

Mr. John F. McManus
President, John Birch Society
P.O. Box 8040,
Appleton, WI 54912
February 11, 2007

Dear Sir,

I appreciate the opportunity to respond to the president of the John Birch Society. Consequently, I know I am addressing a man of honesty, honor, integrity and patriotism, who places the text of the Constitution and obedience to the same second only to the words of the Bible. Because of this I know that you would never mislead or allow anyone in your organization to commit the same regarding the Constitution; nor would you ever do anything that would in any way, manner or fashion harm this nation or do damage to its Constitution or the American way of life.

Mr. Hirschhorn has asked me to respond to your thoughtful letter of February 3, 2007 regarding his article "Healthy Political Faith" and the concerns you have expressed over Congress calling an Article V convention. As I know you to be a man of integrity I know you nor anyone in your organization would purposely base such opposition on half-truths, myths or outright lies. Men of integrity and honor do not do that. We at FOAVC believe in accuracy and documentation to support our assertions and I can assure you Mr. Hirschhorn can do so in regards to every statement made in his article if he were so challenged. I am sure you hold your statements in no less a high regard of accuracy.

Therefore I assume your statement in your letter was an inadvertent, unintentional error saying the 1787 Convention was a "runaway." It is a popular myth that the 1787 Convention acted on its own to create the Constitution and its actions were not authorized by anyone. Allow me to quote directly from the legislation passed by Congress on February 21, 1787 regarding the call of that convention:

"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...* (Emphasis added).

Resolved that in the opinion of Congress it is expedient that on the second Monday in 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." (Emphasis added).

It is a popular myth regarding the convention that it acted completely on its own without support of the Congress or the states. But as you can see, your statement is incorrect. Congress set the agenda for the convention and also required the document be named “the Constitution.” It did require the convention report its proposals to itself for its assent (which the convention did and which Congress did assent to before sending the matter to the states for their consideration and assent) and also that such proposals be ratified by the states *before* the proposals took effect; in short Congress required the efforts of the convention be *ratified* by the states and Congress before taking effect. All the actions of the convention were directed toward its specific assignment: “alterations and provisions...revising the Articles of Confederation.” This is why if you read the Constitution and the Articles of Confederation you will see much of them contain the exact same language because the convention delegates saw no need to alter those parts of the Articles of Confederation. The rest of the original Constitution (as the Congress had requested the name change in its law) was the alterations and provisions the delegates felt were necessary to “render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.” There was never was a runaway convention in 1787, only a group of delegates appointed by their states, meeting in Philadelphia in May of 1787 to make alterations to the Articles of Confederation, as authorized by that document, the states and by an act of Congress conducting their business as specifically authorized by that law, the Articles of Confederation and the states.

I wanted to correct this part of the record because I am sure it was, as I have said, inadvertent. As with the Founders, ratification of the actions of a convention prevented any possibility of a runaway convention just as ratification today will do the same with any action taken by a convention today. I am sure Mr. Mass, Editor of the John Birch Society Bulletin in his article entitled “A Second Constitutional Convention Would Endanger Our Republic” published January 23, 2007 was just as inadvertent as yourself in your letter. I am sure he is as honorable man with as much integrity as you. I am sure as an editor he hold accuracy as his highest standard. I am sure you agree honorable men of integrity do not use half-truths, lies, myths or other such tactics in order to persuade. They present the whole truth and facts and allow truth of their arguments regarding these facts persuade their audience. I am sure that you as a man of honor share this sentiment. As such, I am sure you understand why I ask you to use your good offices to request Mr. Mass publish a correction regarding his article in the Bulletin as soon as possible to correct this inadvertent error, that is specifically that he did not point out in his article the automatic check and balance built into Article V of ratification would stop such concerns or that such actions as he describes (e.g. overthrowing the Constitution by attempting to throw out the ratification process) is a violation of already existing federal criminal law. However, this request is not the main purpose of my letter. Frankly, I find nothing gained by trading accusations worthy of Armageddon concerning a convention call back and forth. I believe in finding solutions to problems. I am sure you agree.

