Research Question: "What Legal Authority did the Delegates to the Summer of 1787 Federal Constitution Convention Have to Abolish the Articles of Confederation?"[1]

Section 1: America's Political Refrain

The very best Broadway musicals have an unforgettable refrain that both sets the foundation for the underlying story and makes the entire performance unique.[2] The political refrain that has been both a guiding principle of American governmental structure and has made America unique among nations of the world has been the concept of separation of powers. The concept of separation of powers is found again and again in many variations that permeate American governmental structure. Examples include the bicameral legislature, the three "separate but equal" branches of federal government and the concept of federalism wherein federal, state and local governments each play a separate and distinct role.[3]

Separation of powers is also a key feature of the Convention method of drafting a constitution, which of course was the method used in 1787 to create our existing Constitution of

[1] This is an adjustment from the initial research question posed. As I proceeded to analysis of the evidence, what became clear is that the initial question was myopic and dismissive of the truly important. The real questions to ask regarding the issues at hand are 1. What legal authority did the 55 Delegates think they had? 2. How and why were those conclusions drawn? and 3. What is the best legally correct answer and, thus, who was right? While questions 1 & 2 are far more entertaining to consider, the limits of this essay and the need for further primary source research leaves us with a present focus on addressing question number 3 exclusively.

[2] The critical importance of a legendary refrain cannot be overstated. A prime example would be Andrew Lloyd Webber's musical refrain "Don't Cry for Me Argentina," which "certainly qualifies as a legitimate showstopper" and "is the emotional centerpiece" of the entire theatrical event. Jim Beviglia, "Julie Covington, "Don't Cry For Me Argentina" *American Songwriter,* accessed February 24, 2022. https://americansongwriter.com/julie-covington-dont-cry-argentina/

[3] U.S. Constitution. As to the bicameral system, see Art. 1, Section 1, Clause 2 "…which shall consist of a Senate and a House of Representatives). As to the establishment of three co-equal branches of government (also known as horizontal separation of powers), see Art 1, Section 1 "All legislative Powers herein granted shall be vested in a Congress…"; Art 2, Section 1 "The executive power shall be vested in a President…"; and Art. 3, Section 1 "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"; The limitations on the role of the federal government (also known as vertical separation of powers) are a result of the enumerated powers found in Article 1, Section 8 and the plain language of the 9th Amendment, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people;" and the 10th Amendment "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

the United States.[4] In this application, separation of powers refers to the fact that a legislature may enact laws that are subject to the Constitution, but they are incompetent to draft the form of government itself.[5] Conventions are specifically tasked with drafting governmental systems, but they have no place promulgating laws pursuant to any system they develop.[6] In this manner, a Convention cannot tell a legislature what laws to pass. And a legislature cannot limit or control a Convention. Since a convention cannot be limited by a legislature, this means that a Convention, once called, has extraordinary power.[78] This is especially true when considered in conjunction with the thunderous assertions of the Declaration of Independence, "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[9]

The combination of 1.) an unrestrained Convention and 2.) a philosophy that says a free people may form an entirely new system of government, provides a definitive answer to the question: What legal Authority did the 55 Delegates to the 1787 Philadelphia Constitutional Convention have? But before providing the obvious (to the point of now being anticlimactic) answer, consider that the 1787 Convention ignored the mandates of the Articles of

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[4] Winton U. Solberg, ed. *The Constitutional Convention and the Formation of the Union* (Urbana, IL, University of Illinois Press, 1990), 67-70.

[5] Gordon S. Wood, *The Creation of the American Republic 1776-1787* (New York: Norton, 1969), 338. The philosophical underpinning to explain the desirability of this idea is "nothing can be a greater violation of reason and natural rights, then for men to give authority to themselves."

[6] Ibid. 335.

[7] Concerns over this issue were present at the 1787 federal Convention itself, and the authority of the Convention to effectively abolish the Articles of Confederation was a topic of discussion. The matter is discussed and the resolution of the issue is documented in late August 1787 as follows "The people were, in fact, the fountains of all power, and by resorting to them, all difficulties were got over, they could alter the constitutions as they pleased." James Madison, Notes on the Convention, 31 August 1787.

[8] Gordon Wood is an objective historian that has often used the review format to push back against postmodern historical treatments that fail to accurately reconstruct the past. See, David Gordon, "Review: The Purpose of the Past: Reflections on the Uses of History, by Gordon S. Wood" *The Misses Review*, Vol. 14, No. 1 (Spring 2008)

[9] Declaration of Independence.

