My Response To Robert J. Thorpe
By Bill Walker

On January 17, 2012 at 8:48 am, local time, the Department of Justice received the John Guise Federal Criminal Complaint against members of Congress for failure to obey their oaths of office and call an Article V Convention. Under federal law Eric H. Holder, Jr. Attorney General of the United States has 30 days from the time of receipt of the complaint, January 17, to conduct a preliminary investigation and determine whether to act on the complaint or close it.

This means he must decide the issue by February 21, 2012. (The 30th day is February 20, a national holiday). Under the law, the attorney general is limited in his preliminary determination solely to the creditability of the evidence of the complaint, which, in this case, is the official record of the Congress of the United States, the Congressional Record. According to federal law, Attorney General Holder must determine whether it is in "the public interest" to require members of Congress to obey the Constitution. If the attorney general decides it is not in the public interest that Congress obeys the Constitution, his official decision will likely serve as an official model for future constitutional disobedience by the government.

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On February 1, 2012 I published an article on Nolan Chart entitled "The ALEC Report, The CATO Proposal; Examining the Errors." On February 2, 2012, Robert Thorpe published a response to my article on Nolan Chart entitled "What about Bill, ALEC, and Natelson? More Wag and Less Bark, Please." I feel obligated to respond to Thorpe's article with an article of response as he chose to write an article rather than the usual practice of putting his remarks in the comment section under my original article. He states in his sub-heading, "Bill Walker owes Robert G. Natelson and the thousands of ALEC members an apology."

An apology for what Thorpe? Being accurate? Pointing out that Natelson has written articles based on an unsupported legal theory of fiduciary control by state legislatures, which acknowledged experts in that field of law have stated is pure nonsense? Pointing out that well established law and public record demolishes this discredited theory? To these last two charges, I do plea guilty and humbly beg forgiveness from Thorpe, Natelson, and others like him. I am sorry that I burst your bubble guys but facts, as John Adams observed, are stubborn things.

Now, as is my practice, I will examine Thorpe's article in depth and as he provided a website in his column, examine its contents also. However, before beginning this examination, let me preface with a few remarks. First, I do not oppose a balanced budget amendment. I do believe it requires more than one amendment to resolve our national issues. Fortunately, the language of the Constitution allows a convention to take such actions and propose such amendments. I reserve any opposition or reservation on this subject therefore to the specific language, intent and meaning a proposed amendment

may contain. Second, unlike Thorpe who apparently was exhausted when he wrote his column I do have the time and energy to pick apart and refute his essay. As always, I use documented references, public record and other irrefutable resources. In short, I present facts, not allegations. I hope in future Thorpe fully recovers from whatever ails him and I wish him all the best in his speedy recovery. We need men like Thorpe to sling unproven, unsupported accusations around, ignore facts and present ridiculous positions. What would I write about if not for people like him? The reason Thorpe does not have the time or energy to pick my article apart is because he cannot and, as I will prove using his own documentation, even he does not wholeheartedly believe what he advocates.

Now, to quote Thomas Jefferson, "To prove this, let Facts be submitted to a candid world."

You may notice if you read my article in the rebuttal I referred to Natelson as "Professor Natelson." In my current article, I simply call him as "Natelson" just as I call "Thorpe", "Thorpe." This is not an accident. In his original article, Natelson presented a scholarly piece—incorrect but scholarly. I therefore felt obligated to give him due respect as scholar. However when anyone urges the American people be cut out of the Constitution and excluded from any participation in altering that document, thus depriving them of their most fundamental right, the right of alter or abolish, then I give them no respect whatsoever. Natelson and Thorpe want to deprive the people of their most precious inalienable right, a right upon which, all other rights of the people, rests. These two would steal that right from the American people. I oppose them with all I have for that. The rights of free speech, gun ownership, fair trial, freedom of religion, voting and so on all are based on the right of the people to alter or if required, abolish their form of government. I will not apologize to anyone who supports such an anti-American position of taking this right away from the American people. Indeed, I believe the members of ALEC owe the American people an apology for even *appearing* to believe and accept what Natelson has proposed. I believe ALEC should publicly renounce this so-called "handbook" and completely disassociate itself from it. Not to do so leads to one conclusion: the ALEC membership supports overthrowing the sovereignty of the American people. As my original article provides reference to prove this charge, I will not repeat specific references here except to state they exist.

