

Constitutional Authority Statements One Year Later: In Defense of House Rule XII

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Executive Summary

For decades, constitutionalists have lamented the size and scope of the federal government, and questioned many of the new laws proposed and passed each year by Congress. As the federal role continued to expand, reaching further into virtually every sphere of American life, some questioned the constitutional basis for any number of federal laws and asked by what authority they were enacted. Not to worry, replied big-government advocates and legal theorists, if Congress exceeds its constitutional limits the courts will be sure to intervene and keep the legislature checked and balanced. And so it went that Congress has continued to pass law-after-law-after-law with hardly a thought given to whether the laws that it enacts are within the bounds prescribed by that so-called “living, breathing,” once-upon-a-time document—the Constitution.

Last year, the new Republican majority in the House of Representatives finally took a reasonable first step toward redressing the constitutional concerns of those concerned that perhaps Congress exceeds its legislative authority all too often these days. House Republicans made good on a campaign pledge to require every bill moving through the House to include a citation to specific constitutional authority for the proposed legislation. When the 112th Congress convened last January, House Rule XII (Rule XII) was amended by adding clause 7, which provides:

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

The new provision engendered a good deal of discussion when it was proposed and it is now worth assessing how well it has worked thus far and how it might be made more effective.

Of course, the new and improved Rule XII is not a wonder-drug for all that ails Washington, nor will it alone cure Congress' penchant for over-exerting itself; but in our view the Rule is an initial step in the right direction and the Republican House Leadership should be commended. First, Rule XII reminds Congress that the Constitution has meaning and should be respected. Second, it reinforces the principle that Congress has limited, enumerated powers. Third, the Rule allows Congress to engage the other federal branches in a conversation about the meaning of the laws and the Constitution itself. And finally, it offers constituents some insight into how their elected Representatives understand the Constitution and congressional authority.

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Despite the Republicans' laudable effort to stem the extra-constitutional tide, this is not to say that the Rule has worked perfectly, or couldn't be improved. Indeed, after a year under Rule XII, it is all too clear why the Rule has become necessary, and that some Members should become more acquainted with the Constitution they have sworn to uphold. The Republican Study Committee (RSC) in the House of Representatives has just updated and released an informative tally of the Constitutional Authority Statements for every bill and joint resolution that

have been introduced during this Congress. Their findings revealed what many expected, and demonstrated how hard it has been for some Members to support their legislative agendas with specific constitutional authority. The RSC's raw data provide a panoramic view 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. For example, it is not terribly surprising that the Interstate Commerce Clause, Article I, § 8, Clause 3, was cited more than any other clause; but it does indicate 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. Similarly, it is unfortunate, though not unexpected, that 470 Constitutional Authority Statements cited Article I, § 8, which is merely a string of specific powers granted to Congress, without citing any specific authority therein. At best this constitutional shorthand suggests a degree of carelessness or laziness, and at worst a willful disregard for Congress's limited lawmaking authority under the Constitution. Either way, it tells the electorate something important about the current Congress—how some of its Members view the laws, the Constitution, and their own legal authority.

But a closer examination of the Statements themselves—what details or constitutional reasoning (if any) they possess, and how closely they correspond to the bills' respective purposes—reveals a good deal more about how Members approach the Rule and the Constitution. And that, we think, is something worth knowing.

We begin with a defense of Rule XII and explain the positive role it can play in our constitutional system. We then examine how Rule XII has been implemented and followed over the course of the last year, and we suggest several ways in which the Rule might be bolstered and improved. We encourage the House to modify Rule XII in order to further its underlying purpose of aligning congressional action more closely to the Constitution and Congress' enumerated authority; we urge Members on both sides of the aisle to use their Constitutional Authority Statements to contribute to the constitutional dialogue among the branches and the people, to offer insight into how they view our most fundamental document and the rule of law; and we hope that Members will resist the temptation to make perfunctory and careless citations to catch-all clauses, and instead provide their colleagues and constituents with a reasoned and articulate explanation for the constitutionality of and support for their legislative proposals. Finally, we encourage the public to consider these Authority Statements, to pay them special attention, and to ask their Representatives to explain the views expressed by those Statements. This, after all, is the duty of a free and vigilant people.