

# Constitutional Authority Statements: In Defense of House Rule XII

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A Publication of Constituting America

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*“The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”*

— James Madison, *Federalist 48*

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 continued to pass law-after-law-after-law with hardly a thought given to whether the laws that it enacted were within the bounds prescribed by that so-called “living, breathing,” once-upon-a-time document—the Constitution.

Last year at this time, the new Republican majority in the House of Representatives finally took a reasonable first step toward redressing the constitutional concerns of those worried 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.<sup>1</sup> When the 112<sup>th</sup> 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 worth assessing how well it has worked thus far and how it might be made more effective.

Not surprisingly, Rule XII met with its fair share of Washington cynicism and a dose of liberal criticism. Law professor Sandy Levinson, for example, quickly scoffed at the new requirement. “No lawyer takes this seriously,” he said. “As any lawyer would know, it is not hard to come up with a constitutional justification for anything you want

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<sup>1</sup> See “GOP Pledge to America.”

to do.”<sup>2</sup> Of course, Professor Levinson’s critique assumes that “constitutional” simply means anything that he or Members of Congress might want it to mean; otherwise “*constitutional* justifications” should in fact prove more difficult to establish.

But even some supportive conservatives expressed initial skepticism that the new Rule XII would have much meaningful effect. Senator Mike Lee (R-Utah), a Tea Party-backed conservative, observed that “[t]he 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.”<sup>3</sup>

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 deserves more commendation than it has received. First, Rule XII reminds Congress—even if subtly—that the Constitution has meaning and should be respected. Second, it reinforces the principle that Congress has limited, enumerated powers derived from a specific, foundational source. 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 most importantly, it offers constituents some additional insight into how their elected Representatives understand the Constitution and congressional authority.

This is not to say, however, 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 became necessary in the first place, and that some Members really should become more acquainted with the Constitution they have sworn to uphold. Rule XII has demonstrated how hard it has been for some Members to support their legislative agendas with specific constitutional authority. Unfortunately, in its current form, the new Rule as proven difficult to enforce, and some Members continue to show remarkably little regard for the constitutional limits imposed upon Congress. But these are not reasons to relax or relinquish the Rule. Rather, the House should look to strengthen Rule XII and make it more effective.

We begin with a defense of the new Rule XII and explain the positive role it can play in our constitutional system. We then examine how the Rule has been implemented

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<sup>2</sup> David Weigel, “Because We Say So: How Republicans Are Explaining the Constitutionality of Every Bill They Introduce,” *Slate*, March 23, 2011.

<sup>3</sup> *Id.*

## Table of Contents

I. Defending Rule XII . . . . .	4
II. Constitutional Authority Statements: the Good, the Bad, & the Ugly . . . . .	7
III. Recommendations . . . . .	20

and followed over the course of the last year. Finally, we suggest several ways in which the Rule might be bolstered and improved.

## I. DEFENDING RULE XII

Quick to dismiss the new Rule, critics largely refused to explore the purposes that the rule might serve, or any benefits it may offer. Unfortunately, little attention has been focused on the reasons and justifications for implementing Rule XII, and the defense from Republican Leadership when the Rule was proposed and adopted was hardly full-throated. A memo released by the House Majority Leader’s Office explaining the Rule walked Members through its mechanics—how it would function, how to submit their Constitutional Authority Statements, and even offered a few examples for Members to follow in crafting their own—but it failed to provide more than a cursory justification for the Rule or explain its value.<sup>4</sup>

There are at least four substantive justifications for adopting Rule XII: (1) it reminds Congress that the Constitution has meaning and should be respected; (2) it reinforces the principle that Congress has limited and enumerated powers; (3) it allows Congress to engage the other federal branches in a conversation about the meaning of the laws and the Constitution; and, most importantly, (4) it gives constituents some insight into how their Representatives understand the Constitution and congressional authority.

First, Rule XII challenges the misperception that the Constitution can essentially mean anything that a creative Congressman, lawyer, or judge wants it to mean. Professor Levinson’s scoffing critique exemplifies this misconception and underscores Rule XII’s consequent moral importance—to correct Members of Congress who believe that the Constitution can be bent and twisted into any shape, and to mean whatever they want. Thomas Jefferson once wrote in correspondence: “Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.”<sup>5</sup> By requiring Members to submit Constitutional Authority Statements with their bills, Rule XII reminds Congress that the Constitution is not a “blank paper”; it is not infinitely

“Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.”

--Thomas Jefferson

<sup>4</sup> See *New Constitutional Authority Requirement for Legislation* at <http://www.majorityleader.gov/CAS/>.

Under the memo’s Frequently Asked Questions section:

Q. So why have this Rule at all?

A. Just as a cost estimate from the Congressional Budget Office informs the debate on a proposed bill, a statement outlining the power under the Constitution that Congress has to enact a proposed bill will inform and provide the basis for debate. It also demonstrates to the American people that we in Congress understand that we have an obligation under our founding document to stay within the role established therein for the legislative branch.

<sup>5</sup> Thomas Jefferson, letter to Wilson Nicholas, September 7, 1803.

malleable. It reminds them that the provisions of the Constitution have meaning and command respect. Alexander Hamilton explained that “the most sacred duty and the greatest source of our security in a Republic” is “[a]n inviolable respect for the Constitution and Laws. . . . A sacred respect for the constitutional law is the vital principle, the sustaining energy of a free government.”<sup>6</sup> Rule XII challenges those Members of Congress who—by their very opposition to the Rule—imply a measure of contempt for constitutional law and the “sustaining energy of a free government,” and a willingness to distort the founding document rather than respect its limits.

Second, Rule XII reinforces the fundamental principle that the federal government is one of limited, enumerated powers. In crafting the Constitution, the Framers were keenly aware that they were creating a discrete set of national powers, and that Congress’s authority would be circumspect and well-defined. Jefferson warned that “To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.”<sup>7</sup> Madison highlighted this point in *Federalist* 45, reminding his audience that “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”<sup>8</sup> Of the “general government,” Madison reassured, “its jurisdiction is limited to certain enumerated objects. . . .”<sup>9</sup> Rule XII speaks to this assurance. Even if by serving only as a symbol, the Rule calls attention to this understanding of the Constitution, and reminds both Members and constituents that Congress’ foundational lawmaking authority is not free-wheeling or unlimited, but is prescribed and bounded by a more permanent power.

