Proposing The Constitution And Article V; What If They Had No Choice?

By Bill Walker

One of the major arguments made by opponents of the calling of an Article V Convention as Congress is presently required to do is such a convention will create a new Constitution and impose new ratification procedures on the nation in order to force it to accept this new constitution *just as was done by the 1787 Constitutional Convention*.

Opponents base their entire argument on this historic event. Their story is simple. The Framers of the Constitution met secretly in Philadelphia beginning in May 1787. The Confederation Congress called the convention only to revise the Articles of Confederation. Instead, these delegates elected to usurp the Confederation Congress and states. They decided on their own authority to junk the Articles of Confederation and instead create an entirely new form of government—the Constitution of the United States. To accomplish this illegal act the delegates threw out the ratification process specified in the Articles of Confederation. They substituted a new ratification procedure implanted in the Constitution on the unsuspecting Confederation Congress and state legislatures. This new procedure was the creation of state ratification conventions designed to bypass the state legislatures. The delegates further usurped the Articles by requiring only the consent of nine states to ratify the Constitution for it to take effect instead of ratification of all thirteen states as called for in the Articles of Confederation. Only by the sheerest of luck these opponents state, did these delegates create our present Constitution. Thus, based on this historic record, these opponents say we cannot afford to risk another convention because we might not be as lucky the second time around.

An interesting story, if true. If, as the opponents to a convention contend, history teaches us a lesson we should avoid, we should do so. However, if history does not teach us this lesson, then we must avoid falling into the trap these opponents lay by heeding them. An Article V Convention call is a peremptory mandate of the Constitution. To heed these storytellers means allowing the government the authority to veto the Constitution. To take such a faithful step of allowing governmental veto of the Constitution based on this story means it must ring true.

These storytellers base their opposition to a convention on the fear an agenda of a convention cannot be controlled and cite the 1787 Constitution Convention as the sole example of this fear. They ignore the over 700 state constitutional conventions that have happened in this country since 1776 as apparently all of these went on without a hitch and therefore are no good in proving their point. To placate their fear these opponents want a constitutional guarantee that only those proposals they politically support will be the convention agenda. Interestingly these opponents never ask for a limited agenda for a convention that does not favor their political position but their political opposition. In any event, the Constitution does not give this guarantee. Instead, it demands amendments be passed not the basis of political advantage but superiority of proposal. It is not the Constitution or a convention these opponents fear; it is the lack of political advantage for

themselves they resent and they use this fear of a convention which they themselves have created to mask their true intentions: give us control of the agenda of a convention for our own political ends and then we will support it.

Nevertheless, these opponents raise a valid issue that demands an answer. Did the Framers actually act in reckless disregard of the current law of the day to impose their will on the hapless Confederation Congress and state legislatures? An examination of the historic record is mandatory in order to clarify the issue. The questions to answer are these: did the delegates to the 1787 Constitutional Convention violate the terms of alteration of the Articles of Confederation by proposing the Constitution of the United States? If they did not, and there were violations of the Articles, who actually committed them? Does historic record support the allegation we should avoid a convention because of events in 1787?

Attempts to revise the Articles of Confederation began with the first of two "conventions." The first, the Annapolis Convention, described in Federalist 40, convened from September 11 to September 14, 1786. This "convention" was entitled a "Meeting of Commissioners to Remedy Defeats of the Federal Government." Nine states sent commissioners to the Annapolis meeting but only five state delegations (a total of 12 delegates) actually attended the meeting. Because of this, these delegates felt there were an insufficient number of states represented to take any action other than to forward a report to the Confederation Congress and the states recommending a broader meeting be held in Philadelphia the following May.

The Annapolis meeting report recommended the "appointment of commissioners to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every States, will effectually provide for the same."

This report is significant for several reasons. First, the recommendation language clearly shows in the minds of those involved in the process, the "Constitution of the federal government" and the "Articles of Confederation" were interchangeable both in meaning and in intent. Thus to revise "the Constitution of the federal government" and the "Articles of Confederation" was the identical action so long as the result was to render the final product "adequate to the exigencies of the Union." In short, the Framers were more concerned about result than methodology or terminology.

Second, the report requests "further provisions" (plural) are implemented rather than "a provision"(singular) to the Constitution of the federal government. There is problem with this recommendation. It conflicts with actual text of the Articles of Confederation, which permit only an "alteration" to the Articles. The alteration of the Articles of Confederation is contained in Article Thirteen. The relevant part of that Article reads, "...nor shall ***any alteration*** at any time hereafter be made in any of them [Articles of Confederation]; unless ***such alteration*** be agreed to in a Congress of the United States, and be afterwards

confirmed by the legislatures of every State." For this reason the report recommended "an act" (singular) be reported to the Congress and the states.

