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BURNING DOWN THE HOUSE (AND SENATE): A PRESENTMENT REQUIREMENT FOR LEGISLATIVE SUBPOENAS UNDER THE ORDERS, RESOLUTIONS, AND VOTES CLAUSE

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BURNING DOWN THE HOUSE (AND SENATE): A PRESENTMENT
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Gary Lawson*

Forthcoming, 83 **Tex. L. Rev.** – (2005)

The potential payoff from challenging received wisdom is often uncertain. Received wisdom frequently has become received for very good reasons, and challenging it turns out to be a waste of time and energy for everyone concerned. Sometimes the enterprise produces a modest positive payoff because the received wisdom emerges from the challenge stronger and better understood for the ordeal. And on some relatively rare occasions, there is a large payoff when the received wisdom turns out to be far more received than wisdom, and long-established understandings must be rejected in favor of new learning.

Seth Tillman might very well have hit the jackpot – or at least three cherries – with A Textualist Defense of Article I, Section 7, Clause 3: Why *Hollingsworth v. Virginia* Was Rightly Decided, and Why *INS v. Chadha* Was Wrongly Decided,¹ in which he tries to shake up the received wisdom concerning the Constitution’s rules for the legislative process. The Constitution’s widely neglected Order, Resolution and Vote Clause (“ORV Clause”)² has long been understood by almost everyone, including myself,

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¹ 83 **Tex. L. Rev.** – (2005) (forthcoming).

² See **U.S. Const.** art. I, § 7, cl. 3:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or

simply to prevent Congress from seeking to circumvent the Constitution’s presentment requirement by labelling a prospective law an “order,” “vote,” or “resolution” rather than a “bill.” This superficially seems like a sensible constitutional precaution because bills are the only entities for which presentment to the President is textually required under Article I, Section 7, Clause 2.³ Mr. Tillman, however, argues that the ORV Clause additionally requires presentment for single-house action (other than adjournments, which are specifically exempted from the ORV Clause’s reach) taken pursuant to prior bicameral statutory authorization. He would have us read the clause to include the following meaning (with his interpolations in brackets):

Every [final] Order, Resolution, or Vote [of a single house] to which the [prior] Concurrence of the Senate and House of Representatives may be necessary [as bicameral congressional authorization for subsequent single house action] (except on a question of Adjournment) shall be presented to the President of the United States [so that his veto might act upon the subsequent single house action just as it acted upon the prior authorizing legislation]; and before the Same [subsequent single house action] shall take Effect [in conformity with the prior authorizing legislation], shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.⁴

being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

³ See **U.S. Const.** art. I, § 7, cl. 2:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

⁴ I have made some minor wordsmithing changes to Mr. Tillman’s interpolations, but the substance is unchanged.

Mr. Tillman is quite likely correct about the original meaning of the ORV Clause. It does not merely prevent Congress from circumventing the presentment requirement for bills through clever labelling, though it certainly does at least that much. Instead, it also subjects to presentment a range of legislative action that is not subject to presentment under Article I, Section 7, Clause 2. The ORV Clause is not *merely* an anti-circumvention device; it also has independent substantive bite.

One crucial element, however, is missing from Mr. Tillman's discussion: he does not identify the class (or classes) of bicamerally-authorized single house actions to which the ORV Clause, as he interprets it, would apply. That is, he has not identified the proper domain of the ORV Clause. I propose to fill that gap here. There is one – but quite possibly only one – important category of legally effective single-house action that requires prior legislative approval, and which therefore requires presentment to the President under the ORV Clause: the issuance (and perhaps also enforcement) of legislative subpoenas. Neither House of Congress has the enumerated power to issue such subpoenas, but a law authorizing their issuance by individual Houses could well be “necessary and proper for carrying into Execution” powers validly granted to the respective Houses, such as impeachment powers. The extension of presentment to those actions makes sense of the ORV Clause, and also makes sense as a matter of constitutional structure. Although this is a narrower scope for the ORV Clause than Mr. Tillman envisions, I hope that he views this contribution as a friendly amendment, as once one identifies the legislative actions that are subject to presentment under the ORV Clause but not Article I, Section 7, Clause, 2, the construction of the ORV Clause advocated by Mr. Tillman gains in power and plausibility.