Third, Rule XII provides an excellent avenue for Congress to join in the conversation with the other federal branches over the meaning of the Constitution and the laws Congress passes. Too often, Congress seems eager to let the federal courts dictate the meaning and constitutionality of the laws, and, in so doing, Congress has largely withdrawn from the constitutional dialogue. As a Member of the House of Representatives, Madison argued on the floor in 1791, “Nothing has yet been offered to invalidate the doctrine that the meaning of the Constitution may as well be ascertained by the Legislative as by the Judicial authority.”<sup>10</sup> Rule XII, if used properly, furthers an open debate within Congress as to the meaning of the Constitution as it relates to specific

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<sup>6</sup> Alexander Hamilton, Essay in the American Daily Advertiser, August 28, 1794.

<sup>7</sup> Thomas Jefferson, Opinion on the Constitutionality of a National Bank, February 15, 1791.

<sup>8</sup> James Madison, The Federalist 45.

<sup>9</sup> James Madison, The Federalist 14.

<sup>10</sup> James Madison, speech in the Congress of the United States, June 18, 1791. Thomas Jefferson later expressed a similar view when he wrote: “My construction of the constitution is very different from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal.” Thomas Jefferson, letter to Samuel Adams Wells, May 12, 1819.

pieces of legislation, and the scope of federal power. Such debate can inform the public and perhaps persuade the Judicial and Executive branches of Congress' view of the law, as well. This is no small matter.

### Virtues of Rule XII

- Rule XII challenges the idea that the Constitution can mean anything that a creative Congressman wants it to mean
- Rule XII reinforces the principle that the federal government is has limited, enumerated powers
- Rule XII helps Congress rejoin the constitutional conversation with the other branches over the meaning of federal laws
- Rule XII shows constituents how Representatives view the Constitution, congressional authority, and the constitutional framework for the bills they propose

To be sure, Constitutional Authority Statements do not compel the courts to rule or the President to act in a certain way, and where the meaning and constitutionality of a statute is clear, courts should refrain from looking “behind the text” or digging into the so-called legislative history. But in other cases, where the constitutional answer is new or less clear, courts may benefit from looking to congressional debate and discussion regarding the constitutionality of a law as a source of persuasive authority that can inform the court’s view.

In *Myers v. United States* (1926),<sup>11</sup> for instance, the Supreme Court was asked “whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.”<sup>12</sup> Chief Justice Taft, writing for the Court, noted that the Constitution has “no express provision respecting removals” for Executive branch officers, with the exception of impeachment.<sup>13</sup> But Taft also observed that this very question of where the removal power was vested “was presented early in the first session of the First Congress”<sup>14</sup> where it was debated by Representative James Madison and his colleagues. After quoting extensively from the First Congress’s floor debates, Taft found it “convenient in the course of our discussion of this case to review the reasons advanced by Mr. Madison and his associates for their conclusion, supplementing them, so far as may be, by additional considerations which lead this court to concur therein.”<sup>15</sup> Congress’s consideration

and debate over the same constitutional issue did not bind the Court or force its hand, but it afforded relevant “additional considerations” presented by an equal and coordinate branch—considerations with which the Court ultimately agreed. These considerations can enrich the constitutional conversation among the branches.

<sup>11</sup> 272 U.S. 52 (1926).

<sup>12</sup> *Myers v. United States*, 272 U.S. at 106 (1926).

<sup>13</sup> *Myers*, 272 U.S. at 109. See also, U.S. Const. Art. 2 sec. 4.

<sup>14</sup> *Myers*, 272 U.S. at 109.

<sup>15</sup> *Myers*, 272 U.S. at 115.

Finally, and most importantly, Constitutional Authority Statements allow the general public—and each Member’s constituents back home—to understand how their elected Representatives view the Constitution, congressional authority, and the constitutional framework for the bills they propose. In this way, Authority Statements help make congressional action more transparent and Members more accountable to the people they represent. Those who pooh-poohed Rule XII for being little more than symbolic ceremony hastened to add that Members would be most likely to submit rote recitations of the Commerce Clause, the Necessary and Proper Clause, or the General Welfare Clause. Unfortunately, a closer look at the many perfunctory Statements submitted over this past year supports their pessimism. But this, too, is valuable information. Even the most flaccid citation to “Article I, § 8”—which simply lists a series of Congress’s legislative powers—tells us something (perhaps much) about the Member who submitted the Statement. First, it might suggest that the Member does not take the Rule seriously and could not be bothered to square the bill with a more definite constitutional authority. (It is useful information to know that a Congressman thinks himself entitled to flout rules; it is particularly useful for those who have to decide whether he should be sent to Washington to make rules.) Alternatively, perhaps it suggests that the Member could not find a more specific authority, but chose to submit the bill anyway, with little regard for the Constitution’s enumerated powers. (Isn’t that something that voters might find it useful to know?) Or, perhaps the Member actually believes that Article I, § 8 by itself confers sufficient authority for the proposed legislation, thereby demonstrating an unfamiliarity with the founding document—surely an interesting fact for voters to consider. In any event, constituents have learned something important about their elected representative—something that might otherwise have remained hidden.

Why is this knowledge valuable? Why should the people learn such secrets? Because, as Madison prophesied in *Federalist* 44, when Congress misconstrues or exceeds the scope of its authority under the Constitution “in a last resort a remedy must be obtained from the people, who can by the elections of more faithful representatives, annul the acts of the usurpers.”

## II. CONSTITUTIONAL AUTHORITY STATEMENTS: THE GOOD, THE BAD, & THE UGLY

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 thus far during this Congress—3865 Statements as of January 5, 2012. Their published findings reveal the following<sup>16</sup>:

- 3 bills cite only the Preamble to the Constitution.

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<sup>16</sup> The RSC noted that some bills cite numerous sections of or amendments to the Constitution, and may be listed more than once in the RSC’s compilation.

