

Hello, this is Leslie Gielow Jacobs. I'm a professor at University of the Pacific, McGeorge School of Law. The topic of this "In Brief" is "Congress' Commerce, Power."

United States Constitution establishes the three branches of government. Each of the branches of government have what we call enumerated powers. That means that the powers that they have are spelled out in the constitution.

Certain powers aren't spelled out in the constitution. Those are left to the states or to the people. Over the years, there were a lot of questions that have risen about what exactly the scope of the federal government's powers are and particularly Congress' powers. There's no question that Congress' powers have expanded over the course of the past couple of hundred years.

Nevertheless, we still do have a federal government of enumerated powers. We're looking today in this In Brief at Congress' Commerce Clause authority which is one of the biggest sources of federal government power and of Congress' power. In Article 1 of the constitution, which establishes Congress as the lawmaker, it lays out in Section 8 a number of specific powers that Congress has.

For example, it has the power to tax and to spend. It has the power to control -- it says naturalization, but that's been assumed to be immigration as well -- bankruptcies. Congress has power to raise and support armies and navies, to declare war, and other miscellaneous powers.

One of the biggest powers, as I said, is the power in Clause 3, to regulate commerce with foreign nations and among the several states. Congress' power to regulate commerce among the several states was prompted initially by trade wars that were going on between the states. That is, states would prohibit the entry of goods from another state. They put big tariffs on them. It was impeding the flow of commerce across borders.

That's expanded so that now, it's not just the power to control the crossing of borders, goods crossing borders the Congress has. Congress has a much broader power under its commerce power. The question is, whether there are some limit to that? Yes, the court has indeed found a limit.

First, let's talk about the extent to which Congress does have power to regulate things that touch upon commerce. The court has said, they are, in fact, interpreting these few words, the power to regulate commerce among the several states, breaks out into three types of powers that Congress has. One thing it can regulate is the use of the channels of interstate commerce.

Another thing is it can regulate the instrumentalities of interstate commerce or persons or things that are actually traveling in commerce. Most broadly, it can regulate activities that substantially affect interstate commerce. Let's look at each of those things in turn.

First of all, the use of the channels of interstate commerce. What does that mean? That effectively gives Congress the power to regulate how goods are made, or produced, or grown prior to their entry into interstate commerce. That is, Congress can say a certain product can't enter interstate commerce unless it's been made according to certain standards.

It's under this set of power that Congress is able to regulate wages and hours, for example, of factories that are located in one single state, but what the goods they produce will in fact travel in

interstate commerce. An early case has to do with regulating, for example, child labor. You can't make goods with child labor if they're going to travel in interstate commerce.

Nowadays, since most things do in fact travel in interstate commerce, it's a broad, broad scope of power that Congress has to regulate how things are made before they enter into commerce and travel and go to retailers and end up being sold.

The next power is the power to regulate things that are actually in interstate commerce or the pathways of interstate commerce.

Lots of things are interstate. These types of things, things like ships and railroads. We have persons or things in interstate commerce. We have airplanes. The people that are actually traveling or the goods as their interstate commerce. This is fairly obvious and directly relates to commerce and is, in fact, one might say that the least broad of Congress' powers to regulate interstate commerce and the most defined.

We get to the broadest category, activities that substantially affect interstate commerce. Well, nowadays, with our global economy and our national economy, anything, if you look at it, would affect interstate commerce. If interpreted to the extreme, this type of power would allow Congress to regulate anything on a theory that it will ultimately affect the price of things somewhere or somehow.

How has Congress limited this? Well, Congress, what it has to do is put these words in a statute that says, "We are regulating this thing, and it affects interstate commerce."

It's up to a court to make sure that that effect is actually there. How does something have an effect in interstate commerce? The question then that the court looks at is whether in fact Congress is regulating some activity that is part of an overall economic scheme.

Probably one of the most recent cases having to do with this had to do with the Congress regulating the production of marijuana in California after it had legalized it at least for medical use.

It's a scheduled drug under federal law. Congress and the US Attorney's Office was asserting the authority to prohibit even private, small gross of medical marijuana in places in California, whereas California law had said it is a legal thing to do.

The argument was how does this possibly affect commerce? We're talking about somebody just growing things for their own use. They're not going to put it in the market. They're not going to accept money for it. They should be beyond Congress' control.

In that case, the court, in a closed case, said, "No. Congress, in fact, has the power to regulate this because the activity substantially affects interstate commerce."

The reason is that Congress has the power to decide if it wants to eliminate a market entirely through the criminal law. It's possible that the growing at home of this marijuana would mean that these people aren't entering into the market, aren't going out and purchasing things. It's possible that what they're growing could ultimately, even if they say it's not, enter into the market and be sold.

This is one of the broadest extensions of activities substantially affecting interstate commerce. When you have Congress regulating, buying, and selling, the sale of something, the qualities that it has, requiring labeling of things, those are all quite clearly substantially affecting interstate commerce.

It's when it gets to activities that aren't clearly economic that it's possible that the court would find that Congress doesn't have the power.

Now, the example in which the court has said Congress didn't have the power to regulate something was when Congress tried to regulate the holding of a gun close to a school. The argument that Congress made was, "Well, if there are guns near schools, it'll make the kids learn less. They'll get out into the marketplace. They won't make enough money, or perhaps it'll raise insurance cost because there's this possibility of danger near the schools."

Again, factually, those things are correct. As far as the legal matter, the court said, "No, that goes too far. You're trying to regulate an activity that isn't economic at all." Holding a gun, potentially doing an act of violence, that's something that is what beyond Congress' Commerce Clause authority. Congress is not allowed to do it. Notice, the states are. That's the ones who regulate this type of violent activity.

How else can Congress regulate interstate commerce? Even with a gun in a school zone, if Congress rise into the statute, can't hold a gun in a school zone that has traveled in interstate commerce, likely, it has the authority then to regulate that activity.

Putting in a requirement in a statute that a product regulated or an activity have that connection to interstate commerce in fact gives Congress the authority to regulate it.

This is a broad authority that Congress exercises to regulate all sorts of things, things that travel across the Internet or telephones. That's the racketeering statutes, bank fraud, any sort of activities that happen in one place. Some of the activity traveled in interstate commerce. Congress has asserted the authority to regulate it. The court looks at other different things to make the determination.

The bottom line is Congress has authority to regulate commerce. Nowadays, it's very, very broad. There is an outer edge to it that still exists. Essentially, when Congress is trying to regulate something that seems not to be an economic activity at all, purely an activity in one place, then it would be less likely that it would have the authority to do so.

That concludes this In Brief on the topic of Congress' Commerce Clause authority.

This is Leslie Gielow Jacobs of McGeorge School of Law in Sacramento. Thanks for listening.