Confederation.[10] The Convention violated express provisions of the various State Legislatures' authorizing resolutions.[11] They radically changed the ratification system to dramatically lower the threshold needed to ratify (from 100% to 2/3), and then "bolted the door shut behind them" by raising the super majority threshold (from 2/3 to 3/4) needed to modify the Constitution after its initial ratification.[12]

Section 2: "Special Sauce"

In unique American style, a federal "Constitutional Convention" is vested with specific authority to craft a system of government.[13] So long as the Convention does not violate "inalienable rights," the Convention may construct, without further impediment (e.g. attempted limitations by a state legislative body on the scope of the Convention's work), a system of government "in such form, as to them shall seem most likely to effect their Safety and Happiness."[14] A Convention represents the highest expression of the will of the people as to this limited purpose.[15] Accordingly, the Delegates to the 1787 Philadelphia Convention were solidly within their legal rights to abrogate the Articles of Confederation and craft an entirely new system of government inclusive of changing the ratification process.

To be clear, a Constitutional Convention in the American political experience has these critical ingredients that, when mixed together, are greater than the sum of the initial parts:

[10] Articles of Confederation, Article XIII

[11] See, for example, the Delaware Resolution that passed February 3, 1787, which specifically limited the authority of the appointed delegates as follows, "So always and provided, that such Alterations, or further Provisions, or any of them, do not extend to that Part of the Fifth article of the confederation of the said States."

[12] David A. Super, "A Dangerous Adventure: No Safeguards Would Protect Basic Liberties from an Article V Convention" *American Constitutional Society* Issue Brief October 2021. https://www.acslaw.org/wp-content/uploads/2021/10/Super-IB-Final3615.pdf

[13] Like any good restaurant's "special sauce," the mix of ingredients in just the right way can produce a result that is far greater than the sum of the parts assembled.

[14] Declaration of Independence.

[15] Wood, 319.

1.) It is subject to and protected by a separation of powers from federal and state legislative bodies. This fact prohibits a Convention from both creating a system of government and then running that same system of government, but it also prohibits legislative bodies from limiting or interfering with their designated work once they are convened[16]; and,

2.) Provides an outlet for peaceful revolution, and the opportunity to enact a completely new system of government in conformity with the Declaration of Independence. Once a Convention is convened, a revolution is not just possible, it is expected.[17]

Due to the above, the American concept of a Constitutional Convention differs from the English experience. The English Convention method was born of necessity and most notably used in the somewhat awkward times when a monarch is being deposed by force or replaced in a bloodless revolution.[18] However, in the English example, the legal authority for a Convention to act was wanting at best, and quite possibly treason.[19] The only real determiner of legitimacy was which end of the sword you were standing at when the matter was called to question.

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[16] Only two states, New Jersey and North Carolina sent Delegates to Philadelphia without any restrictions on how they may amend the Articles of Confederation. See, New Jersey Legislature, "Resolution Authorizing and Empowering the Delegates," November, 24, 1786, State of North Carolina, "Appointment of Delegates," June 1, 1787. All of the remaining states that sent Delegates (Rhode Island never sent any Delegates) included limiting language of various degrees. For example, Delaware and Massachusetts both prohibited their delegates from surrendering the equal suffrage provisions of Article V of the Articles of Confederation. See, Delaware General Assembly, "An Act Appointing Deputies," February 3, 1787.

[17] A Convention is not to be brought forward for trivial matters, but with an expectation of fundamental change. As Alexander Hamilton noted, "The States sent us here to provide for the exigencies of the Union. To rely on and propose and plan not adequate to these exigencies, merely because it was not clearly within our powers, would be to sacrifice the means to the end." Notes on the Convention, June 18, 1787. In this matter he was far from alone in this thought. James Wilson, a delegate from Pennsylvania, shared these same thoughts at the Pennsylvania Ratifying Convention, "The Federal Convention did not act at all upon the powers given to them by the states, but they proceeded upon original principles, and, having framed a Constitution which they thought would promote the happiness of their country, they have submitted to their consideration, who may either adopt or reject it, as they please." James Wilson, Pennsylvania Ratifying Convention, Nov. 26, 1787.

[18] Wood, 310-311.