I

As Mr. Tillman details at length,⁵ James Madison’s minimalist understanding of the ORV Clause has acquired the exalted status of received wisdom. After the Convention had drafted what is now Article I, Section 7, Clause 2, which concerns the process by which bills become laws through bicameral passage and presentment to the President, Madison worried that “if the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of resolutions, votes, &c.”⁶ Madison accordingly “proposed that ‘or resolve’ should be added after ‘*bill*’ . . . with an exception as to votes of adjournment,”⁷ but that motion was defeated. The next day, Edmund Randolph proposed the language that is now the ORV Clause, which was adopted.⁸ Madison described Randolph’s successful motion as “having thrown into a new form the motion putting votes, resolutions, &c., on a footing with bills”⁹ – that is, as having the same purpose and effect as Madison’s defeated proposal from the prior day. Madison’s account of the meaning of the ORV Clause as simply a clarification of the scope of the

⁵ Tillman [56-63]

⁶ [Note to editors: As do most people these days, I get most of my sources on-line but prefer to cite the printed versions. At the editing stage, I will insert appropriate citations to the printed works, but I don’t plan to track them down unless you are going to publish the piece.]

⁷ CITE

⁸ CITE

⁹ CITE

presentment requirement of Article I, Section 7, Clause 2 has since been accepted by the Supreme Court¹⁰ and the scholarly community.¹¹

The Madisonian view limits the scope of the ORV Clause to preventing circumvention of the lawmaking processes of Article I, Section 7, Clause 2. That precaution, of course, was completely unnecessary because of the principle of enumerated powers. Under that principle, institutions of the federal government¹² can only exercise those powers specifically granted to them and whatever incidental powers flow from those specific grants. Congress's power to make law accordingly comes from, and is defined by, those provisions of the Constitution that give Congress legislative jurisdiction over particular subjects and prescribe particular procedures for the exercise of that jurisdiction. The procedural provision for lawmaking is Article I, Section 7, Clause 2:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.¹³

¹⁰ See *INS v. Chadha*, 462 U.S. 919, 946-47 (1983).

¹¹ Tillman [59 n.88]

¹² All federal powers are granted to specific institutions; the Constitution never vests powers in “the federal government” as an undifferentiated entity.

¹³ **U.S. Const.** art. I, § 7, cl. 2.

According to the clear terms of this provision, the only legislative entity that can ever become a law is a bill. Nothing else – not a vote, not a resolution, not an order, not an Executive Order, not a regulation, not a judicial decision, not a singing telegram – can ever become a law under the Constitution, simply because there is no constitutional provision prescribing the process by which any of those other entities can become a law. If the ORV Clause merely reinforces this point, it is wholly redundant.

That does not prove or mean that Madison was wrong about the effect of the ORV Clause. Redundancy is a familiar feature of the Constitution.¹⁴ Many provisions function precisely as “anti-inference” provisions that do nothing more – and nothing less – than preempt arguments that might otherwise be made, even where those arguments would be clear losers without the anti-inference provision.¹⁵ But if the sole function of the ORV Clause was to emphasize that only bills can become laws, the clause’s language is very strangely suited to that task. There are a lot of very easy ways to say that laws can only emerge from the process specified in Article I, Section 7, clause 2, and the odd locution of the ORV Clause does not leap to mind as the first choice. That is not proof, in the strict logical sense, that the ORV Clause therefore serves an additional function, but it ought to make one suspicious.

¹⁴ See Gary Lawson, *Delegation As Discretion: The “Proper” Understanding of the Nondelegation Doctrine*, 73 *Geo. Wash. L. Rev.* – (2005) (forthcoming) (identifying a large number of obviously redundant constitutional provisions).