Third, the Confederation Congress accepted the report's recommendation, which is the most significant point of all. On February 21, 1787, the Confederation Congress issued a convention call for May 1787 in Philadelphia. This fact the Congress issued a convention call is highly significant. If the Confederation Congress or the states opposed changes in current Articles of Confederation they would have ignored the Annapolis report altogether. The convention would not have existed at all and thus could not have duped the Confederation Congress and the states as opponents contend. But the Confederation Congress did call a convention and accepted, from the very beginning of that process, as demonstrated in its convention call language, that proposal of "provisions" (plural) were required in order make the "Constitution of the federal government (Articles of Confederation)" "adequate to the exigencies of the Union."

The February 21, 1787 convention call by the Confederation Congress for the 1787 constitutional convention reads as follows: "Whereas, there is provision in the articles of Confederation and perpetual Union, *for making alterations therein*, by the assent of a Congress of the United States, and of the legislatures of the several States; and whereas experience hath evinced, that there are *defects in the present Confederation*; as a mean to remedy which, several of the States, and particularly the State of New York, by express instructions to their delegates in Congress, *have suggested a convention for the purposes* expressed in the following resolution; and such convention appearing to be the most probable means of establishing in these States a firm national government:

Resolved – That in the opinion of Congress it is expedient, that on the second Monday of May next a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such *alterations and provisions therein*, as shall, when agreed to in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and the preservation of the Union."

As evidenced by its call, the Confederation Congress accepted the Annapolis Report recommendation that a convention was required to revise "the Constitution of the federal government." More importantly, the Confederation Congress assumed it had the authority under the Articles of Confederation to call such a convention. There is no written authority in the Articles of Confederation for the Confederation Congress to call a convention to propose any alteration to the Articles of Confederation. Given that the Confederation Congress was a very weak political body, it is somewhat surprising it assumed this authority. No doubt, the fact that a powerful state, New York, suggested it gave impetus to the idea.

Nevertheless, the historic record shows the Confederation Congress ignored the terms of the Articles of Confederation in order to call the 1787 constitutional convention in that there was no written authority given by the Articles for the Congress to do so. This fact

leads to an inevitable conclusion. The fault lies not with the 1787 constitutional convention but the Confederation Congress for establishing the alteration procedure of the Articles of Confederation could be ignored. From the very beginning of the process with its convention call Congress, then, as now, assumed the authority to ignore the alteration procedures laid down in the governing document of the nation. In 1787, it issued a convention call it was not legally authorized to do. Today it refuses to issue a convention call it is mandated to do.

The conflict between the 1787 constitutional convention call and the Articles of Confederation is at once obvious and subtle. The convention call of the Confederation Congress as well as the Annapolis Convention which made the original proposal to the Confederation Congress, requested *provisions or alterations* (plural) to the Articles of Confederation (though the Annapolis Convention did request "an act" (singular)) but the Articles of Confederation only allow for an *alteration* of the Articles of Confederation. This technical but very real limitation placed in the Articles of Confederation means the convention call of the Confederation Congress was illegal under the terms of the Articles of Confederation. The Articles did not specify the Confederation Congress had the authority to call a convention. The Articles further did not specify the Congress possessed the authority to require that convention to propose *alterations and provisions* to the Articles of Confederation. Under the terms of the Articles, even if the Confederation Congress did have the authority to call a convention it could only instruct a convention to propose an *alteration* to the Articles of Confederation.

From the very beginning of the process however, individuals who lead the Articles of Confederation ignored its provisions in order to create a better form of government. To accomplish this, these individuals took advantage of the very errors within the Articles of Confederation that they sought to correct with the 1787 constitutional convention. Article Thirteen of the Articles of Confederation simply states "any alteration [must] be agreed to in a Congress of the United States and ... confirmed by the legislatures of every State." True, the Articles do not specify the Confederation Congress has the authority to call a constitutional convention. More importantly, a simple reading of Article Thirteen reveals there is no procedure whatsoever for any political body to propose an alteration to the Articles of Confederation. Thus, whoever or whatever decided to propose it could propose an alteration. The Confederation Congress, along with the states, simply took advantage of the silence of the Articles to call a constitutional convention.

