Courts – Not All Powerful

The United States Constitution defines the scope and purpose of the judicial system it created. As with all other aspects of the government the founders of this Nation framed, there were "checks and balances" established to assure that the court system did not usurp power and destroy the liberty of the Nation.

Article I, Section 8, clause 9 states:

"Congress shall have power… To constitute Tribunals inferior to the supreme Court;…"

Article III of the Constitution creates "one supreme Court," and reiterates that Congress has the authority to create lower courts, saying:

"…such inferior Courts as the Congress may from time to time ordain and establish." (Article III, Section I, clause 1)

In recent modern times, the Executive Branch has ignored the constitutional stipulation that only Congress may create courts or "tribunals," and claimed to establish courts for various purposes. No authority is granted within the Constitution for such action, and Congress is remiss if it fails to aggressively act within its constitutional prerogative to preempt such usurpation.

Article III of the Constitution defines the scope and power of the United States supreme Court, noting specific cases in which the Court has "original jurisdiction." Within the scope specifically defined within the Constitution, the supreme Court can not be denied authority to act. However, the authors of the United States Constitution placed "checks and balances" within the Constitution on the Court. Certainly Article III, Section 2 Clause 2 of the United States Constitution defines a "check and balance" which was created to prevent the court system from usurping power. It states specifically:

"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."

Regardless of opinions to the contrary, the United States Constitution actually states: "…with such Exceptions, and under such Regulations as the Congress shall make." We often speak of the "checks and balances" that were so wisely written into the document to prevent power from being consolidated into tyranny, but almost no one recognizes this "check" which may be exercised to balance against a usurping court.

And, of course, as previously noted, the Constitution delegates to the Congress authority over the existence of all federal courts inferior to the Supreme Court (see Article I Section 8 clause 9 and Article III Section 1). While Article III Section 2 of the United States Constitution delegates specific authority for Supreme Court involvement in certain specified instances, it seems certain

that in cases not specifically enumerated within the Constitution that the United States Congress has the authority to rein in the rogue court system which currently exists by simple majority vote in both the House and Senate. By exercising this rarely-used authority, the United States Congress could remove specific cases from the purview of the federal court system if the federal court system began to usurp authority in those cases.

An example of how this could be accomplished is found in the 1868 Exparte McCardle case, which was taken to the Supreme Court by an individual seeking relief from an onerous act of Congress (but which act Congress had, under authority of Article III Section 2 clause 2, prohibited from being reviewed by the Supreme Court). Following is the relevant excerpt from the declaration the Supreme Court made when McCardle sought to bring the case to them for redress:

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words…. It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

The irony is that this unanimous1868 Supreme Court decision is a good decision upholding a perfectly repellent act of Congress.

While this approach has been rarely used, and some would deny that the authority of Congress to act in such a manner is granted within the Constitution, it is there for all to read, and only awaits a courageous Congress to act upon it.

And in spite of contrary opinions, not only has Article III, Section 2, clause 2 been successfully applied in the past by the United States Congress, it may easily be applied today if Congress could be brought to exercise it by the outcry of an informed electorate. Following is a generically-worded resolution which could be used as a template suggesting how such an act may be worded in the required instances.

Possible Wording of Congressional Act Which Would Remove Cases From the Jurisdiction of Federal Courts:

"The appellate jurisdiction of the Supreme Court and the jurisdictions of the inferior federal courts shall not extend to hearing or determining the power of a state to (Insert the issue or subject which is to be prevented from being reviewed by the federal court system—such as same-sex marriage, abortion, flag burning, educational issues, etc., etc.) . Such jurisdictions shall not extend to hearing nor determining the refusal of any state to give full faith and credit to any act regarding (Insert issue or subject) under the law of any other state."

This approach applies the U.S. Constitution "in the tradition of the Founding Fathers." It recognizes and applies the Congressional authority over the courts as allowed and found in Article I Section 8 clause 9, Article III Section 2 clause 2, and Article IV Section 1.

No “Full Faith and Credit” complaints could be taken to the federal courts, and the power to encroach into these matters would be kept out of the hands of the federal government. Each State would be responsible within their own realm before God for their actions.

—Scott N. Bradley