¹⁵ A good example is the Commander-in-Chief Clause of Article II, which states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” *U.S. Const.* art. II, § 2, cl. 1. This clause does not grant the President the power to conduct military operations. That power comes from the Article II Vesting Clause, which provides that “[t]he executive Power shall be vested in a President of the United States of America.” *Id.* art. II, § 1, cl. 1. In the absence of the Commander-in-Chief Clause, however, Congress might be tempted to argue that its many enumerated powers over the military also include an implied power to direct troop movements. The congressional argument would be a loser, but why not try to foreclose an entirely predictable confrontation between the legislative and executive departments?

Mr. Tillman has followed those suspicions literally halfway around the world¹⁶ to the intriguing idea that the ORV Clause requires presentment for certain forms of single-house actions that take effect pursuant to bicameral authorization. The argument, which covers ground from pre-Founding English parliamentary practice to solid textual exegesis, is bold and (I think) ultimately successful in its broad mission, but it is missing a crucial element: What single-house actions could possibly be the referents of the ORV Clause? What kind of single-house “Order, Resolution, or Vote,” subject to “necessary” (for what purpose?) bicameral concurrence, can ever “take Effect” (in what fashion?) subject to presentment?

Mr. Tillman is stingy with answers. At no point in his article does he clearly define the domain of the ORV Clause as he interprets it. The best that one can glean is that he envisions Congress, by legislation enacted pursuant to appropriate presentment and bicameral procedures, delegating authority to single houses, or perhaps even to single committees, in much the same way that it delegates to executive agents. He suggests this possibility in passing when noting that the ORV Clause can reach *beyond* single-house action: “my *tenative* view is that Congress could delegate lawmaking authority (subject to a veto) to the committee of the whole or to any other committee or subcommittee”¹⁷ He hints at it somewhat more clearly when discussing the British parliamentary roots of the ORV Clause: “The suggestion here is that statutory waiver of otherwise constitutionally mandated bicameralism was consistent with the British view of parliamentary sovereignty. Parliament, as sovereign, could always delegate to any body:

¹⁶ Tillman [71-77]

¹⁷ Tillman [84 n.127]

within or without itself.”¹⁸ He finally came clean in a letter to me: “I believe that anything that Congress might delegate to the President (or to the Executive Branch generally), Congress might *alternatively* or *additionally* delegate to a single-house with presentment”¹⁹

This cannot define, even partially, the domain of the ORV Clause because it is a null set. Congress cannot delegate lawmaking authority to anybody. That is, of course, not the current view of any relevant governmental actor,²⁰ but it is what the Constitution prescribes, which I take to be Mr. Tillman’s primary concern. This is not the place to rehearse the arguments in favor of a constitutional nondelegation principle; I have done that at appalling length elsewhere.²¹ The central point for present purposes is that Congress is permitted to vest a measure of discretionary authority in executive and judicial agents because those agents are vested by the Constitution with, respectively, “[t]he executive Power”²² and “[t]he judicial Power.”²³ Discretionary authority that is properly exercised by those actors is executive or judicial power that is exercised pursuant to legislation “necessary and proper for carrying into Execution”²⁴ federal powers. It is not delegated legislative power. The Constitution does not authorize the delegation of legislative power to the President, the courts, or anyone else. The ORV

¹⁸ Tillman [86]

¹⁹ Letter from Seth Barrett Tillman to Gary S. Lawson, Apr. 9, 2004, at 1.

²⁰ See Gary Lawson, Delegation and Original Meaning, 88 **Va. L. Rev.** 327, 329-30, 334 (2002).

²¹ See id.; Lawson, supra note XX.

²² **U.S. Const.** art. II, § 1, cl. 1.

²³ Id. art. III, § 1.

²⁴ Id. art. I, § 8, cl. 18.

Clause thus cannot require presentment for delegations of legislative authority to single houses or committees because the Constitution permits no such delegations.