As to Thorpe's allegation, that I incorrectly stated the ALEC report was "secret" that not true. It is true the report now appears on the ALEC site. However, what Thorpe apparently does not understand is the length of time I spend writing my articles. According to my notes, I received notice about the ALEC report in mid-January. Being a journalist, I check out facts before writing on them. One of the first thing I always do is check out references which in this case involved going to the ALEC website and searching for the report even though I had a link to it from another source. At that time a link to the report was not on the website. As far as I can determine the link made a recent appearance. I made an extensive search of the ALEC website at the time of writing including the publication page on which the link now exists. The link was not there at the time of my research, hence my assertion the report was, at that time, secret. As I use original research material as much as possible, *if the report had existed as a link on the*

website at the time I wrote the article I would have used that link in my article instead of the link I did use as such original use eliminates any possible charge of contrivance, tampering or similar charges. In short, I use good journalism practices in my articles, in this case, use of documented original references. I could not do this in the case of this "handbook" because the link to prove it on the original source website did not exist.

Thorpe then states I misstated that Natelson, in his "2010 Goldwater paper did not once refer to the actual 1787 Convention proceeding vis-à-vis the amendment process." Again, Thorpe makes a misstatement. Natelson produced *three* reports in 2010. The last two reports were published *after* I published my rebuttal to part one of his reports. If you read my rebuttal, it clearly refers only to the first part of the three reports. Logically, as the title of that report dealt with the Founders, references to the Founders at the 1787 Convention would be in the first part of the report. The report is on the Internet. It does not contain any reference whatsoever to the 1787 Convention. Natelson may have referred to the convention later in remaining two parts of his report, but he did not in the first part. Moreover, as the original part served as the basis on which he made other assertions and claims, the entire report comes into question when I clearly showed the assumptions presented in first part were inaccurate. Again, as the references to this are easily available, I will not repeat them here.

The third "charge" Thorpe levels is my statement that Natelson, by virtue of the fact he wants to cut out the American people and their power of election out of the amendment process, somehow constitutes a "smear" of Natelson's character. He takes issue with my "smoke filled rooms" allegory. Thorpe wonders why I "felt the need to publicly demean Natelson's character, research and scholarship." I felt the need because his research and scholarship are factually, historically and legally wrong. If the facts support Natelson, I have stated that in my article. Generally speaking however, the facts do not support him.

An Article V Convention is a serious issue. Inaccurate information is no help in resolving questions and concerns regarding it. Natelson concocts a theory many, for whatever reason, choose to believe because that unproven theory allows them to "control" the agenda of a convention *without* bothering to deal with the obstacles an elective democracy creates. The most obvious obstacle is the American people usually demand *proof* before handing over the reigns of government. By proof, I mean *documented, factual, irrefutable evidence*. Thorpe and Natelson want a way around the vetting process of American politics, in other words a free ride. Natelson ignores legitimate, relevant evidence as my rebuttal repeatedly demonstrates. This evidence includes Supreme Court rulings, which *directly refute* Natelson's position. Good research demands such issues be addressed in that research, not ignored because they constitute an inconvenience. If the fact Natelson uses bad information, references and contrivances in his material which reflects badly on his character that is his problem, not mine. If he does not want bad reflections on his character vis-à-vis, his research I suggest he does better research. It is not, as Thorpe says, a "smear" job to point out errors; it is the responsibility of citizens to demand accuracy not only of their elected leaders but those who purport to effect or affect the American people. Natelson and Thorpe are both inaccurate. Rejection of them

for this reason is obligatory. In short, I corrected the wrong information Natelson wrote and I do not apologize for that.

