

The Breakfast Club
Constitutional Minute for 19 October 2021

Enumerated Powers, or Not?

Continuing with our discussion of pertinent questions you should ask any candidate for elective office, certainly at the national level and perhaps even at the state level since the same concept applies to all constitutions, I would recommend this question:

“Mr. Candidate. The Tenth Amendment reads: ‘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.’ This amendment clearly describes a government of limited and enumerated powers, yet today the federal government seems to be able to do nearly anything. Do you have any insight as to how this change in governmental power could have happened, and, if elected, do you agree to only vote for bills whose authority and expressed powers can confidently be found within the text of the Constitution?”

I know, it’s a rather long and perhaps loaded question – perhaps you should take it with you in written form to the candidate forum -- but it is extremely important to learn how the candidate who wants our vote feels about this principle. It relates directly to last week’s Constitutional Minute: are we to interpret the Constitution as written or as we’d like it to read?

Madison and others of the Founding era affirmed the enumerated powers principle numerous times in numerous ways. In fact, had they not done so, had they intimated or hinted that the Constitution was creating a government of nearly unlimited power, the Constitution would never have been ratified.

Jefferson said: “Congress has not unlimited powers to provide for the general welfare, but only those specifically enumerated.”¹

At the Virginia Ratifying Convention none other than James Madison insisted: “[T]he powers of the federal government are enumerated; it can only operate in certain cases; it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction.”

Thomas Paine warned that “the governmental exercise of any power not authorised by the constitution is an assumed power, and therefore illegal.”² I could add that laws based on assumed power have no validity and need not be obeyed (according to Thomas Paine, don’t take this as legal advice).

There is a rule in the U.S. House of Representatives³ and I suspect, though I’ve not verified it, in the Senate as well, which requires that any bill proposed in that chamber state within its first paragraphs

¹ Letter to Albert Gallatin, 1817

² In Constitutions, Government and Charters, published in the American Citizen, June 6, 1805

³ House Rule 12

the Constitutional authority for the bill. The intent of this rule is obvious and it comports with the 10th Amendment: Congress should limit itself to the express authority given it in the Constitution. But rules only have worth if they are followed, and not followed “with a wink.” Nevertheless, bills have been proposed in Congress which cited as their “authority” the words of the Constitution’s preamble: “promote domestic tranquility.” Really?

If our candidates have actually studied the words of the Constitution honestly and compared them with the powers being exerted today by the federal government, they will immediately see the disconnect. But understanding the principle of enumerated powers is one thing, acting with integrity consistent with that principle is quite another. When a new Congressman or woman gets to Washington they will immediately find themselves under immense pressure to “go along to get along” and “vote with your party” even when a bill is clearly based on authority found nowhere in the Constitution.

Add to that the fact that, over these many years, the Supreme Court has dismantled most of what Jefferson once called the “chains of the Constitution.” Jefferson said: "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."⁴ Yes, believe it or not, these “chains” once limited the power of the government.

The first several Congresses acted as though the “chains” existed; for instance, the 4th Congress denied a request for aid to Haitian refugees fleeing an insurrection in that country, agreeing with Congressman Madison that "charity is no part of the legislative duty of the government."⁵ But gradually, over the years, bit by bit, Congress gave in to the numerous and unrelenting pleas for help. Today, Congress doesn’t hesitate for a moment when a hurricane devastates a portion of Florida; there is no search of the Constitution’s pages for a source of power, billions of dollars are immediately dispersed.

This happens so regularly that we Americans now see Congress as an bottomless bucket of money and our “savior” when disaster strikes. Congress can do anything and can spend money on anything. Congress is the provider of our needs rather than an instrument that secures our rights and ensures a ordered society.

This view will likely never change until We the People start sending to Washington representatives who are willing to reverse this trend and who see the Constitution, once again, as did its Framers and Ratifiers.

We need to start asking better questions.

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⁴ Thomas Jefferson, fair copy of the drafts of the Kentucky Resolutions of 1798

⁵ Speech in the House of Representatives, during the debate “On the Memorial of the Relief Committee of Baltimore, for the Relief of St. Domingo Refugees” (01-10-1794)