Nor can the ORV Clause refer to statutory authorizations for single houses to implement federal law. The House or Senate, or committees of the House or Senate, are not vested by the Constitution with a general executive or judicial power. They cannot duplicate the functions of executive or judicial agents.

To illustrate this point, consider the actions at issue in the Supreme Court's first case involving the nondelegation doctrine: *Cargo of the Brig Aurora v. United States*.²⁵ In 1811, Congress prescribed that a former 1809 statute imposing retaliatory restrictions on trade with England was again effective unless the President declared by proclamation that England had ceased to violate the neutral commerce of the United States.²⁶ The Court quickly brushed aside a delegation challenge to the President's authority under this statute,²⁷ explaining in a single sentence: "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."²⁸ I have explained at length elsewhere why, and when, such contingent legislation – that is, legislation that takes effect only upon the occurrence or non-occurrence of specified events – is

²⁵ 11 U.S. (7 Cranch) 382 (1813).

²⁶ *Id.* at 384-85.

²⁷ *See id.* at 385-86 ("Congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of a law.") (argument of Joseph R. Ingersoll, counsel for appellant).

²⁸ *Id.* at 388.

constitutionally permissible.²⁹ One part of that analysis is critical to the present discussion:

Every law has an effective date. Laws can take effect immediately, on some specific future date, or on the happening of some future event that may or may not be certain to occur. If a law takes effect only on the happening of some future event that is not certain to occur (or is not certain to occur at a specific time), it is contingent legislation.

.....
The Court [in *the Brig Aurora*] was correct to approve the general practice of contingent legislation. Normally, a statute's effective date will be a calendar date, but there is no evident reason why that effective date cannot be determined by some event other than celestial motions – such as legislation that takes effect only upon occurrence of natural disasters. Once the statute identifies a contingent event as the trigger for effectiveness, someone must determine in any given case whether the event has occurred (just as someone must determine whether the relevant calendar date has occurred if the statute prescribes a calendar date). That someone will either be an executive agent or a judicial agent: The interpretation of the contingency (What counts as a natural disaster? How high does the water have to rise before it constitutes a flood?) and the ascertainment of the whatever facts the contingency depends upon (How high did the water actually rise?) are core executive and judicial functions.³⁰

Thus, in *The Brig Aurora*, it was “necessary and proper” for Congress to allow the President to determine whether the specified contingency – England ceasing to violate the neutral commerce of the United States – had occurred, just as it would have been “necessary and proper” to allow the courts to make that determination if that had been Congress’s choice. That is the sort of thing that executive and judicial actors, exercising executive and judicial powers, do for a living. Congress could not, however, entrust that responsibility by statute to itself, one house, or a legislative committee. Unlike the President and the courts, those legislative actors have no enumerated power to implement statutes. It is not “necessary and proper” for Congress to attempt to authorize federal

²⁹ Lawson, *supra* note XX, at 363-69, 387-91.

³⁰ *Id.* at 363-64.

actors who have no constitutionally-granted implementational authority to implement federal laws.

The same considerations explain why the ORV Clause cannot refer to legislative vetoes. A legislative veto is a device whereby executive action implementing a statute is voided by legislative action – whether by Congress, one house of Congress, or a congressional committee – which does not undergo presentment. Legislative vetoes are thus a form of contingent legislation: action takes effect only upon the occurrence (or non-occurrence) of a stated contingency, in this case action (or non-action) by a congressional body. But the specification of the effectiveness of action taken pursuant to statute is either a legislative task that must be accomplished through Article I, section 7, clause 2 legislation or an executive or judicial task in the implementation of a validly-enacted statute. Neither Congress nor any of its component parts has enumerated power to implement federal law in this fashion and thus cannot exercise a legislative veto.³¹

If single houses of Congress cannot receive delegated legislative authority (because no one can receive delegated legislative authority) and cannot implement federal law such as contingent legislation (because congressional bodies have no enumerated implementational powers), then what legal actions potentially requiring

