jurisdiction of the lower federal courts, Congress is in position to restrict the actual exercise of judicial review at times, and even to frustrate it altogether.

Thus in 1869 it prevented the Court from passing on the constitutionality of the Reconstruction Acts by repealing the latter's jurisdiction over a case which had already been argued and was ready for decision (Ex Parte McCardle, 7 Wall. 506, 19 L.Ed. 264); and in the war just closed (i.e., the Second World War) it confined the right to challenge the validity of provisions of the Emergency Price Control Act and orders of the OPA under it to a single Emergency Court of Appeals and to the Supreme Court upon review of that court's judgments and orders. (U.S. Code, tit. 50, app. Sec. 924(a); Lockerty v. Phillips, 319 U.S. 182, 87 L.Ed. 1339, 63 S.Ct. 1019; Yakus v. U. S., 321 U.S. 414, 88 L.Ed. 834, 64 S.Ct. 660; Bowles v. Willingham, 321 U.S. 503, 88 L.Ed. 892, 64 S.Ct. 641)

When it exercises its power to establish an inferior court under Article III, Section I, Congress is empowered to specify what its jurisdiction shall be.

The Supreme Court has rightly ruled in multitudes of sound decisions that inferior federal courts, such as District Courts and Courts of Appeal, can exercise only such jurisdiction, civil or criminal, as may be conferred on them by an Act of Congress.

Rhode Island v. Massachusetts, 12 Pet. 1233, 9 L.Ed. 1233; Levy v. Fitzpatrick, 15 Pet. 167, 10 L.Ed. 699; Cary v. Curtis, 3 How. 236, 11 L.Ed. 718; Bath County v. Amy, 13 Wall. 244, 20 L.Ed. 539; Grover & B. Sewing Mach. Co. v. Florence Sewing Mach Co., 18 Wall. 553, 21 L.Ed. 914; Gaines v. Fuentes, 92 U.S. 10, 23 L.Ed. 524; Re Pennsylvania, 109 U.S. 174, 27 L.Ed. 894, 3 S.Ct. 84; Ellis v. Davis, 109 U.S. 485, 27 L.Ed. 1006, 3 S. Ct. 327; Ex Parte Royall,

117 U.S. 241, 29 L.Ed. 868, 6 S.Ct. 734; Holmes v. Goldsmith & Co., 147 U.S. 150, 37 L.Ed. 118, 13 S.Ct. 288; Gregord v. Van Ee, 160 U.S. 643, 40 L.Ed. 566, 16 S. Ct. 431; Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 42 L.Ed. 1126, 18 S.Ct. 685; Lockerty v. Phillips, 319 U.S. 182, 87 L.Ed. 1339, 63 S.Ct. 1019; Bowles v. Willingham, 321 U.S. 503, 88 L.Ed. 892, 64 S.Ct. 641; Sears, Roebuck & Co. v. Mackay, 351 U.S. 427, 100 L.Ed. 1297, 76 S.Ct. 895; South Carolina v. Katzenbach, 383 U.S. 301, 15 L.Ed. 2d 769, 86 S.Ct. 803; Palmore v. United States, 411 U.S. 389, 36 L.Ed. 2d 342, 93 S.Ct. 1670; Hagans v. Lavine, 415 U. S. 528, 39 L.Ed.2d 577, 94 S.Ct. 1372.

Even in cases where it has conferred jurisdiction on federal courts in specified cases, Congress has the power to take away such jurisdiction at any time it sees fit. Kline v. Burke Constr. Co., 260 U. S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077. It may oust federal courts of jurisdiction in pending cases. Re Yerger, 8 Wall. 85, 19 L.Ed. 332; Hallowell v. Commons, 239 U.S. 506, 60 L.Ed. 409, 36 S.Ct. 202.

What has been said makes these things indisputable: first, the Supreme Court's appellate jurisdiction and the jurisdiction of the federal courts inferior to it are conferred upon them by Acts of Congress; and, second, Congress cannot confer upon them jurisdiction of any cause or controversy other than those enumerated in Article III, Section II, Clause 1. Nashville v. Cooper, 6 Wall. 247, 18 L.Ed. 851; Palmore v. United States, 411 U.S. 389, 36 L.Ed.2d 342, 93 S. Ct. 1670.

When it confers appellate jurisdiction on the Supreme Court or jurisdiction on a federal court inferior to it, Congress must give the court freedom to decide the case or controversy judicially one way or another. The power to

regulate the jurisdiction of the court does not empower Congress to instruct it as to how it should decide the case or controversy.

Congress undertook to do that by a proviso it adopted on June 30, 1870. By the proviso, Congress instructed the Court of Claims to ignore the constitutional effect of presidential pardons in deciding the claims of persons who had allegedly supported the Confederacy for cotton confiscated by the federal government in Confederate States during the Civil War. The Supreme Court rightly struck down the proviso in United States v. Klein, 13 Wall. 128, 20 L.Ed. 519, as an unconstitutional attempt by Congress to usurp the judicial power the Constitution reposes in the courts.