- 109 bills cite only Article I, which creates the Legislative Branch.
- 69 bills cite only Article I, Section 1, which grants all legislative powers to Congress.
- 617 bills cite only Article I, Section 8, which is the list of specific powers of Congress, without citing any specific clause.
- 660 bills cite Article I, Section 8, Clause 1, which grants Congress its taxing power and contains the “general welfare” and “common defense” language.
- 732 bills cite Article I, Section 8, Clause 3, the commerce clause.
- 321 bills cite Article I, Section 8, Clause 18, the “necessary and proper” clause, without citing a “foregoing power” as required by clause 18.
- 351 bills cite at least two of the “general welfare” clause, commerce clause, or the “necessary and proper” clause.
- 116 bills cite Article I, Section 9, Clause 7, which provides that no money shall be drawn from the Treasury, but in consequence of appropriations made by law.
- 248 bills cite Article 4, Section 3, which provides that Congress shall have the power to make rules and regulations respecting the territory or property of the United States.
- 346 bills cite an amendment to the Constitution. For example, 60 cite the 10th Amendment (powers not delegated to the federal government), 34 cite the 14th Amendment (“equal protection, etc.”), and 71 cite the 16th Amendment (income tax).

The RSC’s raw numerical data provide 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. 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 617 Constitutional Authority Statements cited Article I, § 8, which is merely a string of some specific powers granted to Congress, without citing any definite 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. More surprising, and even more regrettable, are the 109 bald citations to the entirety of Article I—the Article creating the legislative branch of the federal government—as if by sheer virtue of its own existence Congress may enact any law it pleases. This tells the electorate something important about the current Congress—how some of its Members view the laws, the Constitution, and their own legal authority.

The RSC’s compilation provides a helpful first step, 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 individual Members approach the Rule and the Constitution.

To that end, we offer the following representative samples of the Statements submitted thus far this year. The substantive quality of Statements submitted by both Republicans and Democrats range from the good to the bad to the pitifully ugly, with Members from both parties rendering thoughtful and cogent Constitutional Authority Statements, as well as shameful (or shameless) citations to Article I, and rote references to the Commerce Clause.

### *The Good*

Many—if not most—Constitutional Authority Statements found in the Congressional Record simply provide the bare minimum required by Rule XII: a bill number and a one line citation to the Constitution, nothing more. For example, Congressman Filner (D-CA) introduced a raft of legislation—twelve consecutive bills—with each Authority Statement citing to the “Necessary and Proper Clause” and stating only: “Congress has the power to enact this legislation pursuant to the following: Clause 18 of Section 8 of Article I of the Constitution.”<sup>17</sup> Bearing these sorry examples in mind, it is worth recognizing Statements that go beyond this basic minimum and demonstrate—at least in form—an attempt to support the bill with a fuller description of constitutional authority.

The “Restore Military Readiness Act of 2011” (H.R. 337) introduced by Congressman Hunter (R-CA), for instance, would amend existing military defense legislation so as to require high-ranking military officials to “submit to the congressional defense committees the officer’s written certification that repeal of section 654 of title 10, United States Code, will not degrade the readiness, effectiveness, cohesion, and morale of combat arms units and personnel of the Armed Force under the officer’s jurisdiction engaged in combat, deployed to a combat theater, or preparing for deployment to a combat theater.” As constitutional support, Mr. Hunter submitted a Statement that went beyond the shell citation of the kind provided by Mr. Filner and so many others; in fact, Mr. Hunter went out of his way to explain briefly the purpose of the legislation and the specific power to carry out that purpose:

This legislation ensures that the military readiness of our Armed Forces is maintained through proper certifications which make certain that military commanders have a direct say in significant matters that affect the morale, cohesion and readiness of our military forces. Specific authority is provided by Article I, section 8 of the United States Constitution (clauses 12, 13, 14, and 16), which grants Congress the power to raise and support

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<sup>17</sup> See Congressional Record—House, H1363 (February 18, 2011). Constitutional Authority Statements for H.R. 802, 803, 804, 805, 806, 807, 809, 810, 811, 812, 813, 814.

an Army; to provide and maintain a Navy; to make rules for the government and regulation of the land and naval forces; and to provide for organizing, arming, and disciplining the militia.

The constitutionality of a bill like this is not easily questioned or doubted, but Mr. Hunter’s Statement demonstrates an awareness of Congress’s limitations, and provides a concise connection between the proposed law and its constitutional authority. There is value in that.

Congressman Lipinski (D-IL) also added value when he submitted a rather detailed Constitutional Authority Statement with H.R. 357, a personal bill seeking to make Corina de Chalup Turcinovic eligible for an immigrant visa or to adjust his immigration status to that of a permanent resident. Mr. Lipinski’s Statement asserted Congress’s power pursuant to “Article I, Section 8, Clause 4 of the Constitution [which] provides that Congress shall have power to ‘establish an uniform Rule of Naturalization,’”<sup>18</sup> and goes on to explain:

The Supreme Court has long found that this provision of the Constitution grants Congress plenary power over immigration policy. As the Court found in *Galvan v. Press*, 347 U.S. 522, 531 (1954), “that the formulation of policies [pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.” And, as the Court found in *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)), “[t]he Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’”<sup>19</sup>

One might wonder whether a bill addressing the immigration status of a single individual falls fairly within the constitutional power to create “an *uniform Rule of Naturalization*,” but Mr. Lipinski at least submitted more than a cursory sentence and offered a glimpse of his reasoning. Whether that reasoning ultimately holds water, and whether the Supreme Court decisions in fact support the position for which he cites them, are matters for the debate; but they at least provide a modicum of support for his position, giving him something to defend and something with which opponents of his bill must contend. In this respect, Mr. Lipinski’s Statement has advanced the conversation beyond the driest of introductions, and that alone deserves respectful applause.

To be sure, not all Statements must invite robust constitutional or theoretical debates in order to demonstrate a Member’s grasp of enumerated powers and limited

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<sup>18</sup> Congressional Record—House H356, January 19, 2011.

