Tom McClintock's Capitol Commentaries

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Message from Tom McClintock

Dear Friend,

First, I want to thank everybody who has made my campaign – and my work in Washington – possible. You make it possible for me to go around an increasingly partisan media and reach voter directly. When we're reaching people, we're winning – but that takes time, money, effort and patience.

In this issue, I want to share two speeches that I gave last month. One is adapted from remarks I made on the House floor concerning the Democrats' recent disgraceful "sit-in." To me, it struck at the very heart of our democratic republic, and I called them out on it. The House leadership has promised to hold the members responsible for this outrage accountable when we return in September, and I intend to hold them to this commitment.

I have often said that there are three mortal perils facing our nation: our national debt, our open borders, and the disintegration of the basic architecture of our Constitution. I take on that third threat in a speech I gave recently in Napa – in which I outline the course I believe the House must take to restore the proper balance and separation of powers.

House Rules, Or Rules for Radicals?

July 5, 2016

If anyone doubts the contempt with which the radical left views free speech and the fundamental institutions and traditions of our free government, they should have watched the Democrats' occupation of the House floor on June 22nd.

On that day, they brought the deliberations of the House of Representatives to a standstill in one of the most disgraceful and childish breaches of decorum in the history of Congress. In complete contempt of the House and the rule of law, they shouted down all with whom they disagreed, blocked access to the microphones as members sought to address the chair, and illegally occupied the Hall of the House – forcing an early adjournment and costing the House three full days of legislative deliberations.

Abraham Lincoln once said, "There is no grievance that is a fit object of redress by mob law." What we saw was the mob law of Occupy Wall Street brought to the House Floor.

They have been trying to use the recent terrorist attacks on Americans to make it harder for law-abiding Americans to defend themselves. A strange logic, but so be it. They certainly have a right to their opinions, a right to express those opinions on the House floor, and a right to use all of the procedures of the House to act on their opinions. What they do not have is the right to prevent those with different views from exercising the same rights. Yet that's precisely what they did.

The Democrats who staged the sit in that day have many procedures and opportunities to bring their bills to the House for a vote. They could have executed a discharge petition to bring their bill immediately to the floor. They could have moved to have their bill inserted into any bill pending on the House Floor – a common motion that is heard and voted on several times a week.

Their gun-control proposals had already been heard the Senate and in a House committee and voted down. They had already filed a discharge petition.

Their only problem is that they don't have enough votes to take away the right of law-abiding citizens to own firearms. Well sorry, that's called "democracy." The majority of their colleagues simply disagree with them – for some very good reasons.

Their rights were honored and protected by the Republican majority under the rule of law. Yet they denied those same rights to others by replacing the rule of law with the rule of the mob -- and they did so on the most sacred ground of our democratic republic – the Hall of the House of Representatives.

Instead of working within the time-honored rules of the House to convince the majority to their way of thinking, they decided to tear down the rules. This was the lawless Left on full display and I hope the American people took a long hard look at it, and understand the threat to our democratic traditions and institutions that this conduct reveals.

In recent days, we have seen other Leftist mobs assembled under a foreign flag violently attack American citizens who were merely trying to exercise their right to peaceably assemble in support their candidate for President. We have seen this administration attempt to criminalize political dissent, and use the IRS to intimidate people out of participating in our political process. And now we have watched this lawless behavior imported onto the floor of the House of Representatives.

The House leadership decided not to confront this unprecedented spectacle as it unfolded. It was obvious the members involved were trying to provoke a physical confrontation.

But serious damage was done that day to our orderly process of government and it cannot go unchallenged. The Constitution provides that the House may sanction members for disorderly behavior, and I believe that when the House returns in September, the members responsible for this disgrace must be called to account for their actions. Otherwise, we will have replaced the Rules of the House with Saul Alinsky's "Rules for Radicals." ❑

How Congress Can Reclaim its Authority from the Bureaucracy

California Independent Petroleum Association

June 11, 2016

You have asked me to address one of the fundamental threats to our freedom as Americans: the rise of the administrative state.

The genius of the American Republic was in discovering and applying what I like to call "mother's rule" to government. You all know mother's rule, don't you? Two hungry brothers and one slice of pie. How does mother cut the pie so that every time both brothers go away happy and satisfied? Mother knows. One brother cuts the pie, and the OTHER brother gets to choose his piece. The ambitions of one brother check the ambitions of the other in a perfect harmony of self-interest. The power given to one brother cannot be abused BECAUSE of the power given to the other brother.