³¹ The inquiry is muddled by the modern demise of the nondelegation doctrine. If executive agents exercised only the kind of discretionary implementational power contemplated by the Constitution, it would (I think) be obvious that legislative vetoes are improper. There would also be little or no motive to enact them. Legislative vetoes exist because Congress grants executive actors a kind and quality of discretion that goes beyond executive power and therefore amounts to a delegation of legislative power. It is understandable that the legislature would then want some say in how that legislative power gets exercised. There is a non-frivolous case for the proposition that, *given* the existence of delegations of legislative power, a world with legislative vetoes is closer to the world envisioned by the real Constitution than is a world without them. For an extraordinarily sophisticated presentation of this thesis, see Peter B. McCutchen, Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, 80 **Cornell L. Rev.** 1 (1994). For my brief (and, to most readers who do not share my peculiar interpretative bent, weak) rejoinder, see Gary Lawson, The Rise and Rise of the Administrative State, 107 **Harv. L. Rev.** 1231, 1252-53 (1994). The short response is: The Constitution does not permit second-best solutions. It means what it means.

presentment could single houses possibly engage in? To what single-house actions could the ORV Clause refer even in principle?

II

The ORV Clause refers to “[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives *may be necessary*” “Necessary” for what? Obviously, necessary for such orders, resolutions, or votes to “take Effect.” But we have already seen that no such orders, resolutions, or votes can ever take effect as laws, because only bills can become laws under the Constitution. How can congressional action “take Effect” without becoming a law?

Consider the constitutional powers of the individual Houses of Congress. Obviously, each House has enumerated powers pertaining to the lawmaking process under Article I, section 7. Other than that, each House has the power (and duty) to choose its officers,³² to judge “the Elections, Returns and Qualifications of its own Members,”³³ to adjourn,³⁴ to “determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and . . . expel a Member,”³⁵ and keep a journal of proceedings.³⁶ The House has the power to impeach federal officers,³⁷ while the Senate

³² **U.S. Const.** art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers”); *id.* art. I, § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore”).

³³ *Id.* art. I, § 5, cl. 1.

³⁴ *Id.*; *id.* art. I, § 5, cl. 4.

³⁵ *Id.* art. I, § 5, cl. 2.

³⁶ *Id.* art. I, § 5, cl. 3.

has the power to try impeachments³⁸ and to advise and consent to treaties and appointments.³⁹ The concurrence of the other House is not required for the exercise of any of these powers. Accordingly, the ORV Clause, with its specific reference to actions “to which the Concurrence of the Senate and House of Representatives may be necessary,” is by its terms inapplicable to the direct exercise of any of these powers.

Suppose that the House is considering whether to exercise its impeachment power. In order to determine whether impeachment is warranted, the House quite naturally might want to hold hearings to gather information. It might also want access to documents and/or witnesses that are not voluntarily produced. Can the House issue a subpoena to compel production of the documents and/or testimony? Can it enforce a subpoena that is issued and ignored?

There is nothing in the Constitution that gives either House of Congress power to issue or enforce subpoenas.⁴⁰ One could try to argue that such powers are necessarily implied in the powers granted to the individual Houses, but that is an argument that is very tough to make in the context of the federal Constitution, in which institutional powers are enumerated with considerable care. Professor Michael Rappaport has ably tried to defend such an inference, but the case is unconvincing. Professor Rappaport

³⁷ Id. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment”).

³⁸ Id. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

³⁹ Id. art. II, § 2, cl. 2.

