

Public Domain

by Steve Krulick, Senior Civics Columnist

Let 'er Rep... resentative! (Part 2)

"... it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion, high respect; their business, unremitting attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion..." Edmund Burke, 1774

In Part 1, I posed the academic distinction between a *republic* and a *democracy*. Academic, because today the terms are usually used interchangeably. Unless one is digging up poor Aristotle to flog the old wheeze that a *democracy only* refers to "mob rule" where everyone (actually, every *citizen*... which is never *everyone!*) has direct involvement in governance, and votes on every decision or law, the term *democracy* today includes government by representatives... who are elected by that same "mob" held in too low esteem to rule directly.

But to be picky, let's agree the US is not a simple (or *pure*, or *true*) democracy. We were designed as a *constitutional representative democratic republic*; the nation doesn't have direct election of laws, and a constitution limits what laws can be enacted. (That a pusillanimous Congress and somnambulist populace may have let it become a kleptocratic *oiligarchic kakistocracy* – a government stolen by a few thieving oilmen, in which the worst persons are in power – can be argued, but that is grist for a future column.)

One of the most lengthy and combative debates in the First Congress, as they considered amending the Constitution (with what became the so-called Bill of Rights), hinged on inserting one phrase into what was to become the 1st Amendment: a right of the people "to instruct their Representatives." Because the concept is still relevant, particularly with elections near, and with issues that seem to divide representatives from their constituents, I think it worth revisiting.

This principle concerns whether representatives of the people are to deliberate and use their own best judgment, or to be bound as "instructed" by their constituents, whether it's the general electorate or a constituted body that selected them (as the state legislatures originally selected US senators).

Even before Rep. Tucker of South Carolina introduced his August 1789 wording to add to the proposed "right of the people peaceably to assemble and consult for their common good" (the *only* reason to assemble that Congress sought to protect, though the latter phrase was eventually dropped) the further stipulation "to instruct their Representatives," there must have been others who thought it necessary or prudent, because that sentiment was already in existing law. In fact, here's the exact wording from the North Carolina Constitution of 1776, Article XVIII: *That the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.* Near identical words are in Pennsylvania's

Constitution of the same year, and many other states included such wording, then and for decades to come.

Rep. Page (already cited in Part 1) said, "Under a democracy, whose great end is to form a code of laws congenial with the public sentiment, the popular opinion ought to be collected and attended to... Our Government is derived from the people, of consequence the people have a right to consult for the common good; but to what end will this be done, if they have not the power of instructing their representatives? Instruction and representation in a republic appear to me to be inseparably connected..."

That so many states included this language suggests, as Supreme Court Justice Stevens wrote in *Cook v. Gralike* in 2001, "such historical instructions at one point in the early Republic may have had 'de facto binding force' because it might have been 'political suicide' not to follow them" even if no legally-binding right or power existed. (Indeed, no provisions could give the instructions any coercive effect unless some penalty was attached to the disobedience of them, and no penalty in such cases has ever been imposed or suggested.)

Tucker's clause was vigorously supported by anti-Federalist Elbridge Gerry, who said: "I presume that the gentlemen of this House do not mean to arrogate to themselves more perfection than human nature has as yet been found capable of; if they do not, they will admit an additional check against abuses, which this, like every other government, is subject to. Instruction from the people will furnish this in a considerable degree... Now although I do not believe the amendment would bind the representatives to obey the instructions, yet I think the people have a right both to instruct and bind them."

If you, as I do, find that last sentence puzzling and contradictory, I guess the majority of the House did, too, as they overwhelmingly rejected the clause, 41 to 10. To them, binding instructions would undermine an essential attribute of Congress by gutting the deliberative nature of that National Assembly, as Rep. Sherman argued: "When the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation; all that a man would have to do, would be to produce his instructions, and lay them on the table, and let them speak for him."

It's one thing to advise or petition, but another to *instruct* in a binding manner. For, as the *Cyclopedia of Political Science* (1899) says, "a legislator is not an agent, but a representative." Further in his speech to the electors of Bristol cited at top, Edmund Burke, Irish statesman and supporter of the American cause in the British House of Commons, summarized this belief, even though the land he was speaking of was Britain (American law was based on English common law): "To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But authoritative instructions; mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience, these are things utterly unknown to the laws of this land..."

Yes, there's a place for referenda, where the people directly vote on certain items (usually those that involve major bonding or changes to the state constitution), and most certainly for collective or individual petitioning and advising. After all, we're not mind-readers!

In Part 3, I'll suggest the most effective ways to tell your representatives what YOU think.