[19] Wood, 310-311

Section 3: Impact Upon 21st Century Public Policy

The Constitution of the United States is the supreme law of the land and, under its legal framework, Americans have seen more liberty, more prosperity and a greater leap in living standards than at any other point in all of recorded civilization. Yet the specific legal authority by which it was crafted in 1787 was, as we explore in Section 4 below, just as unevenly understood then as it is now.

The historically understood legal principles (as of 1787) that bridge the gap between State Legislatures empowering, with set limitations, Delegates to consider Amendments to the Articles of Confederation and the final product on September 17, 1787, have been too frequently ignored in historical reference work. This failure of scholarship has created a "knowledge vacuum" in which all manner of nonsense has filled in, and thus it has been responsible for a flood of bad public policy decisions up to and including today.[20]

The best evidence of the existence of a "knowledge vacuum" in this area is that both sides of the political spectrum are equally confused and have both tried to craft critical public policy on the foundation of bad history. This is most notable with organizations that operate at various extremes of the American ideological political spectrum that have utilized this "blind spot" in American history to advance radical policies.[21] A specific example that transcends political ideology can be found in both historical and current movements to use Article V of the US Constitution to convene a Constitutional Convention. Currently, what is considered by most to be the "political left" promotes this as a way to overcome what they perceive to be bad Supreme Court cases like Citizen's United.[22] Conversely, so called "conservative" radio hosts

[20] Super, 1-2
[21] Ibid, 5-6.
[22] See, Wolf Pac, Accessed 2/25/22, https://wolf-pac.com/

like Mark Levin promote the exact same Article V Constitutional Convention, but for the purpose of "reigning in big government."[23] Both ideological extremes are utilizing faulty historical analysis on this kay issue, even to the point of being deliberately misleading.[24]

Section 4: The Convention Method: A Maelstrom of Views

In the lead up to the Convention, the historical evidence is clear that there was a wide view of the powers of a Convention. No doubt, this has led to confusion today in understanding the powers of a Convention as untrained historians can cherry pick 18th century quotes that match their desired position without understanding the context and acceptance of those various positions among contemporaries.

As for the Philadelphia Convention, some refused to participate at all. Some saw the Convention as having improperly overstepped its authority and argued against the document it produced. Some agreed that the Convention was out of bounds but that the result was necessary and thus the usurpation was acceptable. James Madison's opinions and arguments ultimately won out both on the Convention floor and in the ratification debates that followed.

On September 15, 1787, Rhode Island issued a Resolution explaining why they refused to send Delegates to the Convention and why they saw the whole affair as unnecessary and dangerous. The resolution argued that a Convention could very well mean the end of the Articles of Confederation: "As the Freemen at large here have the power of electing Delegates to represent them in Congress, we could not consistently appoint Delegates in a convention, which might be a means of dissolving the congress of the Union and having a Congress without a Confederation." And that such a result would be an open breach of Article XIII of the Articles of

[23] See, Convention of States, Accessed 2/25/22, https://conventionofstates.com/
[24] Super, 3

Confederation, describing the profound consequences of the broken "Compact" as causing the nation to be "all lost in a Common ruin."[25]

Of those that saw the Convention as not having authority to exceed the limitations on their charges and held the entire effort at fault for it, the usual anti-federalist suspects are chief among their number. During the Virginia Ratifying Convention, Patrick Henry said, "That they exceeded their power is perfectly clear…the federal Convention ought to have amended the old system - for this purpose they were solely delegated. The object of their mission extended to no other considerations."[26] A Delegate from Pennsylvania, Robert Whitehall, objected even more vociferously:

> "Can it be said that the late Convention did not assume powers to which they had no legal title? On the contrary, Sir, it is clear that they set aside the laws under which they were appointed, and under which alone they could derive any legitimate authority, they arrogantly exercised any powers they found convenient to their object, and, in the end, they have overthrown that government which they were called upon to amend, in order to introduce one of their own fabrication."[27]

John Lansing was a Delegate from New York. What he saw in the early days of the Convention was so abhorrent to his view of the powers of the Convention, he abruptly left Philadelphia on July 10, 1787. Just before he left, he made the following comments from the floor, "The power of the Convention was restrained to amendments of a federal nature…the acts of Congress, the tenor of the acts of the States, the commissions produced by the several Deputations, all proved this….it was unnecessary and improper to go further."[28]

[25] Rhode Island General Assembly "Resolution on Refusal to Appoint Delegates" September 15, 1787.
[26] Virginia Ratifying Convention, June 4, 1788.
[27] Pennsylvania Ratifying Convention November 28, 1787.
[28] Notes on the Convention, June 16, 1787.