⁴⁰ The issuance and enforcement of subpoenas are separate issues. One could perfectly well believe that Congress has power to issue subpoenas but must secure the services of the executive to enforce them. That refinement, however, is not directly pertinent to the scope of the ORV Clause. The issuance of a subpoena – assuming that the issued document really is a subpoena rather than a polite request – is an event of legal significance regardless of who has ultimate enforcement power. An order, vote, or resolution resulting in the issuance of a subpoena is thus an action that can “take Effect” within the meaning of the ORV Clause.

argues that an inherent legislative authority to issue and enforce subpoenas finds support in both history and constitutional structure. Historically, “Anglo-American legislatures, including the House of Commons, the colonial legislatures, many of the state houses prior to and after the ratification of the Constitution, and early Congresses had the power to punish contempts. Moreover, in several of the state constitutions, this power was not conferred through an explicit provision.”⁴¹ And the power to enforce subpoenas, he argues, follows fairly naturally from a power to punish contempts. But there are two basic problems with this argument. First, examples from British, colonial, or state legislative practice are not especially probative of the powers of the federal Houses, because the federal legislature, unlike those other bodies, is an institution of limited and enumerated powers. A general legislature might well have powers that a limited legislature does not. The early understandings of both Congress and the Supreme Court with respect to legislative prerogatives under the American Constitution support Professor Rappaport’s position,⁴² but those historical *understandings* are at best weak evidence of original *meaning*.⁴³ Congress can be expected to overstate its own powers, and the early Supreme Court was not distinguished by its fidelity to original meaning.

⁴¹ Michael B. Rappaport, Replacing Independent Counsels with Congressional Investigations, 148 *U. Pa. L. Rev.* 1595, 1620 (2000).

⁴² See James M. Landis, Constitutional Limits on the Congressional Power of Investigation, 40 *Harv. L. Rev.* 153 (1926); C.S. Potts, Power of Legislative Bodies to Punish for Contempt, 74 *U. Pa. L. Rev.* 691 (1926). Both articles were prompted by the events ultimately giving rise to McGrain v. Daugherty, 273 U.S. 135 (1927), which remains the leading Supreme Court decision supporting a congressional power of investigation.

⁴³ On the critical difference between original *understandings* and original *meanings*, see Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion in American Legal History 9-12 (2004); Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution’s Secret Drafting History, 91 *Geo. L.J.* 1113 (2003). Careful attention to this, incidentally, supports Mr. Tillman’s argument. Mr. Tillman worries that he has found “no originalist materials *directly* supporting this position.” Tillman [54] If the search for original meaning was a search for direct evidence of mental states of concrete historical persons, this absence might be significant. But if the search for original meaning is,

This basic problem with deriving a congressional subpoena power from the Constitution can be seen in clearer focus by examining the remarks of James Landis, whose impressive historical study of the congressional investigatory power is one of the bulwarks of Professor Rappaport's modern position. Landis defended a broad congressional investigatory power, including the power to compel testimony, with the following observations:

Legislative power unhappily fails to be either a word of art or a self-defining concept. Like judicial power, it summarizes the history of an institution of government for any particular period of time. It did so in 1789. When the political thinkers of that period erected a government and set forth its outlines in a constitution, they were not dealing with new concepts into which judges of a later date were to pour a meaning dissociated from past history and experience. Bred to the bone, as they were, with English conceptions and traditions, a phrase such as legislative power, precipitated centuries of Parliamentary history and decades of colonial practice Constitutions must be expounded. Legislative power is no exception to such a general principle.⁴⁴

This is all well and fine, except for the small fact that the Constitution never vests “legislative power” in any federal institution. The Constitution vests in Congress “[a]ll legislative Powers *herein granted*,”⁴⁵ meaning that it vests in Congress that subset of all powers conceivably labelled “legislative” enumerated elsewhere in the Constitution. This is in stark contrast to the vesting clauses of Articles II and III, which vest in the President and the federal courts, respectively, a general “executive Power” and “judicial Power” – grants which do indeed include all powers fairly encompassed within those terms. It is irrelevant what powers would belong to a body that is vested with a general

as I believe, a search for *hypothetical* mental states that *would* have been held by historical persons if they were in possession of all relevant information, the presence or absence of what Mr. Tillman calls “originalist materials” becomes far less significant.

