A Brief Discussion about Robert Natelson

By Bill Walker

Natelson advocates a legal theory, rejected by the courts before he even wrote it, but warmly accepted by the extreme right wing groups that extends fiduciary law (otherwise known as employee/employer law) to the Constitution. He asserts that under the principles of fiduciary law convention delegates are no more than "agents" of the state legislatures operating entirely under their instructions. As I point out in my rebuttal to his proposal originally written for the Goldwater Institute, world recognized experts in fiduciary law have rejected his premise.

Natelson bases his fiduciary law theory on the fact that during colonial times (pre-revolution) the *English* colonies of North America (operating under English law at the time, that is the authority of the King of England) had authority to control conventions (and the delegates) held between them in a specific manner (i.e., giving these appointed delegates instructions as to what they would discuss and how they would vote at such a convention). Because colonies had such authority during the colonial era, Natelson asserts, the states of today *operating under American law a completely different form of law based on an entirely different form of sovereignty* (king as sovereign versus the people as sovereign) still have the identical same powers of control of a convention as they had in colonial times. He compares delegates to being "diplomats" for the states ignoring the fact the Constitution *expressly* states individual states do not enjoy diplomatic status and hence, any representative from them cannot enjoy diplomatic status.

Natelson advocates a "fiduciary" relationship exists between convention delegates and the state legislatures. He believes the legislatures are the "master" and convention delegates are the "agents" of the state legislatures. This fiduciary relationship, according to Natelson, grants the legislatures total control of the convention, from the choice of delegates to full regulation of convention agenda. However Natelson then reverses his "fiduciary" position by admitting that while the state legislatures entirely control the delegates, these delegates are still free to propose whatever they please for amendments. Despite this "freedom" Natelson then asserts Congress has the right to veto any amendment proposal from the convention if it desires (despite Supreme Court rulings which expressly contradict him). Others, inspired by Natelson's work, (but to his credit not Natelson himself) such as Compact for America and the state of Indiana have raised the concept of "fiduciary" control of a convention to a new level. They advocate delegates be arrested if they vary in any way from the instructions of the state legislatures.

To reach his conclusions, Natelson ignored numerous Supreme Court rulings which overturn his theory. He also ignored the record of the 1787 Convention which he failed to cite even once in his article for the Goldwater Institute. To his credit Natelson did discuss some court rulings in subsequent articles but failed to address the fact that during the1787 Convention the delegates did at one time allow for amendment proposal by state applications then voted to remove that passage in favor of state applications causing Congress to call a convention. Moreover, and equally importantly, the 1787 delegates changed the word "amendment" from singular to plural (amendments). This has the effect of allowing both Congress and convention to propose various amendment subjects rather than one amendment subject. Natelson asserts the former language of the proposed Article V still prevails despite the fact the Founders removed it by affirmative vote. Given the debate between same subject and numeric count as the basis on which a convention

call is based the question is obvious: as the previous language *clearly* stated same amendment subject to be proposed by the states, if the Founders desired this authority for the states instead of altering the language by a motion which *undeniably intends that state applications are for a convention call rather than a proposed amendment* why didn't just keep the original language?

While he does discuss some court decisions in subsequent articles (all premised on his first article) Natelson y avoids those decisions, such as McCulloch v Maryland, 17 U.S. 316 402-405 (1819) where the court unequivocally declared the Constitution was created by consent of the people and that without their consent, even though the original proposed constitution was drafted by the states, it had no force of law. Thus the court affirms the proposition that sovereignty resides with the people, not the states. Hence, if there is any "fiduciary" relationship for convention delegates it lies with the people, not the state legislatures.

Natelson also has avoided answering fundamental questions to his theory. For example, as all other groups involved in the amendment process (Congress, state legislatures and state conventions) all are elected by the people, under the terms of the 14th Amendment of equal protection of the law how can it be argued an Article V Convention is immune from election as the courts have stated, "conventions call for action by deliberative assemblages representative of the people, which…voice the will of the people" In short, why is an amendment proposed by Congress (an elected body) any different than an amendment proposed by a convention as in all constitutional aspects the two proposing bodies are identical. I discussed this fact in my Cooley Law School speech and presented Supreme Court decisions which found such discrimination as Natelson proposes unconstitutional.

There is another fundamental question Natelson ignores which, literally, is as plain as the language in the Constitution. How can the states limit a convention to proposing a single amendment (i.e., convention applications must to be for the same amendment subject before Congress must call a convention meaning it is the states who are actually proposing an amendment rather than the convention (and all who do so mislabel the convention usually with the entirely false label of "constitutional convention" whenever they advance this proposition) when the Constitution clearly states it is a "convention for proposing *amendments*" i.e., the power of amendment proposal lies with the convention not the states and the convention can propose *amendments* meaning it can propose multiple subjects?

My rebuttal to Natelson's theory, which he has never refuted, points these facts out. My work was, of course, based on the information Natelson had ignored in his article—Supreme Court rulings which directly refuted him as well as well as the public record of the 1787 convention and the subsequent ratification conventions held in the various states which also refuted him. I also provided in my rebuttal a legal, constitutionally supported method (see pages 99-108) whereby the states can regulate the convention agenda in real time *without* resort to the totally unconstitutional, anti-American proposals of Robert Natelson. Natelson has never refuted this proposal either.

Following the Goldwater article, Natelson authored the ALEC Report (American Legislative Exchange Council) in which he again advocated (p. 15) selection of delegates to a convention be by the state legislatures—*not* the people meaning the people shall have no say in who shall be a delegate to the convention, and as advocated by Natelson, no say in the agenda of the convention. Thus, he proposes to disenfranchise the American people from any participation whatsoever in the convention process as I pointed out in my rebuttal to the ALEC Report. In

short there is a *massive* amount of evidence contradicting him which Natelson has never responded to. Despite clear judicial and statutory language to the contrary Natelson (whom Levin labels an “expert”) persists in his theory to this day and still ignores the questions raised by myself and others about it.