The failure of detail of alteration procedure in the Articles extended into the ratification procedure of the Articles if such a word applies. The Articles, for example, contained no specifics of under what terms the Confederation Congress "agreed" an alteration to the Articles of Confederation. As already noted the Confederation Congress was a very weak political organization. Frequently it lacked enough members to constitute a quorum to conduct business. This fact may explain why after three days of "bitter debate" the Confederation Congress sent the proposed Constitution to the states for affirmation "with neither a vote of endorsement or condemnation." The Articles required the Confederation Congress "agree" with an "alteration" if it was to legally change the Articles of Confederation.

In fact, what the Confederation Congress did was to send the proposed Constitution to the states without agreement but without objection. In short, Congress neither agreed nor disagreed. The states in turn took advantage of this fence sitting by assuming if the Confederation Congress had not expressly disagreed, it therefore agreed as it sent the matter on to them for their consideration. As no term existed defining what agreement was in the Articles of Confederation, there was no violation in all of this. The Articles do specify that the states could only consider an alteration after Congress agreed. Hence, by sending the matter on, Congress signaled that it did "agree" with the proposal despite the fact it never actually voted to "agree" with the proposal when it came before them. If this was a second violation, the Confederation Congress (and the states) ignored the alteration provisions of the Articles of Confederation, not the convention.

If this was a violation, it happened after the convention had concluded its business and disbanded. Clearly, the convention had nothing to do with it. Yet, the convention gets the blame for vetoing the alteration procedure of the Articles of Confederation by the opponents to a convention. The fact is if there were violations, it was the Confederation Congress or the states, which did them, and even here, given there were no laid out procedures, the allegation of actual violation is doubtful. One thing is certain: the convention had nothing to do with it.

As to the affirmation "by the legislatures of every State," as with the rest of the affirmation/ratification procedure there were no specific instructions contained in the Articles of Confederation to accomplish this. Therefore, under the terms of the Articles of Confederation so long as the state legislature "affirmed" the alteration to the Articles of Confederation the method of accomplishment was entirely up to the state legislature. Consequently, so long as the state legislature agreed with the procedure, such as the use of a state convention used to ratify the new Constitution, the terms of the Articles of Confederation were satisfied. Obviously, by calling the conventions at the state level, and ultimately binding themselves to the result, the states agreed with the procedure set forth in the Constitution and satisfied the terms of the Articles.

Contrast this loose, unspecified amendment/alteration procedure of the Articles of Confederation with Article V of the Constitution. If Article V is obeyed, which it is not being currently by Congress; Article V is vastly superior to Article Thirteen. Article V of the Constitution contains a very specific proposal and ratification procedure. Unlike the Articles of Confederation, Article V specifies exactly who can propose amendments to the Constitution and by what terms they may be proposed, a two-thirds affirmative vote of the proposing body. (This is true because of the 14th Amendment, which specifies equal protection under the law meaning in the case of amendment body proposal if one body (Congress) must propose by two-thirds vote, the other body (a convention) is equally bound.) Article V specifies an exact procedure of ratification. Two procedures of amendment ratification, state convention or state legislature but both requiring a three-fourths affirmative vote of all states in order for a proposed amendment to become part of the Constitution are called for.

Convention opponents have made much of the fact that the Framers of the Constitution in Article VII of the Constitution specified the Constitution took effect with only the affirmation of nine states. Beyond the obvious fact that no state legislature voted against the Constitution, which included this provision in it, meaning that all the states affirmed the principle expressed by the Framers in Article VII of the Constitution as to the number of states required to make the Constitution valid, there is precedent in the Articles of Confederation for this authority.

Two of the Articles of Confederation, Ten and Eleven, permitted nine states to act instead of the customary thirteen. Article Ten provided for a “Committee of the States or any nine of them authorized to execute ... such of the powers of Congress of the United States ... shall from time to time think expedient to vest them with.” Article Eleven allowed for admission of other colonies to the Articles of Confederation if “agreed to by nine States.” Article Eleven is the more significant of the two articles regarding the Constitution. Clearly, the states were being called upon to “join” a new form of government and thus “leave” the old form of government even though technically the Constitution was an alteration of the original government, authorized by the terms of that original government, with that original government remaining in place only in a new form.

Nevertheless, under the principle established in Article Eleven of the Articles of Confederation, it required only nine States for this “joining” to occur. Therefore, this principle of nine state affirmations originated not by the Framers of the Constitution but was an integral part of the Articles of Confederation. The Framers merely copied the Articles of Confederation in drafting Article VII of the Constitution to comply with the principle laid down in the Articles of Confederation.

