TESTIMONY
OF
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There are two fundamental reasons that our federal government has far exceeded its legitimate authority granted by the terms of the Constitution. First, it is the nature of man to want to expand his own power. Second, the several states have never employed their constitutional authority to limit the size of the federal government.

We should not be surprised that the federal government has continually expanded its power. When there are no checks on its power, not even the need to spend only the money that it has on hand, abuse of power is inevitable.

George Mason was the delegate at the Constitutional Convention who best understood this propensity of government—all government—and he insisted that we create an effective check on this abuse of power. He said that when the national government goes beyond its power, as it surely will, we will need to place structural limitations on that exercise of power to stop the abuse. But, no such limitations would ever be proposed by Congress. History has proven him correct on both counts.

But Mason's arguments led to the final version of Article V which gave the states the ultimate constitutional power—the power to unilaterally amend the Constitution of the United States, without the consent of Congress.

The very purpose of the ability of the states to propose amendments to the Constitution was so that there would be a source of power to stop the abuse of power by the federal government.

It should seem self-evident that the federal abuse of power is pandemic. But let's note a handful of more of the obvious violations.

We start with Article I Section 1 of the Constitution which requires that all legislative authority be vested in the Congress of the United States. This means that only Congress can make law.

Yet the people and legislature of Pennsylvania—just like the people and government in every other state—are being told daily that they must obey regulations enacted by administrative agencies not by Congress. The EPA is the best know rule-emitting source, but it is not the only administrative agency that imposes its will on Pennsylvanians in blatant violation of the rule that only our elected legislators can enact law.

The Supreme Court has ruled that Congress may delegate its power to the agencies. The Founders would disagree because they understood that Congress cannot give away the right of the people. And it is the right of the people to elect legislators to make the law. We have this right so that we may throw the rascals out if we do not approve of the laws they make. Congress isn't giving away its power; it is giving away our rights.

Next, the General Welfare Clause is the gateway for two of the gravest abuses in our nation. All the entitlement spending that is bankrupting this nation is coming through an improper interpretation of the General Welfare Clause. If that weren't enough, this same Clause is the source of claimed authority to send federal mandates to the states on education, welfare policy, and much more through the use of spending on issues that are concededly outside of the enumerated powers of Congress.

James Madison contended that the General Welfare Clause was not a grant of power at all but a limitation on power. Alexander Hamilton believed it was a grant of power but, as explained by Joseph Story, was limited by one major principle: the General

Welfare Clause did not grant any spending authority on any issue that was within the jurisdiction of the states. The Hamilton/Story view was that if the states can spend money on a topic, then the federal government cannot.

The Supreme Court, however, has said that the General Welfare Clause grants Congress the power to spend money on anything it wants—there is no constitutional restriction. This ruling is the source for virtually all of the spending that is bankrupting this country.

The General Welfare Clause, as interpreted by the Court, is responsible for the problem of federal mandates on the states. Congress takes money from the people, transforms it into "federal money," then it sends it back to the state legislatures with strings attached. These "strings" require the state legislatures to enact policies that are imposed by Congress on subjects that all acknowledge could not be directly enacted by the national government.

This means that the legislature of Pennsylvania is beholden to enact the will of Congress, not the voters of Pennsylvania on subjects outside the jurisdiction of Congress. In reality then, this legislature is being asked to enact the will of the voters of California, New York, Florida, and Texas—etc.—rather than the will of the voters of Pennsylvania. The essence of a Republican form of government is that the people of this state are entitled to elect those who make their laws. This system of federal mandates is not just bad policy; it strikes at the heart of our legacy of self-government.

Finally, the Supremacy Clause of the Constitution makes treaties a part of the Supreme Law of the Land. This provision was designed to ensure that the states did not interfere in foreign policy. But the Founders never imagined treaties like the United Nations Convention on the Rights of the Child. This treaty invades our national sovereignty, the sovereignty of the states, and the

sovereignty of the family in every area concerning children. Our Supreme Court has already used this treaty on two occasions for authoritative interpretations despite the fact that we have never ratified this treaty. And if the internationalist left blame any single American for the failure of our nation to ratify the treaty, they usually name me.