<sup>19</sup> *Id.*

authority. Congressman Womack (R-AR), for example, submitted a commendable Statement when he introduced H.R. 1255—“The Government Shutdown Prevention Act of 2011.” The bill, of course, was an appropriations bill, but Mr. Womack rightly recognized that his proposal carried out multiple legislative functions and that therefore different constitutional powers authorized various components of the larger bill. Rather than refer only to the so-called “Spending Clause,” or the broader “Necessary and Proper Clause” to justify the full measure of the legislation, Mr. Womack’s Statement cites to a distinct constitutional authority for each provision in the bill, and offers a succinct explanation as to why each provision is consistent with the Constitution:

Congress has the power to enact this legislation pursuant to the following: Section 2 is enacted pursuant to the rulemaking powers provided in clause 2 of section 5 of article I of the United States Constitution in furtherance of the appropriation power provided in clause 7 of section 9 of article I of the Constitution and spending power provided in clause 1 of section 8 of article I of the Constitution. Section 3(a) is enacted pursuant to the rulemaking powers provided in clause 2 of section 5 of article I of the United States Constitution. Section 3(a) is consistent with article XXVII in that it does not vary the compensation of Members and Senators but only seeks to regulate its disbursement during certain periods. Section 3(b) is enacted pursuant to clause 18 of section 8 of article I of the United States Constitution. Section 3(b) is consistent with clause 7 of section 1 of article II of the United States Constitution in that it does not vary the compensation of the President but only seeks to regulate its disbursement during certain periods.

Here, had Mr. Womack merely cited to the “spending power provided in clause 1 of section 8” as authority for the entire bill, he would have shown an ignorance of or disregard for the specific and proper constitutional authorities for his legislation. Instead, he identified the appropriate constitutional powers and tied them to specific relevant portions of legislation, making it easier for the public and his colleagues to understand his view of the law and displaying a tacit recognition that different legislative objectives are often authorized by different grants of constitutional power.

### *The Bad*

Members on both sides of the aisle have made a number of common, substantive mistakes in drafting their Constitutional Authority Statements. First, Members have routinely submitted citations to overly broad “catch-all” sections or clauses without specifying which power (among many) supports the bill, likely in the hope that the broad clause will be presumed to include the proper authority for the legislation. Second, Members summarily invoke the “Commerce Clause,” “General Welfare Clause,” or the “Necessary and Proper Clause” without explaining how those clauses should be read to authorize the proposal, even when the connection between the bill and the cited clause is not clear on its face. Several representative samples of these common errors follow.

### *Catch-all Citations*

According to the RSC's study, 617 bills cite only Article I, Section 8—a section that lists the many specific powers of Congress—without citing any specific clause. The rationale for such citations would seem to be that Section 8 includes Congress's "enumerated powers," and therefore citing to Section 8 generally is the safest—not to mention easiest—section of "authority" to invoke. When in doubt, some Members must think, cite to all of them.

Such citations suggest a disregard for the purposes of Rule XII, or, more troubling, a tacit admission that no specific constitutional authority for the law exists, but the bill was submitted anyway. Consider, for example, H.R. 1262, the "Reform the Postal Service for the 21<sup>st</sup> Century Act," introduced by Gerald Connolly (D-VA). The bill relates to the administration and improvement of the post offices and postal service, a federal function plainly contemplated by and provided for in the Constitution. Unfortunately, Mr. Connolly's Constitutional Authority Statement cites only to Congress's "power to enact this legislation pursuant to . . . Article I, Section 8."<sup>20</sup> One is left to wonder why Mr. Connolly did not more specifically refer to Article I, Section 8, *Clause 7*, which grants Congress the authority "To establish Post Offices and post Roads." Perhaps he distinguished between "reforming" and "establishing" the postal service, and thought it improper to cite Clause 7 because his bill did not "establish" a post office. This is unlikely, and even if true it would suggest that although Mr. Connolly did not believe that Clause 7 authorized his reform bill, "Section 8" more generally somewhere contains the requisite authority even though Mr. Connolly failed to identify it.

The catch-all citation in this case is all the more disappointing because H.R. 1262 is a prime candidate for Mr. Connolly to have done some legwork and explained that the legislation was authorized by Article 1, Section 8, Clauses 7 and 18. Clause 7, of course, authorizes Congress to create the postal system, and Clause 18 is the oft-cited "Necessary and Proper Clause," granting Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." The power to establish the postal service is unquestionably a "foregoing power" for purposes of the "Necessary and Proper Clause," and the two clauses, when properly read together, provide solid constitutional ground for a bill that reforms and improves that postal service. Mr. Connolly could have invoked and explained a relatively straightforward set of constitutional powers, thereby demonstrating a familiarity with and respect for the Constitution and its enumerated powers. His decision to do otherwise speaks volumes—about what he thinks of Rule XII, about whether he ought to respect rules that he might disfavor, and/or about the Constitution itself.<sup>21</sup>

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<sup>20</sup> Congressional Record-House H2107, March 30, 2011.

<sup>21</sup> See also, Michele Bachmann (R-MN), introducing the "End Tax Uncertainty Act of 2011" (H.R. 86) in order "To prevent pending tax increases, permanently repeal estate and gift taxes, and permanently repeal the alternative minimum tax on individuals and for other purposes." She submitted a

Blanket citations of Article I, § 8, Clause 1—the clause granting Congress the 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”—present a similar concern. Too often, Authority Statements cite to Clause 1 without any attempt to explain how the attached bill corresponds to the power to collect taxes, or pay debts, or provide for the common defense, or provide for the general welfare of the country. For instance, Chris Smith (R-NJ) introduced H.R. 2006, a bill “To establish a National Autism Spectrum Disorders Initiative,” with the stated purpose of “improv[ing] the lives of persons with autism spectrum disorders through research . . . .” For constitutional support, however, Mr. Smith’s Authority Statement offered the rote assertion: “The constitutional authority on which this bill is based is Congress’s power under Article I, Section 8, Clause 1 of the Constitution.”<sup>22</sup> Ron Kind (D-WI) took the same shortcut when he introduced H.R. 1057, “The Fitness Integrated with Teaching Kids Act.” Presumably, Mr. Smith and Mr. Kind do not believe that researching autism or setting federal standards for the number of square feet schools must use “primarily . . . for physical education,” are bills that “provide for the common defense”; but neither do they explain whether their laws would levy taxes, pay debts, or provide for the general welfare. One must assume that both bills address the “general welfare.” But although these initiatives may be very helpful to families affected by autism, or gym teachers looking for more floor space, their relationship to Clause 1 is not self-evident, and the 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 legislative authority. Neither possibility inspires much confidence.