Unlike Thorpe suggests I will not be a wagging tail for anyone. I will not "go along" just to be "politically correct." If the charge of "mudding the waters" is applicable to anyone it is applies to Natelson, not me. Neither Thorpe nor more significantly, Natelson, has attempted to refute what I have stated as to the substantive issues of the ALEC report or Natelson's earlier work, which I analyzed. Thorpe says the ALEC handbook is "invaluable" yet he has not proven this statement by refuting my specific objections to it. Instead he begs off by saying he lacks energy to do so. It has been well over a year since that my critique of Natelson's original work. Natelson has never responded or attempted to refute my original rebuttal. He certainly has had the time. The only possible conclusion from this fact is I am correct in my critique.

Now let us discuss Thorpe's group Balanced Budget Amendment Taskforce (BBAT) in some detail. First, it is one of numerous groups on the Internet all supporting a balanced budget amendment. This particular conservative movement believes the states have the power to limit a convention to proposing a single amendment, in this instance, a balanced budget amendment. Disproving his assumption is no more difficult than referring to Article V, which clearly allows for both Congress and a convention *to propose amendments*, not *amendment*. A simple read of any competent reference of the 1787 Convention proceedings clearly shows this plural was no accident and was arrived at after several drafts of Article V had been discussed and voted upon by the delegates. It is worth noting had the BBAT proposal of convention regulation existed in 1787 under no circumstances could that convention have written the Constitution. The delegates would be in jail or forced to propose a single alteration in language to the Articles of Confederation, a completely unsatisfactory result. Even the Congress of that day noted in its original resolution calling the convention it required several *alterations* to fix the issues of the Articles. We are in the identical situation today. A single amendment just is not going to do the job and we are foolish if we limit our last constitutional option to a plan that prevents it from doing that job.

I have said this before, but I'll repeat it here: the Supreme Court on numerous occasions has unanimously stated states cannot alter the terms of Article V, operate under the *federal* Constitution when using the amendment process and cannot add anything to the expressed language of that Article. Thus, the states have no authority whatsoever to limit a convention by their applications. There is little doubt if presented with BBAT proposals the courts would unanimously rule against them.

BBAT's position is not only unconstitutional but also politically naive. What happens if a convention is limited as described and during the course of the convention realizes *additional* amendments are necessary to solve the problem? What then? The states, having followed the unsupported advice of Natelson and Thorpe, will be too far out on the political branch to retreat. The only recourse will be for the convention to propose an amendment, which it has already publicly acknowledged is inadequate and submit it for ratification. The result will be political disaster for the states and the nation. The states

will have no choice but to defeat the amendment proposal they themselves insisted be proposed. This is why the Founders gave the convention latitude—so they can avoid being political asses by not doing the job assigned—fix the problem causing the convention call in the first place. For the record, the states, to date, have identified 22 separate issues they feel require amendment in their applications. It is height of ludicrousness to suggest a single amendment can address all 22 issues and have any chance at ratification. This is why a convention has flexibility. The convention can examine the issues and decide which actually require amendment and which issues are not longer relevant. In short, as described by the Supreme Court, it does its assigned constitutional job—a deliberative body representative of the people and their needs.

Under Thorpe and Natelson's scenario of convention agenda limitation, state legislatures will be loathe to repeat the mistake again of having to repeal what they themselves proposed. This means the states will not submit the necessary applications for a second convention to do the job the first convention should have done but couldn't because it was prevented by the dynamic duo and their crackpot theory of fiduciary convention control. The result— the saddling of future conventions not only with false charges of "runaway" but an even heavier load: they cannot do the job. The upshot of this is the American people will lose faith in the most important part of the Constitution, the amendment system and its ability to change our form of government to meet the changing needs of the people. The dangers of this are obvious.

