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From the SelectedWorks of Seth Barrett Tillman

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Extract from Gary Lawson, Teacher’s Manual to Federal Administrative Law (5th ed. 2010), citing Lawson-Tillman Exchange

Seth Barrett Tillman

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TEACHER’S MANUAL

to

FEDERAL

ADMINISTRATIVE

LAW

Fifth Edition

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President for signature or veto, and provision for override of a veto by supermajorities in each house. The second provision is even more interesting. The received wisdom concerning this provision, dating back to Madison's notes from the Convention, treats it as a device for avoiding circumvention of A1 S7 C2 through clever labeling. Note that the basic lawmaking provision, A1 S7 C2, refers to "[e]very Bill"; a "Bill" is therefore the only legal entity for which this provision requires presentment. Could Congress avoid the presentment requirement by passing something as law that it labels an "order" or "resolution" rather than a "bill" and thus claim that A1 S7 C2 doesn't apply because the provision only refers to bills? As a matter of first principles, the answer is clearly not. Just as a "Bill" is the only legal entity for which presentment is required, a "Bill" is the only legal entity that can become a "Law," for the simple reason that there is no other provision of the Constitution that enumerates a process by which any other legal entity can become a "Law." Nonetheless, there is sometimes constitutional value in stating the obvious, if only to prevent people from making tempting-but-losing arguments that will drain time and resources. A good number of constitutional provisions are "anti-inference" provisions of this sort. But could the framers seriously have thought that Congress would try such a ridiculously transparent ploy to expand its powers -- and could they have thought it seriously enough to warrant drafting an entire paragraph of a short constitution to cover it? What sort of power-mad, unprincipled people did the framers think were going to wind up in Congress? (The students by now should be getting the idea.)

I said that this "just-in-case," anti-inference understanding of A1 S7 C3 is the received wisdom. The received wisdom may not be entirely correct. Certainly the clause serves the anti-inference function described above, but is that all that it does? Madison thought so, but perhaps Madison was wrong. Maybe there are certain congressional actions, including actions by a single House taken pursuant to prior statutory authorization, for which presentment is independently required by A1 S7 C3 but not by A2 S7 C2. For an intriguing argument to this effect, 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 Decided, 83 Tex. L. Rev. 1265 (2005). I have written a brief comment on this excellent article, see Gary Lawson, Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas under the Orders, Resolutions, and Votes Clause, 83 Tex. L. Rev. 1373 (2005), to which Tillman has responded, which argues that Tillman is probably right but that the only single-house actions that are subject to presentment under A1 S7 C3 are legislative subpoenas.

A1 S7 C1. I used to think that this clause had separation-of-powers implications, but Akhil Amar's masterful America's Constitution: A Biography (2005) says that it only applied to civil actions brought by