We cannot allow international law to control the domestic law of the United States. Americans should make the law for America.

We can fix all of these problems and many more, with short and clear constitutional amendments.

- Treaties cannot regulate our domestic policy.
- The executive branch may not make laws.
- The Commerce Clause is limited to the regulation of shipping.
- If the states have jurisdiction over an issue, Congress may not spend money on that same issue.
- The federal budget should be balanced.

These are not final constitutional language, but represent the essence of the rules that can be enacted by the Article V process.

I think that every sensible American would like a few rules like that to carry out the real meaning of limited government and federalism that was the core meaning of this constitutional republic.

Why haven't we done this?

The reason we haven't done this is because we have questions and fears.

If we read actual history and not internet bloggers and Wikipedia, if we rely on original documents of the founding era, and if we know the law, we have answers to those questions and we can assuage any reasonable fear.

Let me spend a few minutes on the three most common questions.

1. *Even if we call a convention for a limited and noble purpose, won't we subject ourselves to a runaway convention just like the original Constitutional Convention which was supposed to only amend the Articles of Confederation but instead wrote a whole new Constitution?*

First of all, it must be noted that this argument trashes the legitimacy of the Constitution. One cannot claim to be a constitutionalist if he believes that the Constitution was illegally adopted.

I have a two page paper that gives you the history on the adoption of the Constitution that few of us ever learned in school and certainly not on the internet.

The idea that the Constitutional Convention was only supposed to amend the Articles of Confederation came from language from a resolution passed by the Confederation Congress in February of 1787. Congress had no power under the Articles of Confederation to call any such convention. Nor does anyone think that the Articles of Confederation Congress possessed any implied powers. Congress wasn't calling the Convention—it was merely endorsing the Convention called by the States. This enactment by Congress had no more authority than a congressional resolution today declaring National Pickle Week.

There is no precedent for a runaway convention. It didn't happen in 1787 and it won't happen today.

Moreover, there is no possibility of a runaway convention. There have been had several hundred applications for Article V conventions since the founding of the Constitution. Yet we have never had a convention because two-thirds of the states have never agreed on the topic. This historical fact reveals that we have an absolutely iron clad rule, until there is an agreement on the topic by 34 states, there can be no convention.

But, can't the rules be changed in the middle of the Convention?

I litigated a case which establishes the relevant rule in the ratification phase of Article V, but it is fully applicable here. Congress tried to change the rules for ratification of the ERA. I filed the first lawsuit in the nation challenging that action. My case was consolidated with a later case and we worked together representing state legislators from Washington, Arizona, and Idaho. We won. The ruling of the federal district court was that you can't change the rules in the middle of the Article V process.

Even though that lower court decision is not formally binding on the whole nation, it is a persuasive precedent and it was based on many other historical facts and prior rulings. In an Article V case the holding was: You can't change the rules in the middle of the stream.

Finally, it is politically impossible to ratify any amendment that goes outside the scope of the applications from the states. Thirty-four states have to apply for a convention for a particular purpose.

Since 38 states must ratify any proposed amendment, if these 34 states insist on sticking to the topic they proposed, the matter is closed. At a minimum, both houses of 22 states that said "We want a convention for this limited purpose" would have to approve the amendments for wholly unrelated purposes.

People who make such assertions have no idea how hard it is to get a governmental body to reverse itself.

And this is compounded by the fact that if a single body in each of these states votes "no"—that state is a "no" vote.

There are 99 legislative chambers in this nation. If just 13 chambers from different states vote "no", the amendment is killed.

Political reality is clear. A runaway convention is a myth that is causing the states to unilaterally disarm themselves and is letting the federal government continue to run away with its abuse of power. The only winners of the runaway argument are the EPA, Congress, the White House, and especially the Supreme Court.

2. *Why will the federal government obey these amendments if it is not obeying the Constitution today?*

While I understand and appreciate the frustration expressed by this question, it is not the most precise way to explain the current situation. Our country has two constitutions—in effect. There is the Constitution as written and then there is the Constitution as interpreted by the Supreme Court. There is very rare overlap in these two constitutions. But the federal government is in fact obeying the Constitution—just the wrong one.