“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.”

*--James Madison*

The more likely and worrisome conclusion to draw from bare-bones Statements like these, however, is that Members blithely assume that the prescribed power to “provide for the common Defense and general Welfare of the United States” grants Congress carte blanche to enact any law it chooses—merely on the theory that any and every law is a per se law for the common good. Read this way, of course, Congress’s authority would be effectively unlimited, restrained only by whatever a majority of its Members believe to be “for the general welfare”—which, in Mr. Kind’s case, apparently includes the number of hours children spend in gym class. This very approach to the clause was foreseen and rejected by Madison, who wrote in correspondence:

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Constitutional Authority Statement: “Congress has the power to enact this legislation pursuant to the following: U.S. Constitution Article I Section 8.” Congressional Record—House H44, January 5, 2011.

<sup>22</sup> Congressional Record—House H3756, May 26, 2011.

If Congress can employ money indefinitely to the general welfare, and are the sole and supreme judges of the general welfare, they may take the care of religion into their own hands; they may appoint teachers in every State, county and parish and pay them out of their public treasury; they may take into their own hands the education of children, establishing in like manner schools throughout the Union; they may assume the provision of the poor; they may undertake the regulation of all roads other than post-roads; in short, everything, from the highest object of state legislation down to the most minute object of police, would be thrown under the power of Congress. . . . 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.<sup>23</sup>

Let it never be said that Mr. Madison was not prescient.

*The Article I, Section 8, Clause 3 Vortex – “the Commerce Clause”*

With at least 732 Constitutional Authority Statements citing to Article I, § 8, Clause 3,<sup>24</sup> the so-called “Commerce Clause” has lived up to its reputation as the legislature’s “Hey-you-can-do-whatever-you-feel-like Clause.”<sup>25</sup> The Commerce Clause grants Congress the power “To regulate Commerce with foreign Nations, and among the several States . . . ,” and the Supreme Court has long held that “[t]he Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnapped. Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities affecting commerce.”<sup>26</sup> But for years, Congress and the courts interpreted these categories so broadly that “the Commerce Clause had become an ‘intellectual joke,’ a sort of get-out-of-court-free card good for virtually any piece of federal legislation.”<sup>27</sup> Even after declining to enforce federal statutes on Commerce

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<sup>23</sup> James Madison, Letter to Edmund Pendleton, January 21, 1792.

<sup>24</sup> See RSC Study at infra \_\_.

<sup>25</sup> Alex Kozinski, *Introduction to Volume Nineteen*, 19 Harv. J.L. & Pub. Pol’y 1, 5 (1995).

<sup>26</sup> *United States v. Perez*, 402 U.S. 146, 150 (1971).

<sup>27</sup> Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. 1253, 1257 (2003). For a full discussion of the Commerce Clause see Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 146 (2001) (arguing that the Commerce Clause originally had a narrow meaning under which “Commerce” meant “the trade or exchange of goods,” “among the several States” meant “between persons of one state and another,” and “To regulate” meant “to specify how an activity may be transacted.”).

Clause grounds in *United States v. Lopez*<sup>28</sup> and *United States v. Morrison*,<sup>29</sup> the Supreme Court has been reluctant to question the constitutionality of laws passed pursuant to the Commerce Clause. It is no wonder that former Speaker of the House Nancy Pelosi scoffed incredulously, “Are you serious? Are you serious?” when asked which constitutional clause specifically authorized Congress to enact Obamacare’s individual mandate requiring virtually everyone to purchase private health insurance.

Mrs. Pelosi’s rhetorical sentiment, though unfortunate and revealing, should not be too surprising; and a few examples of the Constitutional Authority Statements submitted over the past year suggest that her view of the ever-elastic Commerce Clause is widely shared by her colleagues.

## “Are you serious? Are you serious?”

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--Nancy Pelosi, on the  
constitutionality of Obamacare’s  
“individual mandate”

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Consider H.R. 1127, the “Children’s Sports Athletic Equipment Safety Act,” introduced by Bill Pascrell (D-NJ) ostensibly to “encourage and ensure the use of safe football helmets and for other purposes.” Mr. Pascrell’s Authority Statement reads, in its entirety: “Congress has the power to enact this legislation pursuant to the following: Article I, Section 8, Clause 3 of the United States Constitution.” The bill directs the Consumer Product Safety Commission to initiate a rulemaking proceeding for developing a consumer

product safety rule with respect to new and used youth helmets, standards for concussion resistance, and warning and manufacture labels. One might guess—for that is all that Mr. Pascrell’s Authority Statement permits—that because a football helmet was produced and sold as part of a commercial enterprise, Mr. Pascrell therefore believes that football helmet safety is a class of commercial activity within Congress’ reach. To be sure, concussions and head injuries sustained during football season are serious concerns, but it is not at all clear how helmet safety qualifies as (1) a channel of interstate or foreign commerce; (2) an instrumentality of interstate or foreign commerce; or even (3) an activity that substantially affects commerce—the three classes of activity reached by the Commerce Clause.

Similarly perplexing is the Statement accompanying H.R. 126, the “Fairness in Firearms Testing Act,” introduced by Phil Gingrey (R-GA) requiring the Bureau of Alcohol, Tobacco, and Firearms (ATF) to “make a video recording of the entire process of the examination and testing . . . of an item . . . for the purpose of determining . . . whether the item is a firearm and if so, the type of firearm . . .” The bill provides that the Bureau shall make the recording available to “a person who claims an ownership interest in an item with respect to which a recording is made,” or to “a defendant in a criminal proceeding involving” the firearm or ammunition. H.R. 126’s Constitutional

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<sup>28</sup> 514 U.S. 549 (1995).

<sup>29</sup> 529 U.S. 598 (2000).

Authority Statement even quotes the Commerce Clause, stating: “Congress has the power to enact this legislation pursuant to the following: Article I, Section 8, Clause 3 of the Constitution that states that Congress shall have Power ‘To regulate Commerce with foreign Nations, and among the several States . . . .’” Of course, the bill relates only to providing videotaped evidence of Bureau firearms tests to owners and defendants who request those tests as part of a legal proceeding. Neither the tests nor the tapes are involved in the production or interstate shipping of firearms, so it is difficult to understand how requiring such tests is authorized by the Commerce Clause. Regrettably, Mr. Gingrey has not provided the benefit of his explanation.

