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Caution, Not Paralysis: A Point-By-Point Defense of Mark Levin and Refutation of Publius Huldah

October 2, 2013 at 9:51am

By Robert Kelly

Anonymous blogger Publius Huldah has attacked Mark Levin for proposing an Article V Convention of States to bring the federal government back in line. She claims not only that such a process would be commandeered by Congress, but also that there is a substantial risk such a convention would "run away" and do incalculable damage to our rights and our system of government. In order to reach her conclusions, Ms. Huldah has misconstrued the text of theConstitution, the Philadelphia Convention Debates, and the historical background against which they were framed. Far from defending our Constitution as she purports to do,her sloppy scholarship, attacks on the legitimacy of our Constitution, and advocacy for the extra-constitutional doctrine of nullification, exhibit a fundamental disregard for the laws, principles, and men that made this country great.

(You can read Publius Huldah's article at: http://www.usanewsfirst.com/2013/09/15/publius-huldah-refutes-mark-levin-says-keep-the-feds-in-check-with-nullification-not-amendments/#sthash.DVkCRlKx.r2lWoADU.dpbs)

The Problem and the Solution

The place to begin, as Ms. Huldah properly recognizes, is understanding the problems thatAmerica faces today. I'm sure we're all acutely aware of them. Let it suffice to say that we have a runaway federal government that is abrogating to itself rights and powers properly left to the states and the people. Sometimes federal officials scoff at the idea of constitutional limits; other times, they use the Constitution as a pretext for their abuses.

Ms. Huldah only seems to identify the first of these two issues. "It is idiotic," she claims, "to assert that you can rein in a federal government which ignores theConstitution by *amending*

theConstitution!" That may be true if the only sin of federal government was flat out ignoring the Constitution. Unfortunately, that is an overly simplistic view of our current predicament. The real problem we face is a combination of feckless politicians who trample our Constitution with impunity, others who exploit constitutional loopholes to pass their pet projects, and still others who remain wholly ignorant of the Constitution's meaning. It's these last two groups of politicians who don't understand the Constitution, or apply it according to their own fancy, that can be corrected through constitutional amendments.

And indeed,the historical fact is that amendments do work. The first 10 Amendments stand as bulwarks of individual liberty to this day. The 11th and 14th Amendments permanently corrected erroneous Supreme Court decisions. The 22nd Amendment imposed term limits on the President. Before resorting to revolutionary remedies that find no mention in the text of the Constitution (and therefore lack checks and balances), we should look first to the Constitution's own methods for fixing our government, Article V foremost among them.

The Text

Since the Constitution is the foundation of our government, and the starting point for any solution to Washington's abuses, let's begin the core of our analysis there, with the text of Article V:

"**The Congress**, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, **on theApplication of the Legislatures of two thirds of the several States, *shall* call a Convention for proposing Amendments**,which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . ." [emphasis mine]

Ms. Huldah asserts that this text, or rather its silence, gives Congress the power to call and control a convention of states. But is the text really silent, or does it give us some direction with regard to Congress's authority over a convention?

Note what the text says: “The Congress . . . on the Application of two thirds of the several States, *shall call* a Convention for proposing amendments . . . .” In legal documents the word “shall” means “must.” It doesn’t mean “you can do it if you feel like it.” It doesn’t mean “you really ought do this, but can ignore it if you want.” It means “you must do this.” If a state law says, “you shall not drive drunk,” that’s not a suggestion, it’s an order. If you disobey it, you do so at your peril, both legally and morally. When Article V says, “Congress . .. on Application of the Legislatures of two thirds of the several States, **shall** call a Convention for proposing Amendments” it means Congress **must** call a convention if enough states ask for one. **Congress has no discretion.** The text of Article V itself sets the tone for Congress’s power, or rather its lack thereof, over a convention of states.

Ms. Huldah reluctantly concedes this point, but persists in her claims that the silence ofArticle V gives Congress room to appoint and control the delegates to the convention. This claim exhibits a fundamental ignorance of basic agency law,and historical constitutional practice.

The States, Not Congress Appoint Delegates to the Convention

The crux of Ms. Huldah’s argument is that “since Congress calls it [the convention],Congress has the power to appoint whomever they [sic] will as delegates . . ..” This is not only untrue, but patently absurd. Think about it. IfMassachusetts calls a convention, does it get to pick who represents the other states in the convention? Of course not, the other states get to choose their own representatives. This is common sense and agency law 101. The **delegates are appointed by the states they represent**; that’s why they are called “delegates,” because their authority is delegated.

