

## National University of Ireland, Maynooth

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From the Selected Works of Seth Barrett Tillman

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Extract from Rotunda & Nowak, Treatise on Constitutional Law (3d ed. Supp. 2005) citing Lawson-Tillman exchange on Article I, Section 7, Clause 3

Seth Barrett Tillman, *None*

# TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE

Third Edition

2005 POCKET PART

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Volume 2

Chapters 9-16

Replacing prior Pocket Part in back of Volume

THOMSON  
PROPERTY OF THE UNITED STATES  
WEST

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## § 10.2

## HOW A BILL BECOMES A LAW

Ch. 10

lative Power, at p. 13, table 1 (Cato Institute), Policy Analysis No. 358, Oct. 23, 1999.

55. Eg., House Committee on Resources, Behind Closed Doors: The Abuse of Trust and Discretion in the Establishment of the Grand Staircase-Escalante National Monument, Committee on Resources Report, 105th Cong., 1st sess., November 7, 1997.

56. *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) invalidated a Presidential Executive Order as unconstitutional. This case was the first time that the Supreme Court invalidated an executive agreement. The justices concluded that it was unconstitutional to try civilian dependents of Armed Forces servicemen by court martial in time of peace for capital offenses committed abroad. While executive agreements with Great Britain and Japan authorized such military jurisdiction, those agreements were unconstitutional.

The D.C. Circuit held that a provision of the National Labor Relations Act guaranteeing management the right to hire permanent replacements during labor strikes preempted an Executive Order that had been purportedly justified by another law, the Procurement Act, which barred the federal government from contracting with employers who hire permanent replacements during a lawful strike. *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 316 U.S.App.D.C. 61 (D.C.Cir. 1995).

In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999), the Court held that an Executive Order removing the Chippewa Indians from lands that were previously ceded to the United States did not terminate the Chippewa hunting, fishing, and gathering rights because the Executive Order was not authorized by statutes, by any treaty, or any other constitutional or statutory authority.

## § 10.8 Legislative Veto of Executive Branch Regulations and Actions

8. For an interesting historical argument that disagrees with *INS v. Chadha*, see, Seth Barrett Tillman, A Textualist Defense of Article I, Section 7, Clause 3: Why *Hollingsworth v. Virginia* was Rightly Decided, and Why *INS v. Chadha* was Wrongly Reasoned, 83 Texas Law Review — (2005), appearing at, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=475204](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=475204). Although James Madison took a contrary position in his Notes on the Debates in the Federal Convention (published posthumously in 1840), Tillman argues that considerable textual and roughly contemporaneous American (and British) historical evidence supports the position that the original meaning of the Orders, Resolutions and Votes Clause was to permit a statute to delegate lawmaking authority to a single house acting (by order, resolution or vote) subject to presentment, with the concomitant possibility of veto and two-house override.

Gary S. Lawson, Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and

Votes Clause, 83 Texas L. Rev. — (2005), also appearing at, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=556789](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=556789), which agrees in principle with Tillman's, A Textualist Defense, but limiting the practical effect of Orders, Resolutions and Votes Clause to congressional subpoenas that must be presented to the President and authorized by prior statute.

See also *Commonwealth v. Caton*, 1782 WL 5, 8 Va. (4 Call.) 5 (1782) (the Case of the Prisoners), reported at, 2 David John Mays, The Letters and Papers of Edmund Pendleton 1734-1803 (1967). Pendleton was President of the Supreme Court of Appeals of Virginia. In one of a number of bench issued seriatim opinions, Pendleton held that, although a constitutional provision may authorize a statute to delegate lawmaking authority to a single house, that power was unexercised by the legislature. See id. at 416-427; see also id. (Dandridge, J., dissenting) (governor's power to issue pardon transferred to lower house by joint operation of constitutional and statutory provisions); id. (Mercer, J., dissenting) (same).