⁴⁴ Landis, *supra* note XX, at 156.

⁴⁵ **U.S. Const.** art. I, § 1, cl. 1.

“legislative power” because Congress is not such a body.⁴⁶ In the absence of an enumerated subpoena power, such a power can therefore only be located through a very strong and careful constructed inference.

Professor Rappaport accordingly further invokes structure and purpose in support of an inference of a congressional subpoena power: “Without this power [to enforce subpoenas], the houses would have to rely on executive prosecutions for enforcement of their subpoenas. This reliance, however, would render the impeachment and oversight powers far less effective because the executive branch might be reluctant to aid congressional investigations of itself.”⁴⁷ This is all true, but is only relevant if one assumes that Congress must have power to compel testimony in order to carry out its tasks. That is a huge assumption. The Constitution specifically guarantees criminal defendants the right to compel testimony in their favor.⁴⁸ There is no such specific guarantee for civil trials, nor is there any special provision for congressional investigations. There is nothing logically absurd about an adjudicatory proceeding without compelled testimony. Within a Constitution of limited and enumerated powers, it would require absurdity of a very high level in order to infer the existence of a power as potent as the power to issue and enforce subpoenas.

This leads to the second problem with Professor Rappaport’s argument: one cannot draw a clear line from a legislative power to punish contempts in general to a power to enforce or issue subpoenas. Perhaps one can make an “argument from

⁴⁶ It is an error that Landis repeated. See Landis, *supra* note XX, at 221 (referring to “[t]he grant of legislative powers by the founders in 1789”).

⁴⁷ Rappaport, *supra* note XX, at 1620-21.

⁴⁸ **U.S. Const.** amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor”).

absurdity” case for an unenumerated-but-implied power on the part of each House to punish attempts to disrupt its proceedings, as did the Supreme Court in 1821 in Anderson v. Dunn.⁴⁹ There is an element of self-protection involved in such a power to preserve decorum and ability to function that is not present with respect to subpoenas. The ability to issue subpoenas might make the job of the House and Senate easier, but the world would not fall in if no such power existed. There is a much stronger case for inferring a power to punish contempts in limited circumstances involving potential disruption of congressional affairs than for inferring any such power with respect to subpoenas.

I am frankly dubious about even the limited power recognized in Anderson v. Dunn. It is not necessarily absurd to have the House and Senate depend on the President for criminal enforcement of their rules of decorum. The President, after all, is completely dependent upon the House and Senate for funding⁵⁰; the President cannot so much as buy pencils or paper clips without statutory authorization. There are, of course, always grave dangers with making institutions dependent upon each other for important elements of their functions, but there are equally grave dangers with the opposite approach. In any event, even if one could properly infer a congressional power to protect itself from disturbances, that does not support an inference of a congressional power to gather information through compulsion. Arguments from necessity require necessity, and there is no necessity for subpoenas.

Thus, the case for an inherent constitutional power on the part of Congress, or its constituent parts, to issue or enforce subpoenas is very weak. There are, however, ways

⁴⁹ 19 U.S. (6 Wheat.) 204 (1821).

⁵⁰ See **U.S. Const.** art. I, § 9 cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”).

in which each House can acquire the power to issue, and perhaps enforce, subpoenas without relying on remote inferences from granted powers. Congress has power to enact legislation (subject to presentment) that is “necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*” Can Congress constitutionally enact legislation authorizing each House to issue and enforce subpoenas, even if those bodies could not take such actions on their own?

If the answer is “yes,” then the proper domain of the ORV Clause becomes clear. Suppose that such legislation authorizing the use of subpoenas by individual Houses in pursuance of their constitutional functions, such as impeachment, is permissible. That authorizing legislation constitutes precisely the prior bicameral authorization for single-house action that Mr. Tillman contemplates. The issuance and/or enforcement of a subpoena by an individual House then becomes an “Order, Resolution, or Vote” that can “take Effect” – that is, have legal consequences other than as legislation. The ORV Clause, so understood, requires that before any single House seeks to compel testimony pursuant to statutory authorization, that single-house action must be presented to the President just as was the authorizing legislation.

