

# The Strange Case of Senator Mike Gravel

By Bill Walker

Recently I received an email concerning the [National Initiative](#). This is a constitutional proposal by former Alaska senator Mike Gravel. Part of his proposal involves using an Article V Convention to bring his proposal into effect.

Fundamentally, I agree with the senator's proposal though some of its details may require re-examination. No doubt, when a convention undertakes consideration of the [National Initiative](#) the proposal will receive the detailed examination required. As such, as the purpose of this article is not to discuss the merits of the proposal but rather the theories under which Senator Gravel proposes it, I will leave a detailed discussion of for another day.

In sum, The National Initiative (quoting the proposal) “is a legislative package sponsored by The Democracy Foundation <http://ni4d.us/>, a non-profit IRS 501 C (3) corporation that includes an Amendment to the Constitution and a Federal Statute. The Democracy Amendment 1) amends the Constitution asserting the legislative powers of the people, 2) sanctions the national election conducted by the nonprofit corporation Philadelphia II, giving Americans the opportunity to vote on the National Initiative, 3) creates an Electoral Trust (vital to maintain citizen lawmaking independent of representatives) and defines the role of its trustees, and 4) outlaws the use of monies not from natural persons in initiative elections.

The Democracy Act is a proposed federal statute that 1) sets out deliberative legislative procedures (copied from Congress) to be used for initiative lawmaking by citizens in every government jurisdiction of the United States, 2) defines the limited powers of the Electoral Trust that administers the legislative procedures on behalf of the people, and 3) defines the electoral threshold that must be reached for the National Initiative to become the law of the land. It is important to understand that the National Initiative does not alter the existing structure or powers of representative governments. Rather, it adds an additional Check — the People — to our system of Checks and Balances, while setting up a working partnership between the people and their elected representatives.”

Senator Gravel [publicly favors](#) an Article V Convention. He has presented several arguments for holding a convention. He is one of a handful of public figures that has stated publicly and correctly, the states have submitted the proper number of applications from the proper number of states required by the Constitution to cause a convention call. Indeed, he notes, “That numeric requirement—the only specified requirement in Article V—has been satisfied, with 50 states submitting over 500 requests.” (To be completely accurate, [49 states have submitted 748 applications](#)).

Despite his slight numeric discrepancy, the senator's arguments for holding a convention are sound. His assertion the 1787 Federal Convention was a “runaway” convention, however, is incorrect. As I have proved [many times in these columns](#) the myths spun by convention opponents the 1787 convention was a “runaway” may “sound” good, but the historic record conclusively proves there was no runaway convention. Thus, those

convention proponents who accept this myth do nothing but accept a premise, which needlessly weakens their own position.

In fact, the 1787 convention was one of a multiple step process of proposal and approval involving the people, the states and the national government mandated by the Articles of Confederation ultimately resulting in the Constitution replacing the Articles as law of the land. The most persuasive evidence, or lack of it, that the convention was not a runaway is the fact today's convention opponents are unable to provide even one example of any convention contemporary asserting the convention was, in fact, a runaway—that is, it did not possess the legal right to propose the Constitution. Clearly, if the convention were a runaway at the time, surely someone, most likely an opponent of the proposed Constitution (and there were many) would have mentioned this fact. No doubt if such a written record existed, it would be splashed from one end of the Internet to the other by today's well funded convention opponents, but the reality is no such record exists. The fact is the reason most people believe the convention was a runaway stems not from any historic record or fact but is due to the great financial gulf between super rich extremist usually conservative opponents and woefully under funded proponents of all political stripes who are lucky enough to get their message out at all. Thus, despite the fact Gravel is wrong about the 1787 convention being a “runaway” this should not detract from his otherwise solid arguments for holding an Article V Convention.

However, the senator makes two erroneous statements in his presentation that cannot be overlooked. First, he makes an assumption about employing Article VII of the Constitution to bring about ratification of his proposal. Second, he fails to take advantage of what the states have already submitted in their applications. In both cases, the senator wastes precious valuable political capital by presenting a needless and valueless political theory, which detracts from his presentation, and by ignoring a political advantage presented him by political decisions made before his time.

