

TO: Members of the 112th Congress
Committee Staff Directors and Counsels; Member Staff
FR: Speaker-Designate Boehner, Majority Leader-Elect Eric Cantor, Rules Committee
Chairman-Elect David Dreier, Transition Team Chairman Greg Walden
DT: December 17, 2010
RE: New Constitutional Authority Requirement for Legislation

The Pledge to America released by House Republicans in September of this year included a commitment to “require every bill to cite its specific Constitutional Authority.” To implement this proposal, the Transition Team and the Elected Republican Leadership are recommending a change to standing Rules of the House to require that each bill or joint resolution introduced in the House be accompanied by a statement citing the specific powers granted to Congress in the Constitution to enact the proposed law.

As this requirement will apply to all bills and joint resolutions introduced in the 112th Congress — including those introduced on the first day — we are writing to provide early guidance for complying with this rule so as to minimize any disruption caused by its implementation. Our staff will also hold bipartisan briefings for your staff to assist in compliance with this new requirement.

INITIAL STAFF BRIEFINGS

- 1:00 PM, Monday, December 20, 2010 in HVC-215
- 1:00 PM, Tuesday, December 21, 2010 in HVC-215

Additional briefings will be scheduled for January 3rd and 4th, 2011.

TEXT OF THE PROPOSED RULES CHANGE:

The new rule will be a new paragraph of clause 7 of rule XII:

"(c) A bill or joint resolution may not be introduced unless the sponsor has 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 statement shall appear in a portion of the Record designated for that purpose and be made publicly available in electronic form by the Clerk."

COMPLIANCE WITH THE PROPOSED RULE:

When a Member presents a bill or joint resolution for introduction and referral (when it is dropped in the “hopper”), the bill must be accompanied by a separate sheet of paper citing the constitutional authority to enact the proposed bill or joint resolution. Below is the suggested format for the citation:

_____ Member Signature: _____
(Bill Number)

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 7 of Rule XII of the Rules of the House of Representatives, the following statement is submitted regarding the specific powers granted to Congress in the Constitution to enact the accompanying bill or joint resolution.

The blanks are to be filled in by the sponsor. Below are five illustrative examples of citations of constitutional authority:

- The constitutional authority on which this bill rests is the power of Congress to make rules for the government and regulation of the land and naval forces, as enumerated in Article I, Section 8, Clause 14 of the United States Constitution.
- This bill is enacted pursuant to Section 2 of Amendment XV of the United States Constitution.
- This bill is enacted pursuant to the power granted to Congress under Article I, Section 8, Clause 3 of the United States Constitution.
- The Congress enacts this bill pursuant to Clause 1 of Section 8 of Article I of the United States Constitution and Amendment XVI of the United States Constitution.
- This bill makes specific changes to existing law in a manner that returns power to the States and to the people, in accordance with Amendment X of the United States Constitution.

It is important to note that the sample citations above are merely examples. Further, the citation to accompany a bill is not limited to one sentence and a sponsor may provide additional explanatory details if they wish.

DETERMINING A BILL'S CONSTITUTIONAL AUTHORITY:

While the Office of the Legislative Counsel will assist Members by providing a properly formatted Constitutional Authority Statement form, it is the responsibility of the bill sponsor to determine what authorities they wish to cite and to provide that information to the Legislative Counsel staff.

In addition to the Constitution itself, there are a variety of resources available to Members and staff to assist them in identifying the power granted to Congress by the Constitution to enact a proposed bill. These include:

- The Federalist Papers, written mostly by James Madison and Alexander Hamilton to explain the purpose of the Constitution, are considered by many to be the primary source of authority on what the Constitution was understood to mean when it was ratified. There are various editions of the Federalist Papers that provide useful commentary, including the Clinton Rossiter edition, which contains a useful copy of the Constitution with page references to the Federalist Papers that discuss those parts of the Constitution in the margins. The Federalist Papers are also available online at <http://thomas.loc.gov/home/histdox/fedpapers.html>
- The Congressional Research Service's "Annotated Guide to the Constitution" includes an outline format that allows users to select main topics, then scale down to more narrow subjects within the Constitution and relevant Supreme Court decisions. For House Members and staff, this information may be accessed through CRS's website: <http://www.crs.gov/analysis/Pages/constitutionannotated.aspx> The Heritage Foundation has a variety of resources available for Members and staff, including the *Heritage Guide to the Constitution*, which provides a clause-by-clause analysis along with relevant court cases that is written for lawyers and non-lawyers alike. For more information visit: www.heritage.org.
- *The Founder's Constitution* is an on-line version of a five-volume work first published in 1986 that includes a range of documents that help explain and place into context the specific provisions of the Constitution. Information is arranged by article, section, and clause of the U.S. Constitution, from the Preamble through Article Seven and continuing through the first twelve Amendments. It is available at: <http://press-pubs.uchicago.edu/founders/>
- There are a number of think-tanks and associations from across the political spectrum that provide research and commentary on constitutional issues, including:
 - The Brookings Institution: <http://www.brookings.edu/topics/u-s-constitutional-issues.aspx>

- CATO Institute: <http://www.cato.org/constitutional-studies>
- The Federalist Society: <http://www.fed-soc.org/>
- The American Constitution Society: <http://home.acslaw.org/>

The adequacy and accuracy of the citation of constitutional authority is matter for debate in the committee and in the House. The rule simply requires that the bill be accompanied by a constitutional authority statement upon introduction. The statement will be publicly available through the Congressional Record and will be available with other relevant bill information, such as a list of cosponsors, on the Thomas website.

FREQUENTLY ASKED QUESTIONS:

Q. What if a sponsor declines to attach a Constitutional Authority Statement when introducing a bill?

A. Under the rule, the clerk will not accept the bill and it will be returned to the sponsor. This is the same process used to enforce clause 5 of Rule XII, which since 1995 has prohibited the introduction of bills or resolutions which seek to designate a specific period of time (such as a day, week, or month) for a particular commemoration.

Q. Does this rule apply to the introduction of all bills and joint resolutions, such as bills that merely make technical corrections to current law or proposed constitutional amendments?

A. Yes, the rule applies to all bills and joint resolutions. In these instances, a sponsor may in their Constitutional Authority Statement wish to refer back to the power granted to Congress to enact the statute they are proposing to amend or the powers under Article V to propose constitutional amendments.

Q. Isn't it the courts' duty to determine whether a law is constitutional and thus doesn't this rule infringe on the power of the courts?

A. No. While the courts have the power to overturn an Act of Congress on the basis that it is unconstitutional, Members of Congress have a responsibility, as clearly indicated by the oath of office each Members takes, to adhere to the Constitution.

Q. What impact will the Constitutional Authority Statement have on litigation regarding the constitutionality of Acts of Congress?

A. To the extent that a court looks at the legislative history of an Act, the Constitutional Authority Statement would be part of that history. However, the courts have made clear that they

will not uphold an unconstitutional law simply on the basis that Congress thinks that the law is constitutional.

Q. What if the citation of constitutional authority is inadequate or wrong?

A. As stated earlier, the adequacy and accuracy of the citation of constitutional authority is a matter for debate in the committees and in the House. Ultimately, the House will express its opinion on a proposed bill, including its constitutionality, by either approving or disapproving the bill.

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.