Not surprisingly, history backs this up. According to research done by constitutional law scholar Robert Natelson, there were at least 32 multi-colony and multi-state conventions held prior to the ratification of the Constitution and in every single one, each state appointed its own delegates. Natelson’s excellent article is available here: (http://www.floridalawreview.com/wp-content/uploads/5-Natelson.pdf). Ms. Huldah would have done well to read his work before opining on a subject she knows little about.

Whoever appoints and controls the delegates to the convention will ultimately control the convention itself. Since the state legislatures are the ones represented at the convention, the delegates, and ultimately the convention, answers to them.And if we do our job as civic-minded citizens, the state legislatures, and thus the convention, will answer to us.

The Purpose of a Convention of States Is to Limit Congressional Power

As many scholars have noted, the Founder's purpose in providing for a convention of states is fundamentally incompatible with broad congressional discretion over the convention. Mr. Levin makes just this point, but Ms. Huldah dismisses it as"circular reasoning." Far from engaging in circular reasoning, Mr. Levin is applying an established principle for interpreting legal documents (including the Constitution): the language of the document must be read to further its purpose. When the text of the Constitution is silent, as Ms. Huldah contends that it is on this point, the next most important guide is the purpose of the text as understood by the Founders.

Thankfully, James Madison's notes from the Philadelphia Convention tell us exactly why the convention of states language ended up in Article V. In early drafts, Article V allowed only Congress to propose amendments to the Constitution, but near the end of the Convention, George Mason expressed his apprehension that "the plan of amending the Constitution [was] exceptionable [meaning objectionable] and dangerous." According to Madison, Mason was concerned that "the proposing of amendments" was "to depend . . . on Congress" and therefore, "no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive . . . ." Two other delegates, Elbridge Gerry and Gouverneur Morris, jumped to Mason's support, and successfully moved to add the provision for a convention of states into Article V. **The purpose is abundantly clear: Mason wanted a way for the people to amend the Constitution that didn't depend on Congress** and the Convention supported him. It would be nonsensical in light of this history to read Article V as giving Congress any power to control a convention of states.

Ms. Huldah Completely Misreads the Proceedings of the Philadelphia Convention

Publius Huldah disputes this clear history. According to her, Edmund Randolph andGeorge Mason proposed the change to Article V, and their proposal was soundly rejected. Here's her account of events:

On September 15, 1787, Randolph & Mason said they would not sign the Constitution unless Art. V were amended to require another general convention to approve amendments proposed by what *they* called "state conventions".

So they moved that the following be added to Art. V:

"that amendments to the plan [Constitution] might be offered by the State conventions, which should be submitted to, and finally decided on by, another General Convention."

This was voted on and all the states answered "No."

If you read Ms. Huldah's words critically, a few things should jump out at you.

First, note where the quoted language from Madison's records actually begins; it begins after *Publius Huldah* (not Madison) asserts that Randolph's motion was to add language to Article V. If you look up the actual text (available here http://files.libertyfund.org/files/1909/1314.05_Bk.pdf ;go to pages 552-53) you'll find it was nothing of the kind. Normally, when somebody suggested a change to the proposed text of the Constitution, Madison recorded something to the effect of "Mr. X moved to amend Article Y to say . .. ." But this language is conspicuously absent in Madison's description ofRandolph's motion. That's because **Randolph didn't move to *add* language to Article V; he moved to change the way that their *drafts* of the constitutional text would be ratified by the states.**

Second, why does Randolph refer to the Constitution as "the plan"? When discussing proposals to change the actual text of the Constitution, theDrafters always referred to the Constitution as "the Constitution" or by the particular article being discussed. Throughout the Philadelphia Convention they used the phrase "the plan" to refer to ***their drafts*** of the Constitution that still needed to go to the states for ratification. Again, Randolph's motion wasn't to change Article V, that's Publius Huldah's embellishment. His motion was to allow the states' ratification conventions to amend the *drafts* of the Constitution rather than limiting them to an up-or-down vote on the entire document. Incidentally, this reading is also bolstered by Randolph's own letter on the Convention, where he talks at length about his concern that the Constitution must be "wholly adopted, or wholly rejected" by the state ratification conventions (Randolph's letter is linked below).