There is another limit in Article V not found in the Articles of Confederation and this limit is most important in the discussion of what an Article V Convention might have the power to do. The Articles clearly stated there could be only one alteration to the Articles. It did not state the alteration was limited to only altering a part of the Articles of Confederation. Thus, by the terms of the Articles of Confederation, or lack thereof, an alteration could as easily affect a part of the Articles or the entire document as in the case of the Constitution altering the Articles of Confederation.

Unlike the present Constitution that specifies any amendment must become part of the present Constitution no such guarantee existed in the Articles of Confederation. Convention opponents always overlook this constitutional protection requiring that an amendment becomes part of the Constitution rather than the Constitution becoming part of the amendment. The few words “as part of this Constitution" in Article V dictate any amendment becomes part of the present Constitution thus permanently preventing the very action done by the Confederation Congress and the states in 1787 because no amendment proposal is allowed to replace the present Constitution. Thus amendments are limited in scope to amending a portion of the Constitution leaving the rest of the Constitution unaffected and untouched. A new Constitution, proposed by a convention or by Congress, therefore is impossible because it would have to replace the current Constitution and thus could not be “part of this Constitution.” Such an act is therefore

unconstitutional, as the original Constitution and its ratified amendments, as they have become "part of this Constitution," must always remain intact.

Alexander Hamilton in Federalist 85 explained the reasoning for this assurance contained in Article V, "The moment an alteration is made in the present plan, [the Articles of Confederation] it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each State. To its complete establishment throughout the Union, it will therefore require the concurrence of thirteen States. If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine in favor of subsequent amendment, rather than of the original adoption of an entire system."

While Hamilton was addressing in Federalist 85 the advantages of adoption of the Constitution in regards to future amendments as opposed to retaining the Articles of Confederation, his comments regarding altering the Articles of Confederation clearly show the Articles required a vote on the entire plan by all the states each time a single alteration was desired. In short, the alteration procedure in place for the Articles required a completely new Articles of Confederation each for change to them even if the change only affected one article (or even a few words of one article) of the Articles of Confederation.

As noted by Hamilton this lack of protection of the original instrument legally allowed simultaneous change of the entire instrument as in 1787 creating an entirely new instrument with a single alteration. The Constitution has a better idea: a proposed amendment can only affect a portion of the Constitution because an amendment can only be "part of this Constitution." The rest of the Constitution remains intact and unaffected. Thus, if, at some point, an amendment is repealed the original language of the Constitution replaces it. An example would be the repealing of the 16th Amendment, federal income tax. If repealed, there would still be national taxation but taxation based on the constitutional language already in the Constitution effective from the enactment of the Constitution until amended by the 16th Amendment. Thus, Article V is much more than simply an amendment procedure. It protects the Constitution from being replaced contrary to what convention opponents allege. The fact is the Framers saw this danger and stopped it.

The Framers added yet another protection for a convention always overlooked by its opponents. Unlike the Articles of Confederation which didn't allow for, let alone describe the powers and authority of a constitutional convention, the Framers crafted very careful language not only describing what type of a convention was allowed under Article V but the limits of its powers. Article V describes a "convention to propose amendments" as the only convention that can be called by Congress. Therefore the Framers removed the authority assumed by the Confederation Congress from the current Congress to call a constitutional convention and authorized it only to call a "convention to propose amendments" or an Article V Convention. The "part of this Constitution" language further limits this convention in that it cannot propose anything but amendments and these amendments become "part of this Constitution." Thus, the Framers permanently

removed the possibility of convention called by Congress to propose amendments assuming the power to write a new constitution as such action would violate Article V and therefore be an unconstitutional act.

This fact of lack of protection however served as an advantage to the 1787 constitutional convention. Without it, the Framers could not have created the Constitution. The call by the Confederation Congress requested "alterations" to "federal Constitution" which was in direct violation with the term of "alteration" used in the Articles of Confederation. The Framers faced a decision: present a series of alterations per the call of the Confederation Congress, each of which would have to be voted on by all the states and therefore might result in any of the proposals being defeated or obey the terms of the Articles of Confederation.

The Framers realized the only solution to this problem was to ignore the congressional call, which specified alterations in violation of the Articles of Confederation and instead submit a single alteration as commanded by the Articles of Confederation. However, they also took care to ensure that should multiple issues arise in the Constitution, no such conflict would ever happen again; they allowed for the proposal of "amendments" rather than "amendment." Had they not done so, the Bill of Rights, proposed as a group of amendments, would have never existed. Of course, each amendment was still required to be ratified separately, thus guaranteeing each would be considered on its own merits. Therefore, in order to comply with the Articles of Confederation, the Framers created a single alteration: the Constitution. They submitted this single alteration proposal to the Confederation Congress as required by the Articles of Confederation. In this they returned to the original report recommendation of the Annapolis meeting, that the convention submit "an act" as to "render the Constitution of the federal government adequate to the exigencies of the Union." At this point, their business concluded, the convention, and any responsibility it might have as regards to future events of ratification or affirmation terminated.