That is why I was surprised that neither you nor Mr. Mass chose to point out that you had won a total victory in this matter. For I am sure you realize, as a moderate constitutionalist, that your support for not calling a convention when the two-thirds applications exist, is actually support for the states, Congress or both to possess the power of veto of the direct text of the Constitution. That is, possess a power not authorized nor even contemplated by the Founders, that of allowing the government a choice as to whether or not it must obey a clause of the Constitution.

In *United States v. Sprague*, 282 U.S. 716 (1931) the Supreme Court stated,

“The United States asserts that article 5 is clear in statement and meaning. Contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates this is true. It provides two methods of proposing amendments. Congress may propose them by a vote of two-thirds of both houses; or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them. *Amendments proposed in either way become a part of the Constitution, ‘when ratified by the legislatures of three-fourths of the several States or by Conventions in three-fourths thereof...*

The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and *no excuse for interpolation or addition.*” (Emphasis added)

This is not the only example. In *Hawke v. Smith*, 253 U.S. 221 (1920) the Court said,

“This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on applications of the Legislatures of two-thirds of the states; thus *securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the Legislatures of three-fourths of the states, or by conventions in a like number of states. . . .*

The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.” (Emphasis added).

As I’m sure you aware, Article V does not provide for withdrawal of any application by the state for a convention once submitted nor does it provide Congress any option regarding a call based on those applications. The reason is obvious. If a veto were permitted then Congress would possess complete control of the Constitution (a fear very clearly expressed by George Mason in the convention when the convention proposal was discussed. Mason said,

“The plan now to be formed will certainly be defective, as the confederation has been found on trial to be. Amendments therefore will be necessary, at it will be better to provide for them, in an easy, regular and constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendmt.”

Equally obvious to a moderate constitutionalist such as yourself, a veto by the states would mean that a single state or small group of states could veto a convention on its or their own by simply withdrawing its or their application(s) at an opportune moment.

However as I have indicated, there has been a victory in this issue in your favor. I would term it a real political coup and, as you did not trumpet in your letter to Mr. Hirschhorn I must assume you are unaware of it. It is the reason why Mr. Hirschhorn has taken up the call for an Article V convention because he is very concerned about your victory from a constitutional point of view.

First, let us review how the Founders viewed the convention call and the obligation of Congress vis-à-vis it. As you mentioned in your letter to Mr. Hirschhorn the Federalist Papers, which obviously you regard as the definitive source as to the meaning and intent of the Founders in regards to the text of the Constitution, allow me to refer you to Federalist 85 in which Alexander Hamilton, author of Article V states,

“[T]he national rulers...no option upon the subject [a convention call]... By the fifth article of the plan the Congress will be *obliged* ‘on the application of the legislatures of two-thirds of the states, (which at present amounts to nine) to call a convention for proposing amendments, which shall be valid to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof.’ The words of this article are peremptory. The Congress ‘shall call a convention.’ Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about their disinclination to a change, vanishes in air.” (Emphasis added)

While it may be redundant, I will provide the definition of the word “peremptory” from Black’s Law Dictionary. (As a side note, this particular word is strictly a legal term and was only used by the Founders to describe this specific clause of the Constitution, the convention call. Further, as you may know, the convention unanimously passed the convention clause, not once but twice and even the opposition to the Constitution understood the clause required a numeric count of states nothing more to cause such a call.)

“Peremptory. Imperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative. Self-determined; arbitrary; not requiring any cause to be shown.”

I think you will have to agree the Founder's intent was that Congress must call a convention and didn't intend there be a veto by anyone (except that the states not apply in the first place which cannot apply now as all 50 states have submitted 567 applications to Congress for such a convention. The same logic applies when you cast your ballot in an election. You are not given a veto of the vote the next day.). Since you obviously hold the Federalist Papers as a conclusive source, I think you will have to agree your position is incorrect when placed before the full facts.

However, I did speak of a victory for you, didn't I?

As you may or may not know, I have been involved in two federal lawsuits regarding a convention call for the past several years. The suits, Walker v United States and Walker v Members of Congress both dealt specifically with the issue of the convention call and the obligation of Congress to call it. If you desire a full examination of the issue, I refer you to www.article5.org/webbrief . Here you can study my nearly 800 page brief which used over 208 Supreme Court rulings to support the position the government was obligated to obey the Constitution and thus call and that the current laws and court rulings due to the equal protection clause of the Constitution would equally apply to the convention thus answering most, if not all, of the concerns and fears surrounding the calling of a convention. This brief was written for Walker v. United States, my first lawsuit which was only taken to district court but in which the court ruled that under the political question doctrine Congress had the right to veto the Constitution.

