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Nullification vs. Constitutional Convention: How to Save Our Republic

Every day, the federal government — Congress, the president, and the courts — passes and protects acts that are unconstitutional and deprive Americans of our most basic rights.

The National Defense Authorization Act (NDAA) denies due process rights to anyone detained by the president on suspicion of being a threat to national security. The act also declares the United States to be a battleground in the "War on Terror."

Using the unconstitutional Patriot Act as legal justification, the Foreign Intelligence Surveillance Court (FISA court) regularly rubber stamps the National Security Agency's (NSA) dragnet surveillance activities, robbing Americans of the rights protected by the Fourth Amendment.

Those same protections will soon face another threat, as thousands of government-controlled drones very soon will begin buzzing over the domestic skies.

For its part, ObamaCare is a frontal assault on the Bill of Rights, forcing Americans to choose between following their faith and breaking the law, a direct defiance of the First Amendment.

In the name of safety, President Obama has issued over two dozen executive orders preventing Americans from accessing the right that protects all others: the right of citizens to keep and bear arms.

Federal spending and debt are ballooning — a consequence of the federal government interjecting itself into myriad areas where it has no constitutional authority. For example, there is not a single syllable in the Constitution providing for foreign aid ($74 billion spent from 2010-2011), undeclared wars in Afghanistan and Iraq (nearly $4 trillion spent since 2001), or the 185 federal welfare programs (nearly $2 trillion spent from 2010-2011). In the past decade, based on just those three examples alone, Congress has authorized the spending of over $6 trillion for unconstitutional purposes!

The above is just a sampling of a long list of abuses of the Constitution that have awakened many to the fact that something must be done to rein in a runaway federal government. But what? Many who agree on the problem disagree on the solution. Many want to call a new constitutional convention — or as some prefer to call it, a "convention of the states" — for the purpose of changing the Constitution to restore good government. Many others advocate state nullification of unconstitutional federal acts as a safer and surer way of pushing back against the federal assault.

Who's right? To determine the answer, let's survey both approaches.

The Constitutional Convention Approach

The power to call a constitutional convention is enumerated in Article V of the U.S. Constitution, which states that Congress, "on the Application of the Legislatures of two thirds of the several States, shall

call a Convention for proposing Amendments."

Well-known "conservative" talk-show hosts Mark Levin, Rush Limbaugh, Sean Hannity, and Glenn Beck have all come out in favor of an Article V convention. Levin is leading the charge, having written a popular book promoting this option. In *The Liberty Amendments: Restoring the American Republic*, he argues: "We, the people, through our state legislatures — and the state legislatures, acting collectively [through the Article V convention process] — have enormous power to constrain the federal government, reestablish self-government, and secure individual sovereignty." Levin then devotes most of the space in his book to presenting his case for 11 different constitutional amendments he'd like to see proposed by a convention and then submitted to the states for ratification.

Many conservatives have found Levin's "Liberty Amendments" — his proposal for a Balanced Budget Amendment, for instance — appealing. And one "Liberty Amendment" in particular — his proposal to repeal the 17th Amendment that weakened state sovereignty by requiring that U.S. senators be elected by popular vote instead of by state legislatures — is particularly appealing to constitutionalists, very much including this writer. But his proposed amendments should prompt a question unrelated to their appeal or substance: If the political evils plaguing our nation are a consequence of the federal government's unconstitutional actions, then wouldn't the proper remedy be to restore and enforce the Constitution, as opposed to amending or fixing the Constitution? After all, considering the penchant of all three branches of the federal government — congressional, executive, and judicial — for routinely disregarding existing constitutional restraints on their power, why should we expect that they would suddenly faithfully obey an amended Constitution?

In fact, why would we even assume that an amended Constitution would be an improvement? The Constitution has been amended 27 times in the past, but not all of those amendments improved the Constitution despite claims made by proponents at the time. For instance, in 1913 two damaging amendments were added to the Constitution: the 16th Amendment authorizing the federal government to impose an income tax and the aforementioned 17th Amendment. Those amendments — and all others to date — were proposed by Congress and ratified by the states.