Contrast this with what the Founders really intended will happen in a convention. An open public forum, free from government interference yet limited by constitutional standards. A forum that resolve issues with proposals tailored to address the problem or problems yet constrained within the American system of government, a carefully considered, planned operation designed to bring about thoughtful change when required. A open, public forum where all have the opportunity to present ideas and concepts yet a forum with such a high standard of passage only the best ideas survive the vetting process. The dynamic duo wants to avoid this and substitute their bogus plan instead.

BBAT cannot even get the number applications submitted by the states for their own political subject, a balanced budget amendment correct and they want the power to regulate the entire convention based on their research? BBAT states only 17 states have "active" applications for a balanced budget amendment. This is incorrect.

As shown on the FOAVC website 39 states have submitted applications for a balanced budget amendment. This raises an obvious question: why not use this public record to obtain what Thorpe *says* he wants to obtain: a convention to consider an amendment for a balanced budget? It is far easier to politically achieve a goal when already achieved. Why not then turn from getting more applications to bringing pressure on Congress for a convention call? Why not instead of worrying so much about limiting a convention realize that politically it is irrelevant—the public record shows that few other issues have enough political muscle *today* to actually survive the convention process and actually be proposed. In short, the political process limits the convention just fine *without* any interference from Natelson and Thorpe. So why not take advantage of that fact and push

ahead with the balanced budget amendment proposal Thorpe says he wants. Thorpe accuses me of mudding the waters for correcting him. By doing so instead of him having 17 states on his side, he now has 39, one more than is needed to *ratify* a proposed balanced budget amendment. I am sorry if I made your job easier Thorpe and gave you the means to politically achieve what you say you want. Please forgive me.

Page 8 of the BBAT publication entitled, "Balanced Budget Amendment Campaign Prospectus" has several misstatements. The prospectus states, "If BBA 2.0 supporters are in the majority in the House and Senate, the BBA Convention Joint Resolution is likely to pass without the need for the President's signature or review by the Supreme Court." BBAT has obviously failed to read Supreme Court decisions. In Hollingsworth v Virginia, (3 U.S. 378 (1798)), the court ruled the president shall have no part in the amendatory process. This means there is no requirement for a presidential signature on any convention call and hence no way Congress can pass such a resolution as described. The reason is abundantly clear. If presidential signature were required, the president could withhold it or veto the resolution and thus prevent a convention call even though the states have applied. Article V mandates a call, which is not a resolution nor a law, but a specific act of Congress separate from these acts of legislation. It also mandates the call is peremptory meaning the political makeup of Congress is irrelevant as to it calling an Article V Convention. As the Supreme Court has noted, the amendment process is not the same as the legislative process and therefore operates differently. The court has stated the amendment process specified is Article V is not subject to alteration by either state or federal legislatures or courts. Again I apologize Thorp for eliminating any problems he envisions with Congress. By use of public record and court decision all options on the part of Congress and courts are removed. This means his amendment proposal will get to the convention without Congress, the president or the courts preventing it.

There are more examples of misinformation and poor research in the BBAT material. On page 1 of an article entitled, "Model Amendments Convention Act" the second paragraph reads, "Parts of this act may be precatory rather than legally binding, since courts have held that state law cannot always bind a state legislature or convention operating under Article V. Convention are bound by the scope of the applications (which may be reflected in the congressional call issued pursuant to the applications, and delegates are bound by their commissions and instructions. However, conventions always have been entitled to establish their own rules and procedures." [Closed ellipse is missing in original text].

At the very end of article is this disclaimer: "This model Act, like other model statutes, does not constitute legal advice. Before it is introduced in the legislature of any state, it must be assessed and adapted to the law of the applicable state by an attorney or attorneys licensed to practice in that state." Thorpe attaches disclaimers to his "advice" an act hardly indicative of someone who believes wholeheartedly in its pronouncements.