Third, why does Randolph refer to "***the*** state conventions" as opposed "***a*** convention of states" or "***a*** convention for proposing amendments"? The "**the**" here is very important. He says "***the*** state conventions" because he is referring to a particular set of existing state conventions, namely the ones established by Article VII for ratifying theConstitution. If he had meant to change Article V, he would have referred "***a*** convention of states" or used similar language. He didn't because he wasn't proposing a change to Article V.Thus, the Philadelphia Convention didn't

reject a convention of states; it rejected a separate proposal to modify the role of the original state ratifying conventions.

If Ms. Huldah had taken the time to look just one page earlier inMadison's notes, her error would have become obvious. On page 551, Madison records the full account of Mason's proposal, which expressly has to do with the text of Article V. Here is Madison's report of the action:

Col. MASON thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second ultimately, onCongress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case.

Mr. GOUVERNEUR MORRIS and Mr. GERRY moved to amend the article, so as to require a convention on application of two thirds of the states.

Mr. MADISON did not see [the point of such an amendment,but] saw no objection . . . except only that difficulties might arise as to the form, the quorum, &c., which in constitutional regulations ought to be as much as possible avoided.

The motion of GOUVERNEUR MORRIS and Mr. GERRY was agreed to, *nem. con.*

Nem. con. is an abbreviation for *nemine contradicente*, aLatin phrase meaning "without dissent." Thus, **far from being unanimously rejected as Ms. Huldah suggests, the motion to include a convention of states in Article V was unanimously adopted.**

Now as it so happens, both Mason and Randolph declined to sign the Constitution as proposed by theConvention. Publius Huldah says that they "didn't sign because Art. V didn't provide for the 'state conventions' and the 'general convention' they demanded." Ms. Huldah may not know it, but **both Mason and Randolph wrote extensive letters detailing their reasons for not signing the Constitution and neither of them mentioned Article V** or the lack of a convention of states as a reason for declining to sign (their letters are available here: http://files.libertyfund.org/files/1905/1314.01_Bk.pdf at pages 482-91, 494-96). Of course, this makes sense if you realize that they got what they wanted in Article V, namely a provision that allows the states to amend the Constitution without congressional interference. It makes no sense at all if you take Publius Huldah's view.

Ms. Huldah Grossly Overstates Madison's Concerns about a Convention of States

Ms. Huldah makes a great deal out of Madison's supposed objections to a convention of states under Article V. It is true that at the Philadelphia Convention, as quoted above,Madison did raise some questions about "the form, quorum, &c" of such a convention. But recall that according to Madison's own notes, the motion to add it to the Constitution passed "nem. con." "without objection." ApparentlyMadison had his doubts put to rest, or he didn't consider them important enough to vote against the proposed change to Article V. Either way, his concerns couldn't have been too serious.

Ms. Huldah then quotes a later letter sent by Madison to a Mr. Turberville. (The full letter is available here: http://files.libertyfund.org/files/1937/1356.05_Bk.pdf at pages 297-301). In this letter Madison states his opinion that "a Convention therefore does not appear to be the most convenient or probable Channel forgetting to the object [amending the Constitution]." Ms. Huldah goes on to quote this passage at some length, but like some other authors, she takes it out of context. Madison was expressing his opposition to a proposal by New York to completely rewrite the Constitution. He was not opposing Article V conventions in general. In other correspondence he sent at the time, he makes this abundantly clear (see other letters sent by Madison on pages 244-46, 253-55,277-79). Professor Natelson explains Madison's position in his chapter in *Union& States Rights*, a legal book on state sovereignty (a preview of Natelson's chapter is available here: http://tinyurl.com/nzfvnqg). In fact, asProfessor Natelson points out, Madison specifically recommended a convention of states as a better alternative than nullification (see his letter here: http://files.libertyfund.org/files/1940/1356.09_Bk.pdfon pages 383-403).

There is Practically No Chance of a Runaway Convention

Ms. Huldah then dredges up a series of quotes from Madison and other Founders about the dangers of holding a general constitutional convention, and then layers on a bunch of her own concerns about how a convention of states will "run away" and write a completely new constitution. These arguments entirely miss the point of whatMr. Levin is proposing. He isn't proposing a *constitutional convention* to reconsider our entire form of government; he is proposing a *convention of states* to consider the discrete topic of limiting the power of the federal government.This is what Article V allows the states to do.