So the challenge is gaining control over the Supreme Court.

This can be done and has been done with several amendments.

The Supreme Court ruled that black slaves could never be citizens or even fully human in the infamous *Dred Scott* decision. The 13th and 14th Amendments reversed that case and *Dred Scott* is still reversed.

The Supreme Court ruled that despite the 14th Amendment's Equal Protection Clause, women did not have the right to vote. The 19th Amendment reversed that decision and all levels of government obey the 19th Amendment.

A more modern example, involving legislation which reversed the Supreme Court, in 1990 the Supreme Court threw the right of the free exercise of religion into the constitutional trash can in a case called *Employment Division v. Smith.* Congress reversed that decision with a law called the Religious Freedom Restoration Act. I

am the person who named the law. And I was the co-chairman of the subcommittee of lawyers that drafted the law.

And this past summer, the Supreme Court followed our law in the Hobby Lobby case. If the Supreme Court had followed their prior bad decision, Hobby Lobby would have lost. But the Court had its hands tied with the Religious Freedom Restoration Act and even the justice who wrote *Employment Division v. Smith* voted in favor of Hobby Lobby, which required him to take the opposite position he had taken earlier.

If you know how to write law, the Supreme Court can be reversed and stay reversed.

The Court doesn't want to give up the pretense that it is obeying the Constitution. If they have vague phrases like "general welfare" and "commerce clause" they can abuse their power. But if they have specific rules like "if the states can spend money on a topic or regulate a topic, then Congress may not spend money or regulate the same topic" they will have their hands tied just like we did in the Hobby Lobby case.

3. *Won't Congress take charge of the Convention? Nothing in the text of Article V says that the states are in charge, it says Congress calls the Convention. Won't they use the Necessary and Proper Clause to grant themselves effective control over the Convention?*

Some people like to cite a recent report by the Congressional Research Service for the proposition that Congress believes that it has plenary power over an Article V Convention of States.

Anyone who has any experience on Capitol Hill laughs at the suggestion that the Congressional Research Service speaks for Congress. At most, it is a booklet written by some young lawyer who speaks for a research agency and not for Congress itself.

Let's examine the supposed evidence for this claim. There have been 40-some bills introduced in Congress purporting to exercise control over an Article V convention. What all of these bills have in common is this—they all failed.

Congress does not set precedent by a bunch of failed bills. No matter if it was 200 failed bills; it still sets no legislative precedent of any kind.

The young lawyer who wrote the CRS report would have flunked my Constitutional Law class if he or she wrote such a silly thing on a test. I have my students read *Youngstown Sheet & Tube v. Sawyer.* This case involved President Truman's seizure of steel mills during the Korean War. The Supreme Court noted that Congress had considered a bill which would have given the president the exact power he had employed but the bill failed. The Court said that this was evidence that Congress did not want the president to have such a power.

Youngstown stands for the proposition that a failed bill provides evidence that Congress does *not* embrace the ideas contained in the bill. Thus, over 40 times the Congress of the United States has rejected the idea that it has plenary control over an Article V Convention.

The case precedent we have suggests that whatever precedential weight is to be given to these 40-some failed bills on Article V, all of that weight goes against the idea that Congress has control over this process.

Some also claim that the Necessary and Proper Clause can be used by Congress as a source of authority to enact rules for a Convention of States. However, this Clause is contained in Article I of the Constitution. Congress purported to use Article I power in my ERA case. Congress could not muster the necessary votes to pass a two-thirds vote in both Houses as required by Article V, so the

leadership suddenly claimed the authority to extend the time for ratification by using Article I (Necessary and Proper) power to pass the time limit by ordinary legislation. The federal court ruled, relying on other precedent, that Congress possesses no Article I power in the Article V context.

Conclusion

The federal government will continue to expand and abuse its power until the states demand a halt. Nothing else has worked. Nothing else will work. Article V is the tool that the Founders gave the State legislatures to rein in the abuse of power by the federal government. You have the authority and the duty to stop the abuse and protect our liberty.

Respectfully submitted,

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