The last, Walker v. Members of Congress in which each member of Congress was individually served, made its way to the Supreme Court of the United States which denied certiorari but because of the absolute nature of the question and the opinions of the lower courts nevertheless made a decision in the suit. The reason is obvious: either Congress must obey the Constitution and call a convention or it has the right to veto the text (by whatever means it chooses) and refuse to call. Hence, if even a single court ever ruled that Congress could veto the text, that is refuse to call a convention when in fact the states had applied, then the right to veto the direct text of the Constitution by the government would be established. Well, as I have indicated, the district court in Walker v. United States did make a ruling and the district court in Walker v. Members of Congress repeated that portion of the ruling thus making it a subject of appeal.

By the way I should mention that early in this effort, when I was attempting to gain support from groups I hoped realized that if a veto of the text of the Constitution ever existed, it could tremendous damage, if not terminal damage to the Constitution by the obvious fact that the Constitution would have no effect whatsoever on a government if that government were allowed to veto that Constitution. I approached the John Birch Society at that time. Your group was not interested. Indeed it was then that I learned that your society was actively engaged in support of a veto. In fact, as far as I could determine, your society was at the head of the movement desiring that Congress possess a veto of the text of the Constitution.

As I mentioned, in *Walker v Members of Congress*, each member of Congress was individually served. Under federal law, (2 U.S.C. 118) each member of Congress therefore was required to agree to the lawsuit by requesting representation by the United States through the justice department and therefore publicly assert and argue, that is to say, advocate for the right to veto the text of the Constitution. (As all of the members of Congress did this, and I have the written declaration of the attorney representing the government at appeal level as proof, I think I can safely say that your suggestion of acquiring 218 members of the House in support of your points has suffered a setback.)

Allow me to quote the law, which states,

“In any action brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the United States attorney for the district within which the action is brought, *on being thereto requested by the officer sued*, shall enter an appearance in behalf of such officer; and all provisions of the eighth section of the Act of July 28, 1866, entitled “An Act to protect the revenue, and for other purposes”, and also all provisions of the sections of former Acts therein referred to, so far as the same relate to the removal of suits, the withholding of executions, and the paying of judgments against revenue or other officers of the United States, shall become applicable to such action and to all proceedings and matters whatsoever connected therewith, and the defense of such action shall thenceforth be conducted under the supervision and direction of the Attorney General.” (Emphasis added).

As the matter was submitted to the Supreme Court of the United States and I am sure your society is familiar with the rules of the Supreme Court. Allow me to quote you Rule 15.2 of the Supreme Court.

"A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying petition, the brief in opposition *should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court* if certiorari were granted. *Counsel are admonished that they have an obligation to the Court to point out* in the brief in opposition, and not later, *any perceived misstatement made in the petition.*" (Emphasis added).

In my certiorari it was stated that Congress claimed the right to veto the text of the Constitution under the political question doctrine. The government did not refute it and the Solicitor General of the United States represented the government. Thus, under Supreme Court rules, the government now can veto the direct text of the Constitution. Notice I did not say neither here nor in my certiorari, the convention clause. I deliberately stated, the text of the Constitution.

Finally, you should be aware that such a veto violates federal criminal law, specifically 18 U.S.C. 1918 that makes it a crime for a federal official to even

“advocate” such position. I am sure you know the definition of the word “advocate” includes “stating publicly or in a tribunal.” You can read a copy of the law at <http://www.article5.org/FederalLaws.htm>

You wanted a veto and now you have one. Understand this however. We are no longer discussing political theory of what might or might not occur. We are now dealing with FACT and official and formal government policy regarding their powers vis-à-vis the Constitution. The government now believes it has the power to veto the text of the Constitution and is on public record favoring this. Your society favors such a veto. I must congratulate you on your political victory sir though I suggest that destroying the entire Constitution by allowing the government to veto any of its clauses it chooses is a particularly dangerous way to obtain it.