These are only a few representative examples of the extravagant view that many Members of Congress seem to have that any legislation that touches upon an article of merchandise that was produced by a commercial enterprise or once passed through commercial channels enjoys a presumption of constitutionality under the Commerce Clause. It does not. Rule XII helps highlight just how divorced Congress’ pretense to be regulating “commerce” is from any actual regulation of interstate commerce and the original purposes of the Commerce Clause.

### **The Ugly**

Even more troubling than the one-line, minimalist citations to catch-all provisions, or than the hyper-elastic reading of the Commerce Clause, are those Statements listing the Constitution’s Preamble and the entirety of Article I in order to satisfy Rule XII. These Statements demonstrate a profound misunderstanding of basic constitutional principles, not to mention an overt disregard for Rule XII and its objective.

The Preamble, of course, opens the Constitution with the famous proclamation:

We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Dennis Kucinich (D-OH) invoked the Preamble when he submitted his Statement for H.R. 808, a bill that would establish a “Department of Peace.” The Statement explained only: “The preamble to the Constitution has the following injunction: ‘. . . to promote domestic tranquility. . .’ This is the purpose of the bill.” According to the proposed legislation, the Department of Peace would “be dedicated to peacemaking and the study of conditions that are conducive to both domestic and international peace.” Mr. Kucinich’s citation of the Preamble, however, misapprehends the nature of the Preamble, enumerated powers, and the way in which the Constitution grants authority in the federal system—all in a few tidy lines.



Citing the Preamble as a source of authority for legislative action is misplaced for several reasons. First, the Preamble expresses the underlying purpose for the establishment of the constitutional republic and the operative document that follows. That document both grants and limits powers to the federal government as well as to the States. But the Preamble itself neither grants nor limits any power or authority. It merely describes the purposes for which the Constitution was adopted. Accordingly, although the Constitution was established to “insure domestic tranquility,” nothing in the Preamble authorizes Congress to establish a Peace Department or anything else. Second, the very justice, domestic tranquility, common defense, general welfare, and blessings of liberty lauded in the Preamble, are to be secured by the Constitution that grants *and* limits specific authorities, distributing those authorities according to its specific terms and provisions. In other words, the “General Welfare” mentioned in the Preamble is “promoted” by the creation of a Constitution of limited authorities; and the “blessings of liberty” are “secured” by the very fact that the powers of Congress are limited and *a* Congress may *not* simply enact any legislation it desires; and the “common defense” is “provided for” by a system of dual sovereignty in which the States and the federal government collaborate through well-regulated militias and standing armies to protect and defend the nation.<sup>30</sup> These blessings are secured just as much by the constitutional *limitations* on Congress’ power as they are by the authorities granted to it. Thus, citing to the Preamble as if it grants Congress a particular power to “promote domestic tranquility,” belies a fundamental misunderstanding of the document and its structure.

[But the Preamble itself neither grants nor limits any power or authority. It merely describes the purposes for which the Constitution was adopted.]

Whereas a Statement citing the Preamble fails in effect to cite *any* grant of constitutional authority, Statements in which Members cite “Article I” make the obverse error of citing almost *every* power granted to Congress, and some that are explicitly withheld. Article I begins with Section 1, “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” From there, Article I prescribes a wide range of governing rules and authorities, including, for instance, the composition of both Houses of Congress, eligibility requirements for Senators<sup>31</sup> and Congressmen,<sup>32</sup> the frequency of congressional sessions<sup>33</sup> and elections,<sup>34</sup> and the procedures by which a bill becomes law.<sup>35</sup> Article I

<sup>30</sup> See U.S. Const. Art. I, Sec. 8, cl. 16 (“To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”).

<sup>31</sup> See U.S. Const. Art. I, § 3, cl. 3.

<sup>32</sup> See U.S. Const. Art. I, § 2, cl. 2.

<sup>33</sup> See U.S. Const. Art. I, § 4.

<sup>34</sup> See U.S. Const. Art. I, §§ 2 and 3.

<sup>35</sup> See U.S. Const. Art. I, § 7.

goes on to *limit* Congress’s authority concerning the writ of habeas corpus, bills of attainder, ex post facto laws, direct taxes, duties on state exports, and granting titles of nobility.<sup>36</sup> Thus, the idea that “Article I,” in and of itself authorizes some particular piece of legislation misapprehends the very nature and content of the Article. Nevertheless, 109 bills were submitted with only Article I cited generally in their Constitutional Authority Statements.

Rush Holt (D-NJ) referred to the fullness of Article I in his Constitutional Authority Statements for two of his proposed initiatives this year.<sup>37</sup> He cited, for example, to “Article I of the Constitution of the United States” in support of H.R. 135, a bill “To amend the Internal Revenue Code of 1986 to encourage teachers to pursue teaching science, technology, engineering, and math subjects at elementary and secondary schools.” Under the bill, “eligible teachers” shall receive a tax credit for “an amount equal to 10 percent of qualified undergraduate tuition paid by such individual.” Of course, Congress has the specific authority to lay and collect taxes under Article I, § 8, clause 1, and under the 16<sup>th</sup> Amendment, which provides: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” Not only does H.R. 135’s Statement refer to an overly broad *Article* of the Constitution, failing even to cite the Article’s taxation clause, but despite citing to an entire Article, Mr. Holt misses the constitutional language most clearly authorizing his bill—the 16<sup>th</sup> Amendment.

Similarly, Donna Edwards (D-MD) submitted H.R. 1282, the “National Metro Safety Act,” directing the Secretary of Transportation, in consultation with the National Transportation Safety Board, to “develop, implement, and enforce national safety standards for transit agencies operating heavy rail on fixed guideway.” The Constitutional Authority Statement she submitted stated only that “Congress has the power to enact this legislation pursuant to the following: Article I, Section I ‘All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.’” By this tautological reasoning, simply because *all* legislative powers have been vested in a bicameral legislature, that legislature must be able to require national safety standards for railways. Ms. Edwards would have been on much safer constitutional footing had she cited the wide embrace of the Commerce Clause. As noted above, the Supreme Court’s reading of the Commerce Clause in *United States v. Lopez* “identified three broad categories of activity that Congress may regulate under its commerce power,” including “the use of the channels of interstate commerce,” “the instrumentalities of interstate commerce,” and

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<sup>36</sup> See U.S. Const. Art. I, § 9.

