Written by **Thomas R. Eddlem** on May 26, 2014

Is a Runaway Article V Convention a Myth? 1787 Proves Otherwise

Is a runaway constitutional convention impossible?

Proponents of utilizing Article V of the U.S. Constitution to convene a convention of states to amend the U.S. Constitution claim that a well-worded resolution by state legislatures would not go awry because such a runaway convention is "unprecedented."

Nick Dranias of the Goldwater Institute — one of the more energetic proponents of an Article V convention — published an on-line pamphlet called "10 Facts to Rebut the Mythology of a Runaway Convention." His leaflet is pretty typical of the argumentation addressing skeptics of a constitutional convention. It insists:

> There is zero precedent that any convention of the states has ever "runaway" from its assigned agenda. There have been 12 interstate conventions in the history of our country. All of them stayed within their stated agenda. Even the Constitutional Convention of 1787 was not convened to "amend" the Articles of Confederation, but to "revise" and "alter" the Articles to establish an effective national government. This was fully consistent with the Articles of Confederation because the Articles authorized alterations — a term that had revolutionary significance because it echoed the language of the Declaration of Independence.

The reality could not be further from the truth. Most of the 12 interstate conventions mentioned by Dranias were small regional assemblies of a handful or fewer states, or regional military conventions during the War for Independence from Britain. They involved only a few states and were convened at a time when the nation was less interested in new constitutional governance than military survival. But the 1787 convention was clearly a "runaway convention" in the sense that every single state delegation that had restrictions imposed on its delegates by their state legislature violated those instructions.

The point is key to understanding how constitutional conventions would operate today, even if nearly every American is grateful that the delegates in 1787 ignored their state's instructions. However, most politicians who would become delegates today would not likely be conversant in Montesquieu's theories of separation of powers or John Locke's idea of natural law as were James Madison, Elbridge Gerry, and George Mason. Indeed, today there are vigorous, outright moves by the political left to repeal the freedom of speech and press (protected by the First Amendment) and abolish the right to keep and bear arms (Second Amendment) by means of an Article V convention.

In 1787, only two states — New Jersey and North Carolina — sent delegates to Philadelphia without any

restrictions on how they could revise the national government. All the other 10 states sending delegates (Rhode Island didn't send any) put restrictions on what kind of government their delegates could design.

New York and Massachusetts limited their delegates to "revising" the Articles of Confederation only, and both Massachusetts and Delaware restricted their delegates from amending the rule under Article V of the Confederation that guaranteed each state the right of vetoing constitutional changes and the right to recall congressmen.

New Hampshire, Connecticut, Pennsylvania, Maryland, Virginia, South Carolina, and Georgia put only one restriction on their delegates. These seven states simply required that the new Constitution would have to be ratified by the "several states" before going into force, a term of art referring back to the Confederation Constitution that meant ratification by all 13 states who were then members of the Confederation. The Confederation's Article 13 stated of amendments to the Articles of Confederation:

> nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

Of course, the Constitution that emerged from the convention of the states in 1787 respected none of these restrictions by state legislatures. The Confederation was not "revised"; it was thrown in the historical dumpster. The Congress of the Confederation did not approve the 1787 Constitution, nor did all 13 states ratify our current U.S. Constitution before it was put into force. Rhode Island didn't ratify the U.S. Constitution until May 29, 1790, almost two years after the Constitution took effect, and after a congressional election, the election of President Washington, and passage of the Judiciary Act setting up the U.S. Supreme Court, the first tariff act, and other legislation.

The delegates in 1787 merely threw the rule of unanimity enshrined in America's first national Constitution into the dumpster and wrote new ratification rules in Article VII of the new Constitution (which said the ratifications of the conventions of nine states was sufficient).

A new convention would be empowered to do precisely the same thing in revising the ratification procedures enshrined in the current Constitution: Delegates could proclaim them ratified after adoption by a mere majority of state legislatures or even by a national popular vote.

The history of the 1787 convention proves that the American Legislative Exchange Council (ALEC) is wrong in stating that "there are far more political and legal constraints on a runaway convention than on a runaway Congress." Unlike the arduous procedures under the current U.S. Constitution, a convention can write the ratification procedures to fit what they expect will be approved. In other words, the convention could lower the bar to the point to where proponents would be guaranteed to be able to jump over it.

Some proponents of a constitutional convention, the Compact for America group, hold out hope that imposing oaths upon delegates to follow their preferred restrictions would work. But, the virtue of fastidious delegates who steadfastly hold to the restrictions imposed upon them by their states may actually help a convention veer off the tracks and become runaway. Consider that in 1787 New York delegates John Lansing and Robert Yates left the Philadelphia convention in protest when the convention exceeded the mandate of the New York legislature's resolution. But all their departure did was free up Alexander Hamilton — who had no such legalistic scruples — to adopt the Constitution for New York as the state's lone remaining delegate.

This is not to imply that the 1787 Constitution is "illegal" or that the American government today lacks legitimacy. To the contrary, the states have always held complete sovereignty — in the words of the Declaration of Independence — "to alter or abolish" government at a convention, whether that convention is the Continental Congress in 1776, the 1787 Philadelphia convention, or one convened under Article V of the U.S. Constitution today.

The real question before going to a constitutional convention under Article V today is this: Do Americans trust politicians nominated by state legislatures today to keep to their instructions more closely — or to draw up a better system of government — than those nominated by the state legislatures in 1787? Organizations such as ALEC and people such as Nick Dranias clearly do have that trust, while constitutionalist skeptics such as The John Birch Society and Eagle Forum do not see our current crop of politicians as more enlightened than the Founding Fathers.

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