But suppose mother's rule was different. Suppose the same brother who sliced the pie also got to choose his piece. How would that work out? Very well for one brother, very badly for the other. One becomes master, the other becomes servant.

The American Founders looked to Europe with all its corruption and tyranny and misery and realized, "That's what they've been doing wrong all these centuries." All the powers of government were concentrated in the same hands and this is the very foundation of tyranny.

And so the American Founders divided up the powers of government. One brother legislates, the other brother executes, and mother resolves disputes that may arise.

Thus, Article I, the first and longest article of the Constitution begins, "ALL legislative power herein granted is vested in a Congress of the United States." Emphasis: ALL LEGISLATIVE POWER. When a decision was to be made, they wanted a big, ugly, contentious brawl. They wanted every voice in the country involved in that decision. They wanted a proposition held up to the light of reason from every conceivable angle. And they wanted it to be hard to make that decision. That's one reason they divided the legislative power between two houses – they wanted the Congress to argue with itself – they deliberately built into the system two houses that were designed to have a different perspective and engineered to disagree.

That law making authority is central and fundamental to the architecture of this government. But once Congress makes a decision, the Founders wanted another brother to carry it out. And that brother couldn't be the same collection of squabbling representatives that made the decision. The Founders wanted the decisions to be very difficult to be made, but once made, they wanted the decisions carried out with single-mindedness, vigor and dispatch. And thus, we have the second article of the Constitution that creates the executive branch. It is much shorter than the first and mostly deals with the selection of the President, whom the Constitution commands to "Take care that the laws be faithfully executed."

TAKE CARE that the laws be faithfully executed. The President cannot pick and choose which laws to enforce and which to ignore. He cannot decide who gets to live above the law and who must live under it. And he most certainly cannot make laws by fiat. That defines the very bright line that separates the rule of law from the rule of one man.

Congress makes law but cannot enforce it. The President enforces law but cannot make it. One brother slices but cannot choose. The other chooses but cannot slice.

That separation of powers extends to the raising and disbursing of revenues. The Congress decides how much money to raise and spend and how it should be raised or spent – but it cannot actually raise that money and it cannot actually spend that money. And this concept predates the American Republic by more than 500 years – this was the essence of Magna Carta – which first separated the raising of revenues and the spending of revenues. That's how parliament was born.

Those are the two brothers: Congress and the President. But when disputes arise, someone has to settle them. With the two family brothers that's mother; with the two government brothers, that's the courts. Thus Article III, which says, "The judicial Power of the United States, shall be vested in one supreme Court…" What is that judicial power? It is "All cases in Law and Equity, arising under this Constitution…" The judiciary cannot make decisions nor can it enforce them. It can only resolve disputes.

Antonin Scalia often noted that the Court is entirely reactive – it cannot act on its own but must wait until two parties bring their dispute before it, and then it is bound by the rule of law. And when those disputes arise, you do not want them decided either by the branch that made the law or the branch that enforces that law – you want an entirely separate and disinterested third party resolving those disputes. Neither the brother who sliced the pie nor the brother who chose his piece should settle a dispute involving the actions of one or the other. That's where mother comes in.

I repeat this civics lesson because understanding the fundamental mechanics of the Constitution that protects our freedom is central to understanding the threat from within that it now faces.

For more than a century, since the insinuation of the progressive movement into American politics, this clear separation of powers has slowly eroded until there is nothing separating those powers in the modern administrative state.

For more than a century, Congress has gradually ceded both legislative and judicial authority to the executive branch, and we have now reached a moment when ten times more laws are written by the executive branch than by the legislative branch, and an American is ten times more likely to be hauled before an administrative law judge than before a federal court with all of our due process guarantees.

Congress has ceded executive agencies broad rule-making – that is, law-making authority – that now reach into virtually every aspect of our personal lives and of our economy. These laws are never brought before Congress, so the elected representatives of the people have no say in them and their constituents have no way to petition them or hold them accountable.

Once the agency has written the law, that same agency then enforces the law it has just written. The same brother that slices the pie, now chooses his piece. Law-making and law-enforcing become indistinguishable. The same agency that makes the law now applies it according to its own interpretation.