Mr. Levin has history on his side. As noted above, Professor Natelson's research shows there had been at least 32 multi-colony and multi-state conventions in the century before the adoption of the Constitution. In the vast majority of these conventions, the calling state specified a single subject or set of subjects that defined the scope of the convention and limited its authority. Moreover, this practice of calling single subject conventions has continued up to the present day. As recently as 1996, there was a major drive to call a convention of the states on the single topic of term limits for Congress. So states can limit conventions to a single subject, they can limit the authority of their delegates, and they can stop a runaway convention before it even gets off the ground. All of this has massive precedent in our history, from before the Declaration ofIndependence to the present day. This isn't something that Congress or the courts (or Ms. Huldah) can just throw aside.

But let's say, for the sake of argument, that everything Ms. Huldah fears comes true. For whatever reason the states don't limit the subject matter of the convention, or the courts refuse to enforce it, and the convention goes off the deep end and runs roughshod over our rights, and Congress supports it. Let's say all of that happens. Even still, **the convention's proposals are only a recommendation.They have no binding authority until ratified by 38 states.** Any way you slice it, **the states have final control over the scope and subject-matter of the convention.**

The Founders put the most important safeguards in the text of the Constitution itself. Contrary to what Ms. Huldah asserts, no court is going to allow any change to the Constitution without 38states ratifying. The Constitution expressly says that all amendments, whether originated in Congress or a convention of states, "shall be valid to allIntents and Purposes, as Part of this Constitution, *when ratified by the Legislatures of three fourths of the several States*, or by Conventions in three fourths thereof . . . ." The Constitution is watertight on this point. Not even the most radical, creative, activist judge or legislator is going to be able to get around that. **The checks on a runaway Article V convention are far more robust than the checks on a runaway federal government,** and certainly more effective than the widespread civil disobedience inherent in nullification, where every man becomes a law unto himself.

The "Runaway" Philadelphia Convention

In her final substantive argument, Mr. Huldah raises, once again, the specter of the infamous runaway Philadelphia Convention. Pointing to Philadelphia, she says,"There is no way to stop them from 'running away' and writing a newConstitution with its own mode of ratification. They can cram a newConstitution down your throat and you won't be able to do a thing about it."

So our Constitution was crammed down our throats? If our Constitution was born from such ignominious proceedings, we would do well indeed to throw off the yoke of these petty tyrants who masquerade under the beneficent title of "our Founders."

Allow me to summarize, if I may, this Constitution which was supposedly rammed down our throats. It was document founded on thousands of years of western civilization,experience, and custom, from the Roman Republic to the Magna Carta. It was drafted by a convention composed of some of the most gifted and brilliant men this world has ever known, who knew better than to squander their own heritage of freedom and the goodwill of the American people. It was approved by theConfederation Congress, and it was ratified by thirteen states who otherwise couldn't agree on anything. It has since been confirmed by over 200 years of history, and adopted by 37 additional states now blessed to call themselves part of the United States of America. If this is a runaway convention, I must confess that I'm at a loss what an orderly and proper convention would look like.

In Conclusion: Caution, Not Paralysis

The truth is, our Constitution was not the product of a runaway convention, and one of its greatest aspects is the numerous checks and balances it places on our government. One such important check is the ability of the states to hold a convention for proposing amendments. Of course, we should be cautious in amending such an important document. But caution is not the same thing as paralysis. **Let us be cautious in using the powerful tools the Framers gave us, but let us not be paralyzed to the point of inaction**, and certainly let us not prematurely throw away one of the greatest weapons we have to hold the federal government in check.

Recall the words of George Mason: a convention of states was designed for the time when "the government should become oppressive." Mason had no doubt that such a time would come, and that a convention of states would be the solution. Recall also that the Framers unanimously supported a convention of states as part of Article V.They would not have done so unless they were comfortable with the checks and balances the Constitution placed on the exercise of that power, and they would find it surprising indeed that we had elected to fight the usurpations of the federal government with one hand tied behind our backs. The battle against the government's perpetual tendency to accumulate and centralize power cannot be won with poor scholarship, false modesty, and ill-founded indictments of theConstitution. Instead we must embrace the tools the Constitution gives us, and,in their use, hold ourselves and our government accountable.