In his presentation, Senator Gravel states, “How can American voters amend the Constitution and enact the National Initiative if Congress opposes it? The people must go around all three branches of government to amend the Constitution. There are only two venues within our government structure where constitutions, constitutional amendments, and laws can be enacted into law: the people or their elected representatives. The Framers in Article 7 of the Constitution provided a procedure for We, the People to ratify the Constitution and thereby create our government, but failed to provide procedures for the people to alter the Constitution, even though they repeatedly said the people had the right to change their government as they saw fit. However, the Framers did provide amending procedures for themselves in Article V, thereby perpetuating control of government be elites.

Conventional wisdom now holds that Article V is the only way to amend the Constitution. Article V is how the government amends the Constitution, not how the people do it. If the people had to use Article V to amend the Constitution they would need permission from two-thirds of the Congress and three-fourths of the state legislatures. This would mean that the creator of our government, the people, would have to get permission from their elected representatives, the createes [sic] of the people, to amend the Constitution. This logic is ludicrous. The constituent power of the people—the source of all political power—cannot be subject to the power of its creation.

James Madison had it right when he said that the people could just do it. The people can amend the Constitution and make laws as long as the process they employ is fair, transparent and reasonable. The National Initiative, the ongoing people's legislative procedures, is just that and the national election conducted by Philadelphia II to enact the National Initiative under the precedent of Article 7 is fair, transparent and reasonable. Today's communication technology permits us to ask all American citizens if they wish to be empowered as lawmakers and if a majority of voters who voted in the last presidential election so affirm— regardless of the view of those in government—then the National Initiative becomes the law of the land.”

The senator's “just do it” hypothesis, that is having a majority of voters in the last presidential election establish the National Initiative as law of land by affirmation is just plain wrong. The text of Article VII had a specific, limited purpose—to establish the Constitution *among those states* that ratified the Constitution in conventions held in those states. The text reads as follows: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” In sum, only by the fact all states that were members of the Articles of Confederation eventually ratified the Constitution in conventions held in their borders, and thus, as specified by the Constitution (see Article I, § 10, Clause 1 “No State shall enter into any Treaty, Alliance, or Confederation...”) left the Confederation did the Constitution become the *sole* law of the land. Basically, the political realities of the Constitution assuming evermore membership with a consequential decrease of membership in the Confederation eventually forced all states to ratify the Constitution. Thus, lack of membership terminated the Confederation as law of land when complete ratification by all member states transferred that power from the Articles to the Constitution.

Once Article VII had accomplished its purpose—establishing the Constitution as law of the land among those states that so ratified it—it became a self-terminating provision of the Constitution. Its text is unequivocal and unambiguous. The purpose of Article VII was solely directed toward those states that were already members of the Articles of Confederation. In short, having accomplished its purpose, Article VII no longer has any constitutional effect just as provisions in Article V and Article I no longer have constitutional effect. The portion of Article V which no longer has effect reads, “...Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article...” The year 1808 has passed. Therefore, this passage is without effect meaning prohibitions against Congress prohibiting importation of slaves and proposing a federal income tax have expired. Article I provides another self-terminating example. Section 2, Clause 3 describes the number of representatives each state shall have in Congress until the first census in the United States is taken. Once the census was taken and the number of representatives adjusted accordingly, the clause ceased to have effect and self-terminated.

Thus, Article VII is one of several self-terminating provisions of the Constitution generally intended for the sole purpose of organizing the original instrument. As it is terminated it cannot be the basis for the people to “just do it.” The article no longer possesses constitutional viability as its intent is limited by time and effected parties.

However it must be emphasized: the effect of Article VII, making the Constitution law of the land in place of the Articles of Confederation remains viable to this day. Thus, the means is terminated but the effect is not. Senator Gravel suggests using a means to accomplish a task that is no longer available to either the states or the people. Today, it can only come about by use of the amendment process to re-activate such means and re-introduce such text into the Constitution. Until such occurrence, the clause having self-terminated does not exist within the Constitution and therefore his suggestion is unconstitutional.

Moreover, there is nothing in the Constitution that establishes that assent by a majority of voters voting in a presidential election which is usually less than half of all voters, let alone all the people in the United States, holds any viability to establish anything as law of the land. One could suggest all people who watch television and tune in to a certain program on a certain day create assent. But without textual authority already contained in the Constitution, such a standard created Senator Gravel or anyone else for that matter is both arbitrary and capricious and hence without merit.