When an American citizen runs afoul of that law, he must first appear before an administrative law judge, selected and answerable to the same agency that made the

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law and that brought the charges against him.

Once the agency judge imposes a fine on behalf of the agency, that fine often stays with the agency, beyond Congress' power of the purse. Justice is no longer blind or disinterested. And the accused must pay the fine imposed by this kangaroo court before he can even plead his side before an actual federal court with all the due process protections guaranteed under the Bill of Rights, including trial by jury. Or as Lewis Carroll's Queen of Hearts put it, "Sentence first, verdict afterwards."

As Congress has given away its legislative powers, so too has it given away its power of the purse. As the Republican House began cutting funding to the Environmental Protection Agency, it soon discovered the EPA simply increased fees and fines to make up for the losses, outside of Congress' control. I note that just two weeks ago, Congress gave the Department of Transportation new powers to collect taxes on pipeline companies.

George Will notes that the Consumer Financial Protection Bureau, created by Dodd-Frank in the heyday of the Pelosi Congress, receives all of its funding on demand from the Federal Reserve. He writes, "One CFPB request for $94 million in Federal Reserve funds was made on a single sheet of paper. Its 2012 budget estimated $130 million for — this is the full explanation — "other services."

What is to be done?

I attended a meeting in the Capitol just yesterday of the Article I task force of the House Republican Conference – an informal group established by the Republican leadership. Its purpose is to answer that question – what to do -- before it's too late. High up on their priorities is the REINS Act. The REINS act has passed the House in the last three congresses but has never moved out of the Senate. It simply requires that any regulatory law that the Office of Management and Budget estimates will cost the economy more than $100 million must first be ratified by Congress. Variations include proposals to make it easier for Congress to veto regulatory laws or require more extensive public hearings.

I applaud these proposals – but there are two big problems with them.

First, in order to take effect, the President has to sign them, voluntarily surrendering the enormous powers he has acquired. History has very, very few examples of power being voluntarily relinquished by those who hold it.

The second – and bigger – problem is that these kinds of reforms have it ass-backwards. It is not that executive agencies are passing good laws or bad laws, or that they are using good procedures or bad procedures when they write laws. The problem is that they are writing laws at all! And they are writing laws for the most part precisely because of powers improperly handed them by Congress.

A week doesn't go by in Washington when congressional leaders don't lament the loss of Article I powers to the executive and a week rarely goes by when Congress doesn't grant new law making authority to the executive. Two weeks ago, on a broad bipartisan vote, Congress amended the Toxic Substances Control Act. Under the guise of providing uniform regulations, it grants sweeping new powers to the EPA, it removes the existing requirement that the EPA must consider the cost of regulations when conducting a risk evaluation, it removes the "least burdensome regulation required" standard from current law, increases the fees charged to businesses and still allows states to adopt more stringent standards. It passed 403 to 12.

Just this past Wednesday, on the same day the Republican conference announced the latest meeting of the Article I task force amidst much hand-wringing over the loss of Article I powers, the House passed the PIPES act that grants broad new law-making and tax-making authority to the Department of Transportation.

So here is a novel idea – If we want to stop losing legislative powers to the executive, we should STOP giving away legislative powers to the executive.

That doesn't require any new acts. It simply requires Congress to do no harm.

I have no problems tasking a bureaucracy to use its expertise in its field to draft regulations to implement a broad vision outlined by Congress. But once it has drafted those regulations, they should be sent NOT to the federal register for enactment, but rather to the Congress for consideration, amendment and action. That's not complicated. The Constitution is crystal clear that any act of government that has the force of law must be adopted as a law. That means both houses of Congress must pass it and the President must sign it.

True, Congress doesn't have the same level of expertise as bureaucracies in working out the details. But it has one thing the bureaucracies don't have: ACCOUNTABILITY. That's why the Constitution is written the way it is. So I say again, ANY act of government that has the force of law must be adopted by Congress. And ANY dispute arising from that law must be adjudicated by the independent judiciary under the due process guarantees of the Bill of Rights.