This understanding of the ORV Clause makes a great deal of sense. It is no small matter for Congress to subpoena executive materials or agents. The presentment power is a sensible and natural way for presidents to protect executive prerogatives against legislative overreaching. If Congress really wants the subpoena issued or enforced, it can override the President’s veto, so the ORV Clause does not totally block congressional

investigations. But it does channel them through a presentment process, which is appropriate for congressional action that purports to have legal effect.

There are a number of difficulties with this view of the congressional subpoena power and its relationship to the ORV Clause. Most notably, it is not at all clear that the Sweeping Clause⁵¹ permits Congress to authorize single-house subpoenas. The Sweeping Clause permits Congress to carry into effect the powers vested in the United States Government or its departments or officers. The House and Senate are not the United States Government, federal departments, or federal officers. The term “departments” refers either to the three great departments of the national government – the legislative, executive, and judicial departments – or to units of the executive department, such as the Treasury Department. The individual houses of Congress are branches, not departments.⁵² Thus, a literal reading of the Sweeping Clause does not include the power to implement the various functions conferred on the individual Houses of Congress.

There is some reason, however, to avoid this literal reading. The Sweeping Clause speaks of powers “*vested by this Constitution in the Government of the United States.*” There are, strictly speaking, no such powers. The Constitution does not ever grant powers to the “Government of the United States” as a unitary entity; all powers are granted to specific federal institutions, such as Congress, the House, the Senate, the President, the Vice-President, the Chief Justice, the federal courts, etc. The best reading

⁵¹ It has become conventional to refer to Article I, section 8, clause 18 as the “Necessary and Proper Clause.” The founding generation, however, generally referred to it as the “Sweeping Clause.”

⁵² See Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 **Harv. L. Rev.** 1153, 1156 n.6 (1992).

of the Sweeping Clause is thus to treat the phrase “the Government of the United States” as meaning “principal institutions of the Government of the United States,” which would certainly include the constitutionally-created House and Senate. On this understanding, Congress could, by statute, implement the various powers granted to the individual Houses.

The second problem with this understanding of the subpoena power and ORV Clause is that the President’s presentment power with respect to subpoenas would extend not just to subpoenas aimed at the executive but at any legislatively-issued subpoenas regardless of their targets or scope. Any such subpoena would result from an “Order, Resolution or Vote” taken pursuant to bicameral authorization and therefore would come within the terms of the ORV Clause. But again, that is not an untoward result. Houses of Congress have no enumerated subpoena powers, and there is nothing absurd about a world in which they have no such powers. A fortiori, there is nothing absurd about a world in which they have such powers, but can only exercise them subject to presentment. Which view, after all, is more consistent with a system of checks and balances?

All of which leads up to the final question: Does the ORV Clause also apply to amendment resolutions under Article V? The answer seems to be yes. Article V states, in relevant part, that “[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments”⁵³ The concurrence of both Houses is necessary for an amendment

⁵³ U.S. Const. amend. V.

resolution to have legal effect. Accordingly, it fits within the plain terms of the ORV Clause. The ORV Clause can extend to some forms of action in which the relevant “Concurrence of the Senate and House of Representatives” is prior authorization for subsequent action, but it also extends to action in which the “Concurrence of the Senate and House of Representatives” is immediately necessary to the very action at issue.

III

Thus, in the end, Mr. Tillman is right that the ORV Clause has a broader reach than has traditionally been thought. It includes precisely the single-house action pursuant to prior bicameral legislative authorization for which he argues. But the only action that falls within that description of which I am aware is the issuance and enforcement of subpoenas by single houses pursuant to authorizing legislation. That is not necessarily the result that Mr. Tillman contemplated, but it is a result of considerable interest and significance.