And by the way, another of our FOAVC members Chief Justice Brennan, former chief justice of the supreme court of Michigan is publishing an article describing the above in the Harvard Journal of Law and Public Policy due out next month. The Journal, as I’m sure you know, is probably the highest regarded and therefore the most widely read in the entire legal community. This means every lawyer in the United States is going to know about this veto.

Oh yes, and then there is Coleman. The text of my concern is too long for this already lengthy letter so I will simply give you the web address so that you can read exactly what the district court, appeals court, Congress and the Supreme Court now have in store for us. The site is: www.article5.org/Coleman.htm

You mentioned in your letter regarding the age-old question of whether or not this nation is a democracy or a republic. Sir, right now, officially with the government having the right to veto the text of the Constitution, it is neither. It is a dictatorship.

Because of this, Mr. Hirschhorn has been advocating for a convention call. He realizes a convention must be called for the most fundamental of reasons: to preserve the Constitution.

The fact you appear to oppose an Article V Convention surprises me as the text of the Constitution, as I have already indicated, is peremptory in this matter and thus, to oppose the calling of a convention when the states have satisfied the single constitutional requirement of two-thirds of the applying state legislatures, is tad-amount to opposing the Constitution itself. I know an honorable, a man of integrity, a true patriot such as you would never do that. He would as soon die first than do anything to harm his nation.

Such an act, I am sure you agree, would be a supreme violation of patriotism. There are two kinds of patriots—those committed to obedience and total support of our Constitution, its text and the obvious meaning of that text—committed such that they view any issue regarding the Constitution as a problem to be solved so that the Constitution remains supreme, that the text is fulfilled and not thwarted and is not submissive to such things as fear, ignorance or convenient politics. It requires no effort whatsoever sir, as I am sure you will agree, to support those provisions of the Constitution of which you happen to personally agree; the true test of any American patriot is supporting with equal fervently those provisions of the Constitution of which you totally disagree.

There is always the sunshine patriot among sir who only supports those provisions of the Constitution as may be convenient or palatable. The true patriot finds solutions to constitutional issues; the sunshine patriot only discovers problems. I do not at all intend a characterization of your patriotism sir, only instead to pose a challenge to you to discover within yourself how committed you are to it. An honorable man of integrity will do no less.

I do not count yourself among the sunshine patriots because you have never been offer the opportunity, so far as I know, to solve the concerns you have expressed of an article V convention. Until now.

Like you, I am a concerned American. I am concerned as to how this nation is proceeding and in what direction. Like you, I'm sure you will agree it is not proceeding in a direction in line with the language and text of the Constitution. Like you, I want, as an American, to see that it does.

But the question is how is this to be accomplished? What do we, as Americans, do with a government that is refusing to obey the Constitution and, regardless of who is elected by us to the offices of power, seems unable or more likely unwilling to change or correct the issues we are discussing? I know you agree with me on this point as you mentioned it in your letter.

The issues are systematic and the reality is they can only be solved by Americans coming together and solving them in a systematic manner, not by bickering amongst themselves but by extending hands to one another in friendship and a trust built on the fact that while they may not agree politically on every issue, they do agree on the fact this nation is more than any one individual or individuals.

That is why I am asking you and your organization to join in a new group that is now forming. The group is called Friends of an Article Five Convention (FOAVC). It has one purpose: to bring people together to discuss and solve the problems surrounding the calling of a convention. The group does not believe that Congress should or ever will address these problems.

You have raised valid and legitimate concerns in your article regarding a portion of the Constitution that requires illumination, not confrontation, to resolve. The Founders put the convention clause in the Constitution for a reason: to give people such you and I the ability to make needed change in this nation in a peaceful, thoughtful and legal manner absent of government interference. They gave us the gift of the right of the people to alter or abolish their government sir, their government.

Won't you as a loyal, patriotic American whose greatest concern is the good of this nation, who fervently believes that the text of the Constitution, however it is written, should be obeyed by all Americans loyal and faithful to our nation, our way of life and the Constitution that all of that represents? Won't you join us to help address the issues and concerns you yourself have shown regarding a convention?

I hope you will give thoughtful considering to my request sir. Your nation at this most serious time in its history needs people like you and the people you represent to bind the wounds, to solve the problems, to find solutions.

Until we meet again, I remain with best regards.

Bill Walker
FOAVC