

# Jurisdiction Questioned - Part I

*By Lowell (Larry) Becraft, Jr.*

**W**e suffer a plague of the acronymic alphabet agencies: DEA, FDA, FAA, FCC, SEC, FBI, TVA, IRS, BATF, ad nauseam. One may study the U.S. Constitution searching for the specific provision granting Congress authority over airplanes, telecommunications, securities as well as a wide variety of other matters, and learn that Congress has apparently been denied authority over these subject matters.

This raises an extremely interesting question: where do we find the Constitutional authority for such agencies and the laws they administer? By statute, all federal agencies must confine their activities to the jurisdiction delegated to them: see 5. U.S.C. 588. While this is a simply statutory command, there is an evident problem in that most federal agencies fail to publish any statements, either in the C.F.R. or some other source, which define their jurisdiction in clear and express terms.

The C.I.A. is one agency where it is easy to determine its jurisdiction because a statute has deprived it of any domestic jurisdiction; see *Weissman v. C.I.A.*, 565 F.2d 692, 696 (D.C. Cir. 1977). However, to determine the jurisdiction of other agencies requires some study.

Perhaps the best way to determine the jurisdiction of any given federal agency is to examine various cases regarding the subject matter of that agency. For example, the United States Constitution does not provide that Congress has any authority concerning the fish and wildlife within this country and this has been previously litigated with obvious results. In *McCready v. Virginia*, 94 U.S. 391, 394- 95 (1877), the Supreme Court held regarding the fish within the oceans: "[T]he States own the tidewaters themselves and the fish in them, so far as they are capable of ownership while running." The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state.....

Like fish, the Constitution simply grants no authority to the federal government to control the wildlife within the states of this nation and this has been noted in several cases. A ready example of such a case is *United States v. Shauver*, 214 F. 154, 160 (E.D.Ark. 1914), which concerned the issue of where the Migratory Bird Act of March, 1913, could apply.

Through this act, Congress sought to extend protection to migratory birds by limiting the hunting season and otherwise placing restrictions upon hunting of these birds. As is only natural, upon adoption of this act federal officials started enforcing it, and here they had arrested Shauver in Arkansas for shooting migratory birds.

Shauver moved to dismiss the charges filed against him on the grounds that the act contravened the Tenth Amendment by invading the jurisdiction of the states upon a matter historically reserved for legislation by the states. In deciding that this act was unconstitutional, Judge Trieber noted that the common law provided that the states essentially owned the birds within their borders and state legislation was the sole source by which hunting could be controlled. In so concluding, he held:

"All the courts are authorized to do when the constitutionality of a legislative act is questioned is to determine whether Congress, under the Constitution as it is, possesses the power to enact the legislation in controversy; their power does not extend to the matter of expediency. If Congress has not the power, the duty of the court is to declare the act void. The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game in a state, and is therefore forced to the conclusion that the act is unconstitutional."

Notwithstanding Judge Trieber's decision, enforcement of the act did not stop, and it was thereafter enforced within Kansas, where another man was arrested for killing migratory birds. In *United States v. McCullagh*, 221 F. 288, 293 (D.Kan. 1915), the issue of the Migratory Bird Act of 1913 was again before a different court and it, relying upon its own research of the law as well as the decision in *Shauver*, likewise concluded that this act was unconstitutional:

"[T]he exclusive title and power to control the taking and ultimate disposition of the wild game in this country resides in the states, to be parted with and exercised by the state for the common good of all the people of the state, as in its wisdom may seem best."

The above decisions have never been overruled and they stand today, as valid authority for the proposition that Congress under the Constitution does not have any direct grant of power to regulate and control fish and wildlife within our country.

If this is the case, you might ask, what is the Constitutional basis upon which the U.S. Fish & Wildlife Service has been created and currently operates?

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