Other respected founding era luminaries agreed that boundaries were crossed, but such abuses were justified by the circumstances at hand. Edmund Randolph was a respected Delegate from Virginia. Early in the Convention process, the issue of the power of the Convention was a matter of significant discussion. The following exchange of ideas on the Convention floor on June 16, 1787, is telling:

> William Patterson: "Let us return to our States, and obtain larger powers, not assume them of ourselves."
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> Edmund Randolph: "Mr. Randolph. was not scrupulous on the point of power. When the salvation of the Republic was at stake, it would be treason to our trust, not to propose what we found necessary. He painted in strong colours, the imbecility of the existing confederacy, & the danger of delaying a substantial reform. In answer to the objection drawn from the sense of our Constituents as denoted by their acts relating to the Convention and the objects of their deliberation, he observed that as each State acted separately in the case, it would have been indecent for it to have charged the existing Constitution with all the vices which it might have perceived in it. The first State that set on foot this experiment would not have been justified in going so far, ignorant as it was of the opinion of others, and sensible as it must have been of the uncertainty of a successful issue to the experiment. There are certainly reasons of a peculiar nature where the ordinary cautions must be dispensed with; and this is certainly one of them. He wd.**???** (not) as far as depended on him leave anything, that seemed necessary, undone. The present moment is favorable and is probably the last that will offer."[29]

Ultimately, the matter was resolved in favor of accepting the authority that is granted to an American Constitutional Convention. This fact is documented by Madison himself, "The people were, in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased."[30] Not only did this rationale carry the day on the convention floor, the argument was persuasively used to ratify the Constitution, as this

[29] Notes on the Convention, June 16, 1787.
[30] Notes on the Convention, August 31, 1787.

statement from Federalist No 40 suggests: "A rigid adherence in such cases to the former [limits of power imposed by the States], would render nominal and nugatory the transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.'"[31]

Section 5: The Best Answer

The C.J.S. or "Corpus Juris Secundum" is the largest and most well respected American legal encyclopedia in print. The entry with regard to a Constitutional Convention reads as follows: "The members of a Constitutional Convention are the direct representatives of the people and, as such, they may exercise all sovereign powers that are vested in the people of the state. They derive their powers, not from the legislature, but from the people: and, hence, their power may not in any respect be limited or restrained by the legislature. Under this view, it is a Legislative Body of the Highest Order and may not only frame, but may also enact and promulgate, a constitution."[32] This entry in the Corpus Juris Secundum correctly identifies the nature of a Constitutional Convention with appreciation to separation of powers from a legislature and authority to create new systems of government pursuant to the Declaration of Independence.

The evolution of American law on the matter of the power and autonomy of a Constitutional Convention grew from initial uses to craft State Constitutions following the break with England, with the first example being employed in Pennsylvania and called a "Council of Censors."[33] The Council of Censors "did represent the first and only provision in 1776 for

[31] James Madison, Federalist No. 40.
[32] 16 C.J.S. 9, citing the following cases: Sproule v. Fredericks (1892) 11 So 477 (Mississippi), Koehler v. Hill (1883) 14 N.W. 738 (Iowa), Loomis v. Jackson (1873) 6 W.Va. 613 (West Virginia), Frantz v. Autry (1907) 91 p. 193 (Oklahoma), Cox v. Robinson (1912) 150 S.W. 1149 (Texas).
[33] Wood, 339.

calling a body distinct from a legislature to amend a constitution, and as such was used effectively in 1786 by the Vermonters, who had in 1777 copied almost verbatim the Pennsylvania Constitution of 1776.[34]

Massachusetts and New Hampshire soon followed Pennsylvania's example.[35] From there on, other states followed, "Only a Convention of Delegates chosen by the people for that express purpose and no other, as the South Carolina legislature after four years of bitter contention finally admitted in 1787, could establish or alter a constitution."[36] The end result was a mechanism that permitted for revolution when needed and provided for it in a peaceful way, "It not only enabled the Constitution to rest on an authority different from the legislature's, but it actually seemed to have legitimized revolution."[37]