As noted before Gravel “holds that Article V is the only way to amend the Constitution. Article V is how the government amends the Constitution, not how the people do it. If the people had to use Article V to amend the Constitution they would need permission from two-thirds of the Congress and three-fourths of the state legislatures. This would mean that the creator of our government, the people, would have to get permission from their elected representatives, the createes [sic] of the people, to amend the Constitution. This logic is ludicrous. The constituent power of the people—the source of all political power—cannot be subject to the power of its creation.”

In *McCulloch v Maryland*, 17 U.S. 316 (1819) the court agreed with Senator Gravel to an extent saying “In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the General Government, it has been said, are delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing Congress of the United States with a request that it might be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification.

This mode of proceeding was adopted, and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject -- by assembling in convention. It is true, they assembled in their several States -- and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States.

But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is “ordained and established” in the name of the people, and is declared to be ordained, in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.

The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance, and could not be negated, by the State Governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But surely the question whether they may resume and modify the powers granted to Government does not remain to be settled in this country. Much more might the legitimacy of the General Government be doubted had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league such as was the Confederation, the State sovereignties were certainly competent. But when, “in order to form a more perfect union,” it was deemed necessary to change this alliance into an effective Government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The Government of the Union then (whatever may be the influence of this fact on the case) is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”

The text of Article VII clearly makes the article self-limiting and self-expiring. It’s expressed purpose was to establish the terms and conditions under which the people of the United States could ratify the then proposed Constitution to become the new law of the land. However, it must be emphasized, this process was executed entirely under the authority of the Articles of Confederation, as such authority under the Constitution did not yet exist. Hence, while the states did accept the premise of consent expressed in Article VII to ratify the Constitution, under the terms of the Articles of Confederation, they were not bound to do this. Discussion of the entire process is beyond the scope of this article. Suffice to say the Articles of Confederation mandated votes by the state legislature and Congress to alter that document. The Founding Fathers correctly believed, as they stated in the Declaration of Independence, the people were the sole source of sovereign authority in this nation and thus had to approve any change, alteration or abolishment of any form of government in the United States. Thus, they created a means whereby the people acting through elected representatives (convention delegates as well as elected members of the state legislatures and Congress) could decide whether to accept the Constitution as their new form of government. The combination of Articles and proposed Constitution meant that three forms of consent were required in order to bring about the Constitution becoming law of the land.

This is the fundamental reason why charges the 1787 convention was a “runaway” convention are entirely baseless. The people have the fundamental right to alter or abolish their form of government to whatever degree they choose subject to whatever limitations they have imposed upon themselves already in their current form of government. The Articles of Confederation imposed no limitations that prevented the convention from proposing a new form of government rather than attempting to patch up the old form. Indeed the Articles used the word “alteration” to link any change in form of government to the authority of the people. Thus, if at any time in the process of alteration, the people consented to this alteration, such alteration was legitimate. Moreover, the Articles of Confederation demanded the state legislatures, also representatives of the people in the various states, had to assent to the change in the form of government. Long after the convention ceased to exist the state legislatures and people, acting through convention, voluntarily assented to the form of government suggested by the 1787 convention. As noted by the court, neither the people nor the legislatures were compelled to agree and could have rejected the proposal. Thus, any proposition the convention was a “runaway” is ludicrous because the convention lacked any authority to impose anything on anyone but did have the authority under the current law of the land to *propose whatever it wanted to*.

Only when those with ratification power consented did any change in government actually occur. There was no runaway convention because it was not the convention that actually made the change in form of government—that choice, and it was a choice, was made by each state and the people within that state long after the convention ceased to exist. As noted by the Supreme Court the convention merely offered the alternative to a political situation, which had become increasingly intolerable to the American way of life. The senator’s position that the people are sovereign is correct but as he observed, in the Articles of Confederation this fact was not textually recognized as opposed to the Constitution (“We, the people...” vs. “*Articles of CONFEDERATION and PERPETUAL UNION between the states of New Hampshire, Massachusetts Bay, Rhode Island and providence plantations, Connecticut New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. Article I. THE style of this confederacy shall be "The UNITED STATES of AMERICA. Art. II. Each state retains its sovereignty, freedom, and independence...."*”). That earlier form of government gave the states sovereign power at the expense of the people. It is quite remarkable that not only was the form of government changed between Constitution and Confederation but also was the source of sovereignty as there can only be one sovereign source in this nation. The fact the transition was entirely peaceful is, without question, the most remarkable feat of all.