<sup>37</sup> Mr. Holt submitted a second bald citation of Article I with H.R. 1048, the “Tyler Clementi Higher Education Anti-harassment Act of 2011.” The bill requires, in part, that “Each institution of higher education participating in any program under this title, . . . shall develop and distribute . . . a statement of policy regarding harassment . . . .”

“those activities that substantially affect interstate commerce.”<sup>38</sup> The railroads are among several “channels of interstate commerce” as described by the Court, and the trains and operating stations are part and parcel of the “instrumentalities of interstate commerce,” and would therefore fall within Congress’s authority under the Commerce Clause. By perfunctory citation of Article I, § 1, instead, Ms. Edwards implies either a disregard for Rule XII, an ignorance of relatively basic constitutional law and authority, or a genuine belief that because legislative authority lies with Congress, every law that Congress enacts is *ipso facto* constitutional.

Finally, the Authority Statements submitted with two of John Lewis’ (D-GA) bills attempt an even broader assertion of constitutional power. H.R. 1190, the “Artist-Museum Partnership Act” is a tax bill “To amend the Internal Revenue Code of 1986 to provide that a deduction equal to fair market value shall be allowed for charitable contributions of literary, musical, artistic, or scholarly compositions created by the donor.” H.R. 1191, the “Religious Freedom Peace Tax Fund” would “direct[] the Secretary of the Treasury to “establish an account in the Treasury of the United States to be known as the ‘Religious Freedom Peace Tax Fund,’ for the deposit of income, gift, and estate taxes paid by or on behalf of taxpayers who are designated conscientious objectors.” Both initiatives included the following Statement: “This bill is enacted pursuant to the powers granted to Congress under Article I of the United States Constitution and its subsequent amendments, and as further clarified and interpreted by the Supreme Court of the United States.”<sup>39</sup>

First, setting aside the grammatical structure of Mr. Lewis’s Statement, which suggests that Article I has “subsequent amendments,” it is comical to consider how legislative amendments to the federal tax code could be authorized by all of the Constitution’s “subsequent amendments”—after all, the 13<sup>th</sup> Amendment grants Congress the power to enforce the anti-slavery Amendment, and the 19<sup>th</sup> Amendment grants Congress the power to enact legislation ensuring that both men and women may vote, and the 24<sup>th</sup> Amendment empowers Congress to enact legislation to ensure that poll taxes do not abridge the citizen’s right to vote in federal elections. None of these Amendments, of course, can be said to support new tax deductions for artistic donations. Rather than cite the 16<sup>th</sup> Amendment and its authority to collect income taxes, Mr. Lewis preferred a nonsensical citation to the entirety of Article I and *all* twenty-seven Amendments, only a few of which grant any power to Congress.

Second, one can only guess at the meaning of Mr. Lewis’ reference to the Supreme Court’s clarification and interpretation of Congress’s powers. Congress does not have powers “pursuant to the Supreme Court’s clarification,” as Mr. Lewis suggests. The Court may well interpret Congress’ constitutional authority, but that authority is not “pursuant” to the Court’s interpretation. More than likely, Mr. Lewis has attempted

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<sup>38</sup> See *United States v. Lopez*, 514 U.S. 549, 558-559 (1995).

<sup>39</sup> Congressional Record—House H1987, March 17, 2011.

(rather awkwardly) to insulate his bill from judicial scrutiny, or any suggestion that his bill might be unconstitutional according to the Court's precedent. But rather than frame the debate and offer any evidence of the Court's "clarification" in these areas, Mr. Lewis has cited the entire canon of the Court's jurisprudence. And this does nothing to advance the purposes of Rule XII, other than to highlight what little regard Mr. Lewis apparently has for the House Rule and the Constitution itself.

In light of these examples, some Rule XII skeptics may contend that the Rule has been ineffective, a ceremonial distraction from a Member's more pressing obligations. They may argue that the Rule should be rescinded at the next opportunity, and that Congress be spared the arduous, but meaningless task of aligning proposed legislation with the powers granted by the Constitution. A more honest critic might say that the Rule's results shed too much light on the apparent difficulty that Members have in squaring their bills with our founding document, and that the Rule should be abandoned on that account. We disagree, and offer several suggestions for strengthening rather than discarding it.

### III. RECOMMENDATIONS

Rule XII has demonstrated how difficult it has been for some Members to support their legislative agendas with specific constitutional authority. Moreover, it has revealed, at times with embarrassing consequences, what little regard some Members appear to have for the Constitution and the inherent limits it imposes upon Congress. But that is no reason to relax or relinquish the Rule. It is better, in our view, to enhance the Rule and look for ways to make it more effective.

First, the House could enforce the Rule more strictly and identify, for example, some of the more egregious citations of Article I and the Preamble. Rule XII requires "a statement citing *as specifically as practicable* the power or powers granted to Congress . . . to enact the bill . . ." Citing the whole of Article I or all "subsequent amendments" is not citing "as specifically as practicable," especially when the underlying bill in question involves Congress' authority to amend the tax code. The Rule currently does not require the Clerk to evaluate the content of the Statement, since "those are matters to be considered by Members during consideration of the legislation."<sup>40</sup> But the Rule easily could be amended to allow the Clerk or other designated official to add a note indicating that the Statement submitted does not properly satisfy the Rule's specificity requirement. Thus, for instance, if a bill were submitted with a Statement citing "Amendment 25, § 1," which states only that "In case of the removal of the President from office or of his death or resignation, the Vice President shall become President," and does not confer any authority to Congress, the Clerk could accept the bill and its Statement, but could indicate that the Statement did not satisfy the basic requirements of Rule XII because the

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<sup>40</sup> H.Res. 5 "Adopting Rules for the 112<sup>th</sup> Congress: Section-by-Section Analysis."