Would a constitutional convention propose beneficial or harmful changes to the Constitution? And if the latter proves to be the case, would the states — caught up in the political passions of the moment — still ratify these changes as they did the 16th and 17th Amendments? There is no way of knowing for sure.

What is known is that calling a constitutional convention would be very risky. It would, in fact, be gambling with the Constitution. This is true not only because of the nature of conventions — which may go off in unpredictable directions when called — but also because not everyone who supports a constitutional convention supports the same goals. Make no mistake: There would be plenty of wolves howling outside the doors of a constitutional convention, and, more importantly, there would be packs of them inside the convention, as well.

Consider Wolf-Pac, a leftist political action committee. On its website, Wolf-Pac pushes for an Article V "convention of the states" as the best way to accomplish its "ultimate goal": "To restore true democracy in the United States by pressuring our State Representatives to pass a much needed 28th Amendment to our Constitution which would end corporate personhood and publicly finance all elections in our country." In order to persuade Americans to join its cause, Wolf-Pac will "inform the public by running television commercials, radio ads, social media, internet ads, and using the media platform of the

largest online news show in the world, The Young Turks." No surprise there — if one knows that Wolf-Pac was formed by Cenk Uygur, host and producer of The Young Turks.

But many constitutionalists and conservatives may be unfamiliar with this "progressive" YouTube-based news and entertainment channel that dubs itself the "world's largest online news network." And they may also be unaware that The Young Turks is funded by George Soros. Dan Gainor of the Media Reserarch Center reported: "In fact, Soros funds nearly every major left-wing media source in the United States. Forty-five of those are financed through his support of the Media Consortium. That organization 'is a network of the country's leading, progressive, independent media outlets.' The list is predictable — everything from Alternet to the Young Turks."

That's right, Soros is funding a campaign to bring about the same Article V convention that's being promoted by Mark Levin, Rush Limbaugh, Sean Hannity, and Glenn Beck. And in addition to Wolf-Pac, other liberal groups supporting a constitutional convention include the AFL-CIO, Code Pink, Progressive Democrats of America, and scores of others that seemingly don't share their conservative cohorts' love of and loyalty to the Constitution. So if a convention were called, whose agenda would triumph?

Conservatives who want a BBA (Balanced Budget Amendment) constitutional amendment argue that the convention would not be hijacked by powerful interests with other agendas because the delegates would be bound by state instructions to limit their work to a BBA. This view assumes that only delegates from states applying for a BBA convention would participate. It also ignores historical precedent showing that delegates can and do act independently.

The Convention of 1787 — the Convention that gave us the Constitution — was called "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government [the Articles of Confederation] adequate to the exigencies of the Union." But the Convention of 1787 exceeded this purpose by throwing out the Articles altogether and writing an entirely new Constitution.

Under the rules of the Convention of 1787, the new Constitution could be ratified by nine of the 13 states: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." And that's exactly what was done, despite the fact that the then-existing Articles of Confederation mandated that no "alteration" be made unless it's "agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State." That's quite a change, and this changing of the rules of ratification by the convention was undoubtedly done to improve the prospects of the new Constitution being ratified.

That new Constitution proved to be a great blessing for our country. But the Convention of 1787 was still a runaway convention in the sense that it far exceeded the purpose for which it was called. A second constitutional convention could also run away, though this time the result could be harmful or even disastrous.

In such an "unlikely" eventuality, convention advocates claim, the state legislatures would have the final say and they would never ratify the bait-and-switch amendments. But that claim cannot be said with certainty, considering that, as mentioned above, state legislatures have ratified harmful amendments in the past. Moreover, the state legislatures may not have the final say. First of all, under Article V Congress decides between two modes of ratification — ratification by three-fourths of the state legislatures, or by three-fourths of state ratifying conventions that may or may not reflect the will of the

legislatures. There is an historical precedent for this: Congress submitted the 21st Amendment repealing Prohibition to state ratifying conventions. Second, the convention could conceivably change the ratification rules, as was done by the Convention of 1787.