Exercise By Congress Of Its Power In Times Past

Congress has never authorized federal courts to exercise all of the jurisdiction it has the power to give them under Article III, Section 2, Clause 1.

On the contrary, it has denied them jurisdiction in multitudes of instances ever since it enacted the Judiciary Act of 1789. As a rule, Congress has done this to forestall a flood of trivial litigation, or to minimize the clogging of the dockets of the federal courts.

As has been observed, however, the McCardle Case demonstrates it curtailed the appellate jurisdiction of the Supreme Court in 1869 to prevent it from making a decision it feared the court might render.

The Wisdom Of The Founding Fathers

The Constitution is the most precious instrument of government ever devised by the experience and wisdom of man. The Founding Fathers drafted and ratified it to secure to Americans the power of self rule and freedom from governmental tyranny, whether legislative, executive, or judicial.

They realized, however, that men are fallible beings, and that none of them can be safely trusted with unlimited power. To this end, they vested in the Supreme Court the power to interpret the Constitution, and thereby gave it the power to confine Congress, the President and the States to their allotted constitutional spheres.

They undertook to make Supreme Court Justices faithful to the Constitution by making it the supreme law of the land, and by requiring them as well as all other federal and state officers to be "bound by oath or affirmation to support it." (Article V, Clause 3)

They also undertook to make Supreme Court Justices independent of all things on earth except the Constitution itself by decreeing in Article III, Section 1, that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

Notwithstanding these provisions, two members of the Constitutional Convention of 1787, Elbridge Gerry, of Massachusetts, and George Mason, of Virginia, opposed ratification of the Constitution by the States because it contained no provision sufficient to compel activist Supreme Court Justices to obey their oaths or affirmations to support the Constitution or to prevent them from substituting their personal notions for constitutional precepts while pretending to interpret it.

I do not favor Congress limiting the jurisdiction of federal courts to adjudicate cases in which they have manifested their devotion to the Constitution.

I nevertheless rejoice because the Founding Fathers have reposed in Congress the power to define, limit, or curtail the appellate jurisdiction of the Supreme Court and the jurisdiction of the federal courts inferior to it.

The reason for my rejoicing is simple. I abhor judicial usurpation and deem tyranny on the bench as reprehensible as tyranny on the throne. The constitutional power of Congress to define, limit, or curtail the jurisdiction of these courts is in reality the only means embodied in the Constitution whereby activist Supreme Court Justices can be denied the autocratic power to make themselves America's supreme dictators.

Judicial activists are judges who interpret the Constitution to mean what it would have said if they instead of the Founding Fathers had written it.

The moral inhibition of their oaths or affirmations to support the Constitution has not sufficed to restrain judicial activists. Moreover, life tenure and undiminishable compensation do not render them immune to the temptation to make themselves independent of the Constitution.

Alexander Hamilton asserts in the Federalist No. 79 that Supreme Court Justices "are liable to be impeached for mal-conduct" by Congress under the Article of the Constitution "respecting impeachments", and declares in the Federalist No. 81 that "this is alone a complete security" against judicial activism.

I express no opinion respecting the validity of Hamilton's view that judicial activism constitutes an impeachable offense under Article III, Section 4 of the Constitution.

It is to be noted, however, that this possibility, if it exists, has had no deterrent effect on judicial activism. Moreover, impeachment is a cumbersome process, and cannot be made effective without the concurrence of two thirds of the members of the Senate. Article I, Section 3, Clause 6.

The constitutional power of Congress to define, limit, or curtail the appellate jurisdiction of the Supreme Court and the jurisdiction of the federal courts inferior to it is exercisable, however, by a bare majority of the Houses of Congress. Members of Congress who revere the Constitution are likely to demand that this power be exercised with frequency in the future if activist Supreme Court Justices do not stop substituting their personal notions for constitutional precepts while pretending to interpret the Constitution.

In closing, I refuse to heed Mark Twain's reputed admonition: Truth is precious. Use it sparingly.

The tragic truth is that judicial activism has run riot among Supreme Court Justices during recent years.

They have belittled the role of the States in the federal system of government ordained by the Constitution; they have ignored the fact that society and the victims of crime are as much entitled to justice as the accused, and in consequence have impaired the capacity of federal and state courts to protect the people from criminals; they have nullified basic principles of the Constitution and substituted their personal notions for them in cases having racial overtones; and they have arrogated to themselves the autocratic power to prescribe qualifications for voting in elections and to supervise such elections in defiance of provisions of the Constitution which expressly deny them and the federal government such power.

It is high time for activist Supreme Court Justices to realize that the Constitution of the United States belongs to the people of America and not to them, and that their supreme obligation to our country is to obey their oaths or affirmations to support the most precious instrument of government ever devised by human experience and wisdom.