Statement cited no specific authority granted to Congress. The Clerk would not act as a gatekeeper or prevent bills from moving in their ordinary course, but the Clerk's notation regarding the Statement would adhere to the bill and alert other Members that Rule XII had not been observed. At any point prior to passage, any bill with this notation would be subject to a special privileged motion by a Member to recommit the bill for failure to follow the Rule. If no Member objected to the Statement as submitted, then the bill would not be recommitted. But to avoid risking such sanction, Members would have to ensure at least that they cited a *specific* grant of power as the Rule requires.

Second, to increase transparency and accessibility, the Rule should require that each Statement be accompanied by a short description of the bill's purpose. As currently constituted, the Authority Statements appear in the Congressional Record with nothing more than their corresponding bill numbers. The public—to the extent that it read the Congressional Record—must therefore take the additional step of looking up the bill itself to see whether the authority cited in the Statement has any relation to the purpose of the bill. Members already include a statement of purpose with each bill, so it would not be particularly onerous to require that those statements be included with the Constitutional Authority Statements and appear in the Record.

Similarly, House Rule XIII, clause 3(d), requires each committee report “on a public bill or public joint resolution [to] contain . . . [a] statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” But Rule XII should ensure that at each step in the legislative labyrinth, from submission to the floor, the bill and its Authority Statement are attached thereto and immediately available to Members for their consideration and debate. The Statement would not need to be voted on or enacted as if it were an operative part of the legislation, but debate and discussion of the constitutional reasoning and constitutionality of the bill would be enhanced if the sponsor's constitutional thinking were always present at the beginning of the conversation.

This same rationale lies behind the long-standing “Ramseyer Rule,” which essentially requires committee reports to include a “track changes” copy of the bill. Under the Ramseyer Rule, any bill or joint resolution that would amend or repeal a statute must include “(A) the text of the statute or part thereof that is proposed to be repealed; and (B) a comparative print of any part of the bill or joint resolution proposing to amend the statute and of the statute or part thereof proposed to be amended, showing by appropriate typographical devices the omissions and insertions proposed.”<sup>41</sup> Furthermore, “If a committee reports a bill or joint resolution proposing to repeal or amend a statute or part thereof with a recommendation that the bill or joint resolution be amended, the comparative print required by subparagraph (1) shall reflect the changes in

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<sup>41</sup> House Rule XIII, clause 3(e)(1).

existing law proposed to be made by the bill or joint resolution as proposed to be amended.”<sup>42</sup> As Mr. Ramseyer explained in 1929, justifying his proposed rule:

Suppose a bill is to amend a statute . . . by omitting some words and adding thereto other words. The proposal is that the report shall show by stricken-through type the words to be omitted and by italics the words that are added, so that a Member who is interested in knowing just what changes it is proposed to make in the statute under consideration can *get the report, read it, and have before him exactly the changes which are proposed to be made.*<sup>43</sup>

So, too, should Members and constituents be able to pick up either the bill or the Authority Statement and have before them the exact purpose and proffered constitutional authority for the legislation.

The Ramseyer Rule provides another point of comparison and support for our recommendation that Statements that the Clerk indicates fail to follow Rule XII may be recommitted to the reporting committee. Under the Ramseyer Rule, a Member may raise a point of order against consideration of a bill on the ground that the committee report did not comply with the rule, and the result is that the bill must be recommitted to the proper committee in order to address the defect.<sup>44</sup> As suggested above, the same sanction should apply for failing to abide by the specificity requirements of Rule XII.

Finally, Rule XII should address the problem of attempts to amend an existing law that a Member believes to have been enacted without constitutional authority. That is, to what constitutional authority should a Member cite if his proposed bill would amend (in order to improve) an unconstitutional statute, say, by making it more efficient or by curtailing its reach? One can imagine such amendments being offered when Members realize that they lack the votes to repeal the existing law but may well find the votes for specific modifications. In such cases, Rule XII should make clear that Members may submit Statements indicating that they believe there is no constitutional authority for the underlying statute, but that to the extent that the statute remains positive law, Congress may amend that law to ensure a more efficient administration of the law. The Constitutional Authority Statement might then do one of two things.

First, Rule XII could allow a Member to cite the same authority offered or supposed by the original statute, but permit him to make clear that such authority is disputed and arguably unsupported. Alternatively, as William Niskanen of the CATO Institute argued shortly after Rule XII was adopted, the Rule could be changed to allow Members to express the *lack* of any constitutional authority. Niskanen proposed explicitly permitting Members’ Authority Statements to explain:

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<sup>42</sup> House Rule XIII, clause 3(e)(2).

<sup>43</sup> See *Deschler’s Precedents*, ch. 17, § 60, p. 3144.

<sup>44</sup> See *Deschler’s Precedents*, ch. 17 § 60, p. 3147-48.

There is no authority in the Constitution for the federal activities addressed by this bill. For such time as any relevant constitutional issues are not resolved and the measures addressed by this bill remain in force as positive law, we accept the responsibility to assure that this activity is administered efficiently and fairly and to propose changes that would better serve the American people.<sup>45</sup>

These modifications would be consistent with many of the Rule's objectives, including a recognition of Congress's enumerated powers, and allowing Members to express—and the public to learn—their views of the Constitution, federal law, and the role that government plays in our society, even to the point of acknowledging that what has been proposed falls beyond Congress' constitutional grasp. At present, Rule XII does not make clear which authority Members should rely on in attempting to amend what they believe to be unconstitutional exercises of power, and that point deserves clarification and redress.

In conclusion, we encourage the House to consider these and other modifications to Rule XII in order to further its underlying purpose of aligning congressional action more closely to the Constitution and Congress' prescribed authority. And 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. Members should resist the temptation to make rote and careless citations to catch-all clauses, and should 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.

### **Recommendations**

1. Allow the Clerk or designated official to indicate if a Statement does not satisfy the Rule's specificity requirement
2. Require each Statement to be accompanied by a short description of the bill's purpose
3. Require that at each step in the legislative process, the bill and its Authority Statement be attached and immediately available to Members
4. Address the problem of attempts to amend an existing law that a Member believes to have been enacted without constitutional authority

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<sup>45</sup> William A. Niskanen, *Cite the Constitutional Authority or the Lack Thereof*, CATO at Liberty, January 20, 2011. Available at <http://www.cato-at-liberty.org/cite-the-constitutional-authority-or-the-lack-thereof/>.