But suppose that a convention were called to propose a balanced budget amendment (BBA) and that such a convention did exactly this and no more. Would the BBA restore fiscal sanity in Washington? It would not, for several reasons: A budget can be balanced by raising taxes as well as lowering spending; the amendment's "emergency" provision (yes, virtually all BBA proposals include one) could be used to circumvent the stated purpose of the amendment; and the Washington spendaholics could use basic accounting gimmickry, including off-budget spending (as they do now), to "balance" the budget on paper but not in reality. Regarding the latter, recall that when Bill Clinton was president, the federal government achieved a "balanced budget" on paper, while the national debt continued to climb.

But it's a roll of the dice that a convention would limit itself to a BBA, regardless of any state or congressional instructions to consider a BBA only. Article V states simply that Congress "shall call a convention for proposing amendments" if two-thirds of the states apply for one. Once a new constitutional convention begins its proceedings, the assembled delegates would possess unlimited, though not unprecedented, power to propose revisions to the existing Constitution, based on the inherent right of the people in convention to alter or revise their government.

The prospect of a convention this powerful, composed of politicians (many of whom would likely be bought and paid for by powerful lobbyists and special interest groups) determined to tinker with the precision gears that give movement to the works of our mighty Republic, is frightening and should be enough to give pause to everyone considering enlisting in the forces fighting for a con-con. Indeed, it may have been enough to give pause to some con-con advocates who prefer to call their proposal a "convention of the states" or an "Article V convention" and sometimes even claim that an Article V convention is not a constitutional convention. For example, Mark Levin makes this claim in his book *The Liberty Amendments*. Yet an Article V "convention for proposing amendments" — which could include any number of changes from a single amendment to an entirely new constitution — *is* a constitutional convention and has historically been understood as such.

The Nullification Alternative

The constitutional convention approach surveyed above is based on changing the Constitution. It is risky because the changes could end up being as radical as altering the fundamental structure of our government — and could even entail an entirely new Constitution. It is not as risky as seceding from the union and starting anew, but it is risky nonetheless.

On the other hand, nullification is based not on altering the Constitution but on enforcing it. States that nullify congressional acts or presidential decrees that violate the Constitution would not only be stopping the federal juggernaut at their state borders, they would also be signaling that the Constitution is so vitally important that it must be enforced.

In the Kentucky Resolution of 1799, Thomas Jefferson called nullification the "rightful remedy" for any and all unconstitutional acts of the federal government.

The federal government may exercise only those powers that were delegated to it. This is made clear by the 10th Amendment: "The powers not delegated to the United States by the Constitution, nor

prohibited by it to the States, are reserved to the States respectively, or to the people." Simply stated, nullification recognizes each state's reserved power to nullify, or invalidate, any federal measure that a state deems unconstitutional.

Nullification is founded on the fact that the sovereign states formed the union, and as creators of the contract, they retain ultimate authority to enforce the constitutional limits of the power of the federal government.

There are several benefits for applying this understanding via nullification: It is a far safer approach for remedying problems caused by violating the Constitution than a constitutional convention; it is based on upholding the Constitution and the founding principles of the Republic; and it can be implemented by individual states, without having to first get two-thirds of the states on board.

Despite the benefits, there are those who insist that nullification is unconstitutional. They argue that the so-called Supremacy Clause of Article VI of the Constitution puts federal laws above state laws and that the Supreme Court has the final say on the constitutionality of federal laws. Both of these claims can be easily dismissed.

Regarding the first claim, the Supremacy Clause does not declare that all laws passed by the federal government are the supreme law of the land, period. A closer reading reveals that it declares the "laws of the United States *made in pursuance*" of the Constitution are the supreme law of the land.

In *pursuance* thereof, not in *violation* thereof. None of the provisions of ObamaCare, for example, is permissible under any enumerated power given to Congress in the Constitution. They were not passed in pursuance of the Constitution, therefore they are not the supreme law of the land, and they may be declared null and void by the states.