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So here's what I'm going to do. I have just instructed my staff to review every bill that goes to the floor, and to draft amendments that replace rule making authority being granted to the executive with rule-recommending authority. Where they are tasked to write rules, they will instead be tasked to write recommendations to Congress. And where they are tasked to adjudicate those rules, they will instead be required to seek enforcement the old-fashioned American way: through the courts. How those amendments will fare has yet to be seen. But at least I can guarantee they'll be offered.

I am also going to seek a rule in the Republican Conference and ultimately a House rule that will forbid any bill or amendment from being reported to the floor that delegates Article I legislative powers or Article III judiciary powers to the executive. Indeed, the earmark ban that has been in force for nearly six years now is not a House rule at all. It is simply a conference rule that forbids the majority party from acting on a congressional earmark. The rule I will propose would do the same for the further delegation of legislative and judiciary powers. We'll see how it does.

But even if we're successful in closing the barn door to further delegations of authority, the corral is virtually empty. As I said earlier, the bureaucracy is already writing ten times as many laws as Congress. So how do we get those 90 percent of our powers back?

This is where the question of authorization becomes very important. Since 1837, the House has had a rule that forbids ANY expenditure of funds EXCEPT for purposes authorized by law.

We pass a law that creates an agency for a specific purpose for a specific period of time. During that time, we appropriate funds to it. As its authorization expires, we are supposed to revisit it to ask the obvious questions: It is effective? Is it meeting its goals? Is it still needed? Is it worth the money we're spending? Depending on the answer to these questions, Congress then renews the program, reforms it, or lets it die.

Only when a program is currently authorized is the House allowed separately to appropriate funding for it.

And yet, more than one third of our discretionary spending now goes to programs whose authorizations have lapsed many years, if not decades, ago. Yet we keep shoveling more money at them. How can we do that when our own rules forbid it. That's easy. We just waive the rule.

So here's another radical idea: don't waive the rule.

With a simple letter to the Chairmen of the House's authorizing committees, the Speaker could give them a year to review all the programs under their jurisdictions and to review, revise, reform, renew or reject them. This would not only cull out the programs that should have died years ago, but would also afford the Republican House majority the opportunity to redesign the rest in a form that comports with the majority's promise of a simpler, leaner, more sensible government.

And while we are redesigning these programs we should claw back every scrap of legislative and judicial authority we have ceded these agencies; and then modify and codify the existing rules that Congress believes should have the force of law.

If the President wants the program, he would have to accept his rightful role as the enforcer of these laws – but not also as their author and adjudicator.

I have been trying for the past six years simply to get this rule enforced. I have been unsuccessful so far, but I can tell you I have seen dramatically growing interest in the last two years for doing so, to the point that both the Budget Committee and the Rules Committee have held hearings over the past several months on this radical idea that we should actually follow our own rule.

Here is the fine point of the matter. All the powers of government that the American Founders meticulously separated to protect our liberty are now recombined in the same hands. Measured by the volume of laws and adjudications of those laws, the executive is now literally ten times more powerful than the legislative and judicial branches established by the Constitution. The executive branch, which was designed to be a minister, has instead become a master.

The halls of the U.S. capital are packed with Roman iconography, because the model of the American Republic was the Roman Republic. It is meant to be an inspiration, but also, I believe, a warning: the Roman Republic was never conquered; it slowly disintegrated from within. One usurpation was ignored and followed by another; one diminishment of freedom was ignored and followed by another, in a cycle of rot that eventually plunged it into centuries of despotism and ultimately of collapse.

I believe we have already entered what can only be described as the post-constitutional period of American history. Edward Gibbon, surveying the wreckage of the Roman Republic observed that "the principles of a free constitution are irrevocably lost" – his words: "irrevocably lost" – "when the legislative power is dominated by the executive."

Like the imperial period of Rome, our republican institutions are still visible, but they no longer serve their principal role to protect the rule of law and the liberty of the people. The Roman Senate continued to function for more than 600 years after the fall of the Roman Republic. But it simply became a meaningless ornament. Like a rotting porch, the form could still be seen and recognized, but the structure itself had hollowed out from the inside until one day it finally collapsed and nobody noticed.

The question no longer is whether we can prevent the disintegration of our constitutional architecture. It is already disintegrating before our eyes. The question now is whether we still have time – and the will -- to restore it.

I believe there are enough remnants of our Constitution still functioning to allow us to do so, but those powers must be summoned and reasserted now if the American Republic is to avoid the fate of its predecessor. ❑