

Where Chief Justice Burger Likely Got His Anti-Amendment Convention Views



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Opponents of the Constitution's Article V convention method of proposing amendments tout three letters written in the 1980s by former Chief Justice Warren Burger. In those letters, Burger took a very hard line against any convention of states that might bypass Congress and propose corrective constitutional amendments.

I've previously explained one reason [Burger may have been so adamant](#): Although appointed to the court by President Nixon as a "strict constructionist," Burger proved to be a fairly activist judge. He famously voted for *Roe v. Wade*, the abortion decision that upended laws in all 50 states.

Thus, when Burger wrote his anti-Article V letters, he was protecting *Roe v. Wade* and his Court. At the time, there was a great deal of talk about using Article V to overrule *Roe* and other ventures into judicial activism.

But it seems that Burger was friendly with [a man named William F. Swindler](#).

Swindler was a law professor at the College of William and Mary, which is located in Williamsburg, Virginia. [Burger appointed Swindler](#) to two official Supreme Court committees. Upon Swindler's retirement, Burger wrote a glowing testimonial. Upon Swindler's death, [Burger eulogized him](#) as "an analyst of history and a historian of the first rank."

Swindler was a strong liberal, and he fiercely opposed the convention process of Article V -- particularly when conservative amendments were proposed. During the 20th century, many academics wrote attacking Article V, but [Swindler's assault](#) was the most over-the-top I've seen.

When Swindler wrote, the Council of State Governments was promoting a convention to consider three amendments -- one to streamline the amendment process itself, one to reverse a Supreme Court legislative reapportionment decision, and the third to establish an additional layer of judicial review in a very narrow class of cases. Swindler was apoplectic, and assailed those amendments and the convention idea in unbridled language. He essentially urged resistance to a convention by all means necessary.

Part of Swindler's plan of resistance was that federal officials should act as if the state-application-and-convention process were not part of the Constitution. Asserting that "only a federal agency (Congress, as provided by the Constitution) is competent to propose" amendments, he claimed that the convention procedure should be disregarded as "no longer of any effect."

Thus, Swindler suggested that if the requisite number of state applications was reached, Congress should simply ignore its duty to call a convention.

Alternatively, Swindler wrote, Congress could gerrymander the convention and/or prescribe rules that would render its operation impossible. For example, he suggested that Congress mandate a rule that convention delegates were not permitted to propose any amendment unless they did so *unanimously*. He also argued that the courts should determine which states had permission to participate in the process and which states did not.

Was the author of these lawless propositions the source of Burger's dislike of the convention procedure? He very likely was. Remember that William Swindler was Burger's friend. Their relationship was professional, but it was also personal: [Burger wrote](#) of his "warm personal relationship with Bill" and his "visits and walks with him at Williamsburg." Furthermore, I can find no evidence that Burger ever did any research on Article V himself: he seems never to have heard an Article V case or published anything on the subject.

It is at least probable, therefore, that the source for Burger's anti-Article V views was an ideologically-driven liberal willing to gut the Constitution to achieve his policy goals.

Not much of a testimonial.