Multiple legal authorities have looked upon this historical record and have reached the conclusion that a Constitutional Convention is a special body with enormous power that cannot be controlled or limited by any legislature.[38] Of special note, former U.S. Supreme Court Chief Justice Warren Berger addressed the issue and opined, "[It is my] opinion that there is no effective way to limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda."[39] Associate Supreme Court Justice Arthur Goldberg addressed the matter in an Editorial published in the Miami Herald, "There is no

[34] Ibid.
[35] Ibid, 340-342.
[36] Ibid, 342.
[37] Ibid.
[38] Multiple legal scholars including former federal judges, law professors from Harvard, Yale, Stanford and many others all caution strongly against an Article V Constitutional Convention. Archived with the John Birch Society, Accessed 2/19/22, https://jbs.org/assets/pdf/Legal-Experts-Con-Con.pdf.
[39] Warren Berger, Letter to Phyllis Schlafly June 22, 1988. Archived with the John Birch Society, Accessed 2/19/22, https://jbs.org/assets/pdf/Legal-Experts-Con-Con.pdf.

enforceable mechanism to prevent a Convention from reporting out wholesale changes to our Constitution and Bill of Rights."[40]

Section 6: Be Careful of What You Wish For

Other nations have concepts called a Constitutional Convention. However, in America, it has a special character born of uniquely American political virtues. The most underappreciated aspect of an American Convention is the application of separation of powers. If a legislature is incompetent to limit or muzzle a Convention, it assumes tremendous power once convened. And once convened, a Convention has the full weight of the legitimacy of the Declaration of Independence to "institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

Revolution is no small word and no small concept. Revolution has a massive consequence, and we must be careful with it. Is it possible that the next convention would turn of as solicitous as the last? Perhaps. But also possible is a river of blood like the French Revolution.

Other scholarly treatments of the federal convention add emphasis to the concern over being too cavalier with Revolution. Their research and contribution strongly suggests that we must take great care in our understanding of when to best consider using a Constitutional Convention as a political tool. Much of late 21st Century scholarship on the American founding era politics has centered around a "Diplomacy School" of thought that emphasizes the

[40] Arthur Goldberg, "Steer Clear of Constitutional Convention" *Miami Herald* Sept. 14, 1986, 6C.

understanding of each state as a sovereign entity.[41] As applied to the Power of the Convention, the States had legal authority to scrap the Articles of Confederation and draft a new system of government because sovereigns have the right to negotiate treaties with other sovereigns.[42] Proponents of this view argue that the chief driving force behind the work in Philadelphia in 1787 was less ideological, and more of a geo-political awareness of massive security concerns that forced the sovereign states to unite on the chief basis of survival.[43] The Convention had massive power, but that power was harnessed in a positive direction through a significant factor driving unity of purpose among the sovereign delegations. A relatively obvious corollary suggests that if this same massive power were exercised in the currently existing highly polarized political environment, such application would be rife with potential disaster.

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[41] Robbie J. Totten "Security, Two Diplomacies, and the Formation of the U.S. Constitution: Review, Interpretation, and New Directions for the Study of the Early American Period" *Diplomatic History*, Vol. 36, No. 1 (January 2012). Totten suggests that, throughout the main of the 20th Century, major treatments of the 1987 Constitutional Convention focused on ideological, economic motivations. This includes "progressive" historians such as Charles Beard, An Economic Interpretation of the Constitution of the United States (New York, 191-3); and the "Cambridge School" historians such as J. G. A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (Princeton, NJ, 1975); Historical originalist Jack Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (New York, 1996); and Gordon Wood, The Creation of the American Republic , 1776-1787 (Chapel Hill, NC, 1969). However, more recently, internationalists' views that construct the motivation of the framers to be dominated by international security have come forward. Daniel Deudney, "The Philadelphian System: Sovereignty, Arms Control, and Balance of Power in the American States-Union," Circa 1787-1861, International Organization Vol. 49 (Spring 1995): 191-228, which he expands upon in Daniel Deudney, Bounding Power: Republican Security Theory From the Polis to the Global Village (Princeton, NJ, 2007), esp. 161-92; David C. Hendrickson, Union, Nation, or Empire: The American Debate over International Relations, 1789-1941 (Lawrence, KS, 2009).

[42] Ibid, 80

[43] Ibid.

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