



Constitutional Authority House Rule XII Largely Ignored

All new legislation offered by members of the House of Representatives since January 3, 2011 is required to include, under House Rule XII, a reference to the constitutional authority under which the bill is presented. Most of the bills offered since then show either the members' lack of understanding of, or blatant disregard for, the purpose of Rule XII: to tie the proposed legislation to the enumerated powers under the Constitution.



The rule states:

A bill or joint resolution may not be introduced unless the sponsor submitted ... a statement citing as specifically as possible the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.

The rule was scoffed at by critics who said it would have no measurable impact on bills being presented for consideration by members of the House. Attorney Sandy Levinson, for example, [observed](#) sardonically, "No lawyer takes this seriously. As any lawyer would know, it is not hard to come up with a constitutional justification for anything you want to do."

Senator Mike Lee (R-Utah), supported by the Tea Party, was skeptical as well:

The extent to which [the Authority Statements] turn out to be helpful will turn on how much actual analysis takes place, because there are ways of taking the Commerce Clause and making it apply to everything. That's not new. If that's all that happens, then this isn't going to do much. A study of the recently released numbers from the Republican Study Committee (RSC) looked at every one of the 3,865 "Constitutional Authority Statements" presented by members of the 112th Congress through January 5, 2012 [and] has concluded that Rule XII has been ignored in nearly all cases:

3 bills cite only the Preamble to the Constitution

109 bills cite only Article I (which creates the legislative branch)

617 bills cite only Article I, Section 8 (which contains the list of specifically enumerated powers) without citing any specific clause

732 bills cite the "commerce clause"

321 bills cite the "necessary and proper" clause without citing any of the powers granted in that clause

351 bills cite at least two of the "general welfare," the "commerce," or the "necessary and



proper” clauses

The study by Horace Cooper and Nathaniel Stewart of [Constituting America](#) provides a “panoramic snapshot of Congress’s recent legislative focus, and a bird’s-eye view of how Congress as a whole has played by Rule XII thus far.” The authors noted that the Commerce Clause was cited more than any other clause, indicating “that Members of Congress see fit to legislate in matters of ‘commerce’ and commercial activity more than in any other sphere of American life. The Supreme Court’s hyper-elastic reading of the Commerce Clause since the mid-1930s has rendered virtually every commerce-related statute a valid constitutional exercise — and Congress, it seems, simply cannot resist the legislative temptation...” And so many bills citing Article I Section 8 without noting which of the specific powers are being addressed is evidence of “at best...congressional shorthand [which] suggests a degree of carelessness or laziness, and at worst a willful disregard for Congress’s limited lawmaking authority under the Constitution.”

Especially galling to the authors were the 109 bills citing for authority Article I of the Constitution, noting that “as if by virtue of its own existence Congress may enact any law it pleases.”

Two egregious examples were noted by the authors. Rep. Chris Smith (R-N.J.) introduced a bill to help persons with autism, providing Rule XII language: “The constitutional authority on which this bill is based is Congress’s power under Article I, Section 8, Clause 1 of the Constitution.” The same authority was provided by Rep. Ron Kind (D-Wis.) with his bill to mandate so many square feet schools must allocate for gymnasiums. Unfortunately, Clause 1 says: “The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States...”

The authors noted that these bills had little relationship to that clause and their “failure to explain that relationship suggests either that they thought the requirements of Rule XII were little more than window-dressing, or else that the Members themselves were not quite sure how to tie the bills to a specific grant of authority. Neither possibility inspires much confidence.”

What’s most worrisome is that by largely ignoring the intent of Rule XII, members of Congress consider the rule just another minor speed bump in getting their bills considered for passage “on the theory that any and every law is per se a law for the common good. Read that way, of course, Congress’s authority would be effectively unlimited, restrained only by whatever a majority of its Members believe to be ‘for the common welfare.’”

James Madison was prescient in noting, “Were the power of Congress to be established in the latitude contended for, it would subvert the very foundations, and transmute the very nature of the limited Government established by the people of America.”

The best (or worst) the authors saved for last. Rep. Dennis Kucinich (D-Ohio) offered H.R. 808, a bill that would establish a “Department of Peace,” which would “be dedicated to peacemaking and the study of conditions that are conducive to both domestic and international peace.” His constitutional authority for that bill? Said Kucinich: “The preamble of the Constitution has the following injunction: ‘...to promote domestic tranquility...’ This is the purpose of the bill.” Kucinich’s total misreading of the difference between the preamble which expresses the purpose for the establishment of the constitutional republic, and the actual document which grants and limits power to the federal government demonstrates, according to the authors, “a fundamental misunderstanding of the document and its structure.”



Written by [Bob Adelman](#) on January 19, 2012

The authors offer a number of suggestions for improving the operation of Rule XII including a provision to allow the Clerk of the House to add a note to offered bills indicating that they had failed to follow Rule XII. They are hopeful that such a change would cause members to “resist the temptation to make rote and careless citations to catch-all clauses...”

The only sure and certain limitations on members’ temptations to “rule at will” will be imposed at the ballot box by informed citizens permitting or removing those members who support or deny the restrictions and limitations built into that most precious document: The Constitution of the United States. By itself, so far Rule XII has had little positive impact.



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