Can Congress Limit Federal Court Jurisdiction?

by Phyllis Schlafly *January 25, 2006*

One of the Senators' lines of questioning of Judge Samuel Alito that lacked follow-up concerned the power of Congress to define the jurisdiction of federal courts. Anybody who has read the Constitution knows that Article III, Section 2 clearly states: "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress small make."

Alito skillfully avoided substantive responses to many questions because new cases might come before the High Court, but he ducked the opportunity to explain his views on jurisdiction by calling it an academic debate on which scholars are divided. He was vague on whether he was saying that the Article III section itself can be parsed into conflicting views, or whether the division he referred to is about the wisdom of using the Article III power.

Matters of policy are issues for Congress to decide, not the Supreme Court. The House made policy determinations in 2004 when it passed the Todd Akin (R-MO) bill to give immunity to the Pledge of Allegiance against court challenges, and the John Hostettler (R-N) bill to give immunity to the Defense of Marriage Act against court challenges.

Those who defend judicial supremacy try to disparage these bills as "court-stripping," and insist they are not allowed. But their analysis usually boils down to the policy argument that Congress should not limit court jurisdiction, rather than saying that Congress cannot.

In fact, both the present and the immediate past Chief Justice have recognized that Article III gives Congress the power to define and limit the jurisdiction of all federal courts, including the Supreme Court.

When Chief Justice William Rehnquist issued his last annual report, he spent several pages discussing criticism of the courts and discouraging Congress from using its constitutional power to impeach judges. He then included this sentence: "There were several bills introduced in the last Congress that would limit the jurisdiction of the federal courts to decide constitutional challenges to certain kinds of government action."

Rehnquist didn't say such action would be unconstitutional or unwise or undeserved or out of the mainstream. He added no comment; he just left that sentence for us to construe either as an invitation to congressional action or as a warning to his associates.

When Chief Justice John Roberts was Special Assistant to the Attorney General during the Reagan Administration, he wrote a 27 -page document defending the constitutional power of Congress to limit federal court jurisdiction. Proving that Supreme Court justices recognize this power over the courts, he pointed out that former Supreme Court Justice Owen Roberts (no relation) had proposed an "amendment of the Constitution to remove Congress' exceptions power."

The Owen Roberts amendment was passed by the Senate in 1953 but then tabled by the House. John Roberts concluded that Congress's constitutional authority to make exceptions to federal court jurisdiction is so clear that only a new constitutional amendment could deny it.

Last fall, Congress proved again that it has the power to define court jurisdiction by giving immunity to gun manufacturers and owners from lawsuits that try to impose liability on them for the criminal misuse of their weapons by others. This Protection of Lawful Commerce in Arms Act was promptly signed by President Bush.

This act sensibly prevents gun manufacturers from having to pay the penalty for crimes for which they were blameless. While this law was based on Congress's commerce power, the effect is the same as if the legislation had cited the Article III "exceptions" clause.

Congress also used its Article III power to order completion of a fence on our southern border near San Diego which had been held up for ten years by environmental lawsuits. By the REAL ID Act of 2005, which took effect May 11,2005, Congress legislated that the fence should go forward with "expeditious construction" and that "no court ... shall have jurisdiction to hear any cause or claim" to stop it.

This law has already been upheld as constitutional by a federal court. The American people are waiting for this year's Congress to pass legislation defining the jurisdiction of the federal courts so that supremacist judges will not be able to ban the Pledge of Allegiance, the Ten Commandments, the Boy Scouts, or the traditional definition of marriage as the union of a man and a woman.

When the liberals rant about the need for an independent judiciary, what they really want is a judiciary independent of the U.S. Constitution. Since Samuel Alito said during his interrogation that he respects the "text" of the U.S. Constitution, we trust he means what he said and will not succumb to the liberal equivocation that the Constitution is an evolving document which judges can reinterpret.

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