It is true the people retain the right of alter or abolish as their primary and most fundamental right. It is true from this fundamental right derive all other rights the people enjoy. But it is equally true in their present form of government, a form of government to which they consented, the people have prescribed a textually expressed method whereby their authority of right of alter or abolish is accomplished. That method is entirely contained within Article V. This present form of alter or abolish limits their right of alter or abolish in two fundamental aspects. It does not permit abolishment of the present form of government only alteration through amendments to the original form of government ratified under the terms of Article VII. It only allows such alteration (or amendment)

through elected representatives rather than by direct act of the people. Thus, in light of the text of Article V, Senator Gravel's primary argument is wrong.

Hence, for Senator Gravel to be constitutionally correct today requires either Congress or a convention propose an amendment ratified by the states as mandated by Article V. This amendment would establish a means for the people to "just do it" as the portion of the Constitution he refers to has, by its own language, expired as its sole purpose was for the original 13 states and the people within them to consider whether the rest of the proposed Constitution was to become their new form of government. In sum, our present form of government does not allow for Senator Gravel's "just do it" theory of constitutional government by use of Article VII. It may express a principle, which he says the people have but without proper amendment, it is an unfounded political theory. True, the senator has suggested such an amendment for the Constitution but his text suggests a direct use of Article VII to short circuit the amendment process and the Constitution does not permit this. This portion of his position is therefore unconstitutional and must be rejected.

As such, this clearly discredited theory detracts from the senator's otherwise worthy message. He would do well to discard it and concentrate instead on using what the Constitution offers—the already existing and well understood amendment process to bring about the change he suggests rather than wasting time advancing a constitutional theory that a simple reading of the text of the Constitution refutes.

The strange part of Senator Gravel however is not his erroneous constitutional theory. The strange part is his apparent refusal to discuss or recognize political work already done which serves to give him a political advantage. Specifically, he fails to mention the [1929](#) state of Wisconsin [application](#) requesting discussion by the convention a proposal similar to his. In other words the senator fails to mention in his presentation the states will already be discussing his proposal. Instead, he makes it sound as if he still needs to win state support in order to have it presented at the convention. Why he does not take advantage of this fact is the strange part.

Perhaps the reason is the already submitted application goes further than Senator Gravel's proposal and give more sovereign authority to the people than even Gravel is comfortable with. Gravel's proposal establishes initiative power for the people at the federal level. The 1929 IRR proposal of the state of Wisconsin not only establishes initiative power but referendum authority as well as recall of federal officials. Obviously, it is a much better proposal from the point of view of giving the people authority to regulate the government. It is more versatile as well as more adaptable to various political situations the people might find themselves in where they require such power to resolve issues.

The advantage of referendum and recall are obvious. Referendum allows the people to vote on legislation passed, in this case, by Congress thus giving the people a form of veto over the legislature. Initiative on the other hand, while it may effect already passed legislation, cannot prevent its enactment. A referendum, if properly written into the Constitution, prevents legislation from even taking effect. The advantage of recall is clear. By vote, the people can remove those officials so affected by recall during term of office rather than having to wait for the term of office to end. Moreover, recall is a form of a vote of confidence by the people on the acts of an elected official. It is nearly always triggered by some specific act or acts on the part of an official that run contrary to the

will of the people or a substantial portion of them. Thus, policy decisions are actually the subject of vote. Officials subject to recall generally listen to the will of the people.

While no system or proposal is perfect, the senator's proposal is a sound one and would bring about major changes in our form of government, changes worthy of consideration not only at a convention. Personally, I favor the more extensive Wisconsin proposal as it would give the people a better set of tools to deal with an obviously inflated, over extended, power hungry government. Nevertheless, the entire concept of the people having IRR power is something convention needs to consider be it from Senator Gravel or the state of Wisconsin.