Two-Thirds of the Members Present

“DRASTIC TIMES CALL FOR DRASTIC MEAURES”

by Joseph DeMaio, ©2014

The U.S. Constitution established three branches of government with co-equal powers and a system of checks and balances such that no branch would usurp the authority of the others without consequences. However, Congress has been unwilling to exercise its constitutional responsibility against an ever-expanding executive branch which is now making its own laws.

(Dec. 8, 2014) — Some time ago, I floated the modest proposal that Republican presidential aspirants should flood the system with seal-embossed, hard, paper certified copies of their original birth certificates in an effort to get the Emperor at 1600 to do the same. Plainly, the Internet-posted image of a fake birth certificate has done nothing to confirm the current usurper’s constitutional eligibility, but in a land where everyone has either forgotten or never learned the “best evidence rule,” it is apparently a moot issue.

The fact that it is moot or forgotten, of course, does nothing to erode the rule’s truth: the best evidence of an original document is the original document, not a picture of the

"purported" original and certainly not a kindergartener's clumsy facsimile of it posted on the Internet.

On the other hand, now that the nation seems to be coming to its senses – finally –, having booted from the Senate enough Democrats to secure a 54-46 majority for the next two years, perhaps it is time to consider another modest proposal. Bear with me, as this gets a little dicey because it involves the "I" word: impeachment.

First, even a blind Martian – not to be confused with the Chief Justice of the Supreme Court – can see that the Emperor's actions seeking to grant amnesty to potentially millions of statutory felons constitutes an impeachable offense. Art. 2, Sec. 3, Cl. 4 of the Constitution mandates that the president: "shall take Care that the Laws be faithfully executed." 8 U.S.C. § 1326 – one of those pesky "Laws" the Founders capitalized in the Constitution – was enacted by Congress and first signed into law in 1952 (Truman) and most recently amended in 1996 (Clinton).

Briefly stated, the statute declares that if the same individual who has once illegally entered the country and is then removed or deported thereafter once again crosses the border unlawfully – and for every subsequent deportation and re-entry – he/she "shall be fined under title 18, or imprisoned not more than 2 years, or both." Under 18 U.S.C. § 3559 – yet another "law" annoying the Emperor – any offense punishable by imprisonment for more than one year but less than five years is defined as a "Class E felony." Not a misdemeanor or petty offense: a felony.

It is not unreasonable to conclude, therefore, that because most, if not all, of the people which the Emperor seeks to immunize from prosecution – not to be confused with "benefited by goof-ball arguments about 'prosecutorial discretion'" – have been deported multiple times, only to return illegally, his "executive action" is intended to extend to thousands, tens and hundreds of thousands, and likely even millions of statutory felons.

Let us be charitable here and posit that "only" 10% of, say, five million people here illegally fit the definition of being a statutory felon and would be otherwise eligible for the Emperor's "executive action" on "deferred deportation."

This means 500,000 statutory felons would be immunized from prosecution, deportation or other sanctions. Turn them loose into the communities of the United States… as the Emperor jets off to another Vegas tee-time. Give them work permits, Social Security numbers and, oh yeah, EBT cards. If this be compliance with the Founders' mandate that a president "shall take Care that the Laws be faithfully executed," I will eat my proverbial hat.

Instead, the Emperor's actions are precisely the opposite. Rather than gearing up for additional prosecutions and deportation hearings, his disdain and enmity for the United States takes the form of a directive to his Department of Homeland Security, now headed by Jeh ("I–never-met-an-Emperor-to-whom-I-wouldn't-kowtow") Johnson, to hire up to a thousand new employees to implement the Emperor's unconstitutional plan.

Now for the next modest proposal: if the Emperor refuses to observe the Founders' mandate that he "take Care that the Laws be faithfully executed" rather than that they be "regularly and arbitrarily flouted," why should the Congress be held to a different standard? If the courts say it is OK for the Emperor to violate the Constitution, coughing up the foolish excuse that those who would challenge his actions (or… ahem… his constitutional eligibility) "lack standing" to do so, why should Congress adhere to it? I mean, aren't the three branches "co-equal?"

If one branch can ignore selected portions of the Constitution, why should not another branch enjoy the same prerogative? Or perhaps the explanation from some court will be, as Napoleon the Pig noted in Animal Farm: "All branches are equal, but some are more equal than others."

 Specifically, if Art. 2, Sec. 3, Cl. 4 of the Constitution requiring a president to "take Care" can be ignored with impunity by the Emperor, why must Congress observe the antiquated restrictions on its powers elsewhere in the document? For example, it is provided in Art. 1, Sec. 2 of the Constitution that the House possesses the power to impeach.

By a simple majority vote, the House may refer a bill of impeachment to the Senate for trial on the bill. In the Senate, however, Art. 1, Sec. 3 of Constitution states that no conviction on a bill of impeachment may take place except upon the vote of "two-thirds of the Members present."

Aha…. "present" is the key. So, if only 90 senators show up and are "present" for the vote, conviction (or acquittal) can come on a vote of 60. If only 80 senators show up, then the magic number becomes: 53, ironically, one less than the number the GOP will have in January 2015.

Moreover, even if the word "present" were not there – meaning that it was supposed to take two-thirds of the total Senators constituting the Senate, or 67 senators to convict (or

acquit) – why should the Senate be required to adhere to that arbitrary numerical restriction when the Emperor claims through his "executive action" to be free of a similar restriction on him?

Even the Founders recognized that a conviction or acquittal on a bill of impeachment could take place on a vote of less than two-thirds of the total number of Senators holding office. By stating that the two-thirds vote was to be calculated by multiplying that ratio by the number of Senators "present," even the Founders recognized that fewer than 67 senators could, in exigent circumstances, convict (or acquit). As long as quorum is present, a binding vote could be taken.

Accordingly, why could not the Senate, under its own rule-making authority, proclaim that a simple majority vote on a bill of impeachment would suffice? If it takes but a simple majority to send a bill of impeachment out of the House, why should that arbitrary "two-thirds" ratio have any application in the Senate? And if such a rule were challenged in court, would not all parties have standing to litigate both the "take Care" command supposedly binding the Emperor as well as the "two-thirds" requirement applicable to the Senate?

Drastic times call for drastic measures. And, let us agree, we now live in drastic times. Food for thought.