

The Breakfast Club

Constitutional Minute for 3 May 2021

Can the People, through the Congress, control the Supreme Court?

"The truth is, that, even with the most secure tenure of office, during good behavior, the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but, that they will be ready to yield themselves to the passions, and politics, and prejudices of the day." Joseph Story, Commentaries on the Constitution, 1833

How do we keep the United States from becoming (or, in the eyes of many, remaining) a "tyranny of the 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 3, Section 1).

Congress controls the federal court system, including the Supreme Court in several distinct ways:

1. It constructs the entire federal court system subordinate to the Supreme Court (and can abolish it).
2. It confirms (or rejects) the President's appointment of judges and justices.
3. It determines the extent of the appellate jurisdiction of the Supreme Court.
4. It can reverse a Supreme Court decision through Constitutional amendment.

The federal court system consists of 94 district courts, 13 circuit courts, and one Supreme Court. Each circuit court has multiple judges, ranging from six on the First Circuit to twenty-nine on the Ninth Circuit. Eleven circuit courts, covering separate geographic areas of the US, are joined by a DC Circuit Court and a Federal Circuit Court that hears appeals from specialized trial courts. There are currently 179 judge seats on the U.S. courts of appeals.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be 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, Clause 2) (Emphasis added)

During Reconstruction, Congress withdrew jurisdiction from a case the U.S. Supreme Court was in the process of adjudicating; oral arguments had been heard, but the opinion had not yet been delivered. The Justices acknowledged the authority of Congress to intervene by immediately terminating the case (*Ex Parte McCordle*, 74 US 506 (1869)).

The Left sees this power as a potential threat to judicial independence. Of course, the Left is only interested in an "independent judiciary" that rules in their favor.

Some modern examples of jurisdictional stripping:

The “Constitution Restoration Act of 2005” tried to prevent the Supreme Court from reviewing a government official or agent's "acknowledgment of God as the sovereign source of law, liberty, or government." Died in committee.

The “Marriage Protection Act of 2005” tried to keep federal courts and the Supreme Court from reviewing cases related to Defense of Marriage Act, which defined marriage as between one man and one woman. Died in committee.

The “Pledge Protection Act of 2005” removed jurisdiction in cases interpreting the validity of the Pledge of Allegiance. Died in committee.

The “Public Prayer Protection Act” said the Supreme Court could not review any "establishment of religion" cases involving public prayer by a government agency, officer or agent. Died in committee.

The “We the People Act” would have prevented any federal court from reviewing a state's laws or regulations relating to the free exercise or establishment of religion; any claim based on the right of privacy; and any equal protection claim involving the right of same-sex couples to get married. Died in committee.

The “Safeguarding Our Religious Liberties Act” said that Federal courts could not rule on cases involving Ten Commandments displays, the Pledge of Allegiance or the National Motto. Died in committee.

Congress certainly knows they have this power, but success lies in using it in a cause with widespread support.

Congress can even reverse a Supreme Court opinion, but only through a Constitutional Amendment.

“The judicial Power shall extend to all Cases, in Law and Equity... between a State and Citizens of another State.”

In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793!), Mr. Chisholm sued the state of Georgia to reclaim a debt owed his deceased client, Mr. Farquhar. Chisholm took the case straight to the Supreme Court under its original jurisdiction. Georgia did not show up at trial, claiming it could not be sued without granting its consent to the suit. The Supreme Court ruled in favor of Mr. Chisholm, finding that Article 3, Section 2, of the Constitution took precedence over a states' otherwise sovereign immunity and that the clause granted federal courts the power to hear disputes between private citizens and states.

The States, surprised by the decision of the Supreme Court, called for Congress to propose the 11th Amendment to the Constitution, which precludes a State from being sued in Federal Court without that State's consent.

What do I do with this information? 1. Ensure candidates for office know of the power Congress holds over the Courts. 2. Elect Senators and Representatives who agree to use this power when appropriate.

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