Webster's Dictionary defines "precatory" as "to entreat." In turn, "entreat" is defined as "to ask earnestly: petition or supplicate urgently: beg for. Synonyms: see BEG." In other words, the act "begs" that the American people will go along with being cut out entirely of the amendment process (Section 4, part (a)). It begs despite its unconstitutionality,

delegates allow for removal of themselves from office (Section 4, part (b)). It begs that delegates will obey "instructions" as to how they will vote, what they will vote on, what subjects they may discuss at the convention and so forth (Section 5, parts (a), (b), Section 7 parts (a), (b). Finally, it begs delegates agree to be subject to ***criminal prosecution*** if the delegate *dares* to exercise his First Amendment (and other) constitutional rights (Section 5, part (c). There are so many constitutional and legal violations in this "model" legislation it would take pages to describe them. Even I do not have that much energy. To any American these violations are so obvious, so repugnant to the American system of government, no further explanation is required. If anyone thinks I'm wrong, then I suggest they put themselves under my control as prescribed in this "model" legislation and allow me to control them as prescribed when it comes to them voting in the next election or participating in any public or political event I choose they will participate in. I suspect their participation will be short-lived.

This "model" legislation does not constitute sound legal advice. It constitutes total idiocy. There is no legal basis for this "advice." I have written extensively on what the Supreme Court has ruled on this issue and *those rulings do not support what Natelson and Thorpe state*. Indeed, in most cases, Supreme Court rulings *entirely disagree* with what Natelson and Thorpe state. It should be obvious if this theory were ever taken to court such ideas would be tested by the court or court procedure meaning an opposition *paid* to pick it apart with all the energy and time they need at their disposal. I expressed the points I have written on and proved as to convention procedure in a federal court, the Supreme Court of the United States to be exact, where the federal government conceded I was correct as to fact and law.

I do not believe Natelson or Thorpe has ever presented their cockamamie theory in federal court. Thus, no outside objective source has vetted their theory. As far as I know not a single state has ever passed, let alone even held so much as a committee hearing on the proposed legislation written by BBAT. As I have discussed before any provision in any state law attempting to regulate convention delegates as to how they shall vote or what they shall discuss, is unconstitutional. BBAT acknowledges as much in the above referenced disclaimers. As my last article discussed these issues and the facts supporting them, which Thorpe says he is too exhausted to refute, I will not repeat them here. I suggest if Natelson and Thorpe want to prove me wrong instead of writing a column in Nolan Chart complaining their feelings are hurt and asking for an apology because I dared print the truth they actually go to a state legislature and attempt to get this "model" legislation enacted. Better still, go to federal court and try to get the court to affirm its validity. I predict neither will accept even the slightest portion of this "model" legislation.

Thorpe, Natelson and I agree on two central points: The Constitution currently requires a convention call. The convention needed to resolve issues of this nation. We disagree on the how of the convention, the third of the five steps to achieve a convention. I base my position on well-established law, court rulings, and my experience in the federal court system, historic record and public record. In short, the American system of government has vetted my positions. Because I realize what Thorpe and Natelson have yet to publicly recognize, that when the government makes decisions in this regard they will use these

resources as the basis of their decisionmaking, I am confident my positions will ultimately prevail. Thorpe and Natelson want a free ride. This is not the intent of the American system of government or its political system. If Thorpe and Natelson cannot stand the heat of the vetting process of their ideas, they should stay out of the kitchen of the American political process. I will say it again—their ideas are bogus and un-American. They should find *real* solutions to questions they have about a convention, solutions backed by public law, court rulings and so forth. They need to stop mudding the waters themselves with crackpot theories so full of holes about controlling the convention *nobody* can support them. It makes one wonder since these two are so far out there—do they really support a convention or have just come up with cleaver means to oppose it by making a convention so repugnant no one will support it.