Alexander Hamilton provided the rationale for this interpretation of this part of Article VI when he wrote in *The Federalist*, No. 33:

If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.… But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. [Emphasis in original.]

But how about the claim that the Supreme Court has the final say regarding the constitutionality of federal laws or edicts? Thomas Jefferson had something to say about the matter. In 1804, he wrote that giving the Supreme Court power to declare unconstitutional acts of the legislature or executive "would make the judiciary a despotic branch." He noted that "nothing in the Constitution" gives the Supreme Court that right.

Even Abraham Lincoln, who as president unconstitutionally used his executive power to deny habeas corpus, recognized the lack of constitutional authority for the Supreme Court's assumption of the role of ultimate arbiter of an act's conformity with the Constitution. Lincoln said that if the Supreme Court were afforded the power to declare whether an act of the federal government was constitutional, "the people will have ceased to be their own masters, having to that extent resigned their government into

the hands of that eminent tribunal."

Consider also the opinion of eminent constitutional scholar Von Holtz: "Violations of the Constitution may happen and the injured cannot, whether states or individuals, obtain justice through the court. Where the wrongs suffered are political in origin the remedies must be sought in a political way."

He continues, regarding this "aristocracy of the robe": "That our national government, in any branch of it, is beyond the reach of the people; or has any sort of 'supremacy' except a limited measure of power granted by the supreme people is an error."

How can anyone read these statements, or the 10th Amendment for that matter, and honestly conclude that any branch of the federal government is intended to be the surveyor of the boundaries of its own power? Every department of the federal government was created by the Constitution — therefore, by the states — and has no natural sovereignty. No branch can define its own authority. Such a thought is ridiculous and contrary to any theory of popular sovereignty ever enunciated. If the courts, Congress, or the president possessed such power, it would make them judge, jury, and executioner in every case in which their own act of exceeding constitutional authority is at bar.

Look at it this way: If the federal government was "the decider," what purpose would the 10th Amendment serve? If he's being honest, even the most sanguine political observer would have to admit that the federal government will continue to expand its powers so long as it is allowed to decide the scope of those powers. It will even declare its usurpations constitutional, as was the case with the Supreme Court decision on ObamaCare. Think about it; if forcing Americans to buy a particular product — health insurance — is constitutional, what areas of human endeavor could possibly fall outside the scope of the Constitution?

Hope for a Brighter Tomorrow

Nullifying unconstitutional federal laws is very achievable, if constitutionalists were to inform themselves of this approach and then pursue it. Because the understanding is better in some states than it is in the nation as a whole, it is very possible for states to win victories via nullification to stop unconstitutional federal laws that could not now realistically be repealed on the national level. Although only a relatively small number of states have so far nullified unconstitutional federal laws in the areas of gun control, ObamaCare, NSA surveillance, indefinite detention of civilians, etc., a string of state nullification victories would not only create a bandwagon effect encouraging other states to join the nullification movement, but also contribute to the overall national awakening — shortening the time it otherwise would take to create a constitutionalist U.S. Congress.

A string of nullification victories would also cause Washington to tread more carefully than otherwise in how it might respond to the nullification efforts.

But enacting a string of nullification bills in states across the nation — particularly bills possessing teeth that will be enforced by state officials — will not happen without creating the necessary understanding and activism to get state legislators on board. And improving Congress to the point where most congressmen begin abiding by their oaths of office will not happen without a national awakening — or at least an awakening in most congressional districts. But when this national understanding is created, watch out! Congress will begin terminating and phasing out all unconstitutional programs, and the resulting drop in spending will bring the budget into balance

without any balanced budget amendment. In the meantime, a growing number of states will be holding the line against the federal juggernaut at their borders.

The solution outlined above is not a "quick fix." But the price of liberty is eternal vigilance, not quick fixes. Let's therefore join together to create the understanding that will force elected officials to enforce the Constitution. And let's avoid the more dangerous route of trying to restore constitutional government by "revising" the Constitution.

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