The opponents of a convention stated that the 1787 convention was a "runaway" that is, that the convention completely ignored its instructions from Congress and acted on its own authority to create the Constitution. History shows this allegation to be entirely false for several reasons. First, Congress instructed the convention propose alterations and provisions to improve the Articles of Confederation. There is no historic record but that the convention did nothing but this task. Indeed, the convention acted in total compliance with the Articles of Confederation producing, as specified by that document, an alteration to the Articles. Despite a congressional resolution to act *contrary* to the specific language of the Articles, the Framers refused to do this. Second, there is no authority in the Articles of Confederation giving the Confederation Congress the authority to instruct the convention on anything, as there is no authority in the Articles giving the authority even to call the convention in the first place. Third, the creation of the convention was in the form of a resolution rather than a law. A resolution has no force of law. The resolution called upon the states to convene a convention meaning the Congress recognized from the beginning that a convention was, *a state power*, and not a power of the national government. The intent of this state power, then as now, was to balance the national

power of alteration/amendment procedure. There is no record that any state legislature instructed the convention in any form. The conclusion: based on the historic record the allegation that the convention was a “runaway” is entirely false. The best that can be made of such a charge is that the convention, as instructed by the Articles, chose to obey them rather than obey instructions from the Confederation Congress, which were in conflict with the Articles of Confederation.

The Confederation Congress, again in violation of the Articles of Confederation, sent the proposed Constitution to the states without an agreeing vote. However, the Congress did not disagree. The state interpreted this action as an agreeing vote. Had they felt otherwise, clearly they would not have authorized the state conventions to vote on the Constitution. As there was no prescribed method of affirmation for the states, they were free to create the conventions called for in the Constitution. The historic record is clear. All the state legislatures held such state conventions that in turn voted to affirm the Constitution. As final step, each state legislature accepted these votes presenting two opportunities for legislatures to defeat the new Constitution. No state legislature did so.

The Articles of Confederation clearly allowed for proposal of a single alteration to the Articles of Confederation. The 1787 Constitution Convention produced a single alteration proposal, which it submitted to the Confederation Congress. The Articles of Confederation stated if the Confederation Congress agreed and the states affirmed this alteration was valid. Congress did not disagree and sent the matter to the states all thirteen of which affirmed it. The historic record shows the convention did not violate the Articles of Confederation. Violations of the Articles of Confederation, if any, were by the Confederation Congress and the states and given the circumstances of the lack of specificity of the Articles, this is even doubtful. Thus, any assertion, based on so-called historic evidence that a convention might be a threat to this nation, is entirely false.

The examination of the historic record surrounding the events leading to the adoption of the Constitution shows that contrary to the myth told today by Article V Convention opponents, the only group that actually obeyed the terms of the Articles of Confederation was the 1787 Constitutional Convention. Both the Confederation Congress and the states ignored the terms of the articles during the process but lack of specific instructions makes it difficult, at best, to say either group did anything outside the authority of the Articles. The anti-constitutional opponents have twisted history in order to thwart the Constitution. Their sole argument, the 1787 constitutional convention is a threat, when historic record is closely scrutinized, is insupportable. History does not show a convention is a threat or that it acted outside its authority to propose a new constitution. Quite the contrary; the convention acted in full compliance with the Articles of Confederation. The fears are groundless.

In sum, the historic records prove the allegations of the danger of an Article V Convention are unfounded. Instead, the events that the opponents point to with such fear were a result of the actions of the Confederation Congress and the states that may have violated the Articles but which history shows they probably did not. The reason these political groups were able to do what they did was the Articles of Confederation

contained no specific instructions as to the alteration procedure described in them. This lack of specification in the Articles makes it doubtful that even these two groups actually violated anything. This lack of specific alteration procedure no longer exists in our form of government. The current Constitution, which has a very specific, detailed procedure, laid out for passage of a constitutional amendment and more importantly thwarts any such action of that which happened in 1787 because those who did so in order to give us our Constitution saw to it that it could never happen again. In short, the Framers of the Constitution saw an open door in the Articles of Confederation through which they could act to correct the defects in the Articles and did so. However, the Framers closed that door behind them with the passage of Article V.