

## A Question of Accuracy

### What Else Can You Tell Me About The Burger Letter?

By Bill Walker

In [an earlier column](#) I discussed questions of authenticity regarding the so-called Burger Letter. Since then FOAVC has conducted further research on the so-called Burger Letter and uncovered additional facts discussed in this column.

The [so-called Burger Letter](#) is a one-page letter purportedly written by Supreme Court Justice Warren E. Burger in 1988 at the behest of Phyllis Schlafly, founder of the Eagle Forum, a conservative political action group. Mrs. Schlafly is best known for her political opposition to the proposed ERA amendment during the 1980's.

[Article V of the Constitution](#) requires Congress call an Article V Convention if two-thirds of the state legislatures apply for a convention call ("on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments"). [All 50 state legislatures have submitted over 700 applications for an Article V Convention](#), nearly twenty times the number of applications required to cause a convention call. Article V limits an Article V Convention only to proposing amendments to the current Constitution ("as part of this Constitution"). An Article V Convention is thus not constitutionally empowered to rewrite or propose a new constitution to replace our current Constitution. Hence, an Article V Convention, authorized by Article V of the Constitution, and a constitutional convention, not authorized by Article V of the Constitution, is two separate and distinct conventions. The former is constitutional. The latter is not.

In the mistaken belief these two bodies are identical, Phyllis Schlafly and other right wing organizations such as the John Birch Society, has opposed an Article V Convention call by Congress despite the fact the terms of Article V requiring such a call have been more than satisfied by state applications. Thus, in assuming this opposition, Phyllis Schlafly and her allies in fact are supporting the veto of the Constitution by the government. These anti-constitutionalist opponents believe current political leaders would use a convention to assume total political power and take away all rights currently enjoyed by Americans by rewriting our current Constitution. They would impose this new constitution on America by simple fiat. They present no proof of their allegations. Indeed, their evidence of this belief is so flimsy they cannot even name a single political leader who has advocated using a convention to achieve political power much less be in a political position to mount a coup d'etat of the Constitution.

There are practical political problems associated with their position. Primarily among them is the fact their opposition has existed for several decades. During this time, both conservative and liberal political leaders have been in power in America. None of these leaders has done, or even suggested doing, what these opponents, such as Phyllis Schlafly, have said they would do if they could call a convention. Based on public record the fact is if these political leaders wanted to use a convention to achieve the political

power Schlafly says they would exercise, they could have done it at any time in the past century.

All 50 states have submitted over 700 applications to Congress for an Article V Convention. Only 34 applications are required to compel Congress to call a convention. Therefore, if any political leader was so disposed to use a convention in order to gain political control as charged by opponents to a convention, he could have done any time in the last century. Indeed, as described elsewhere [in our FAQs](#), all of members of Congress are publicly opposed to obeying Article V of the Constitution and calling an Article V Convention. Given these facts, such charges as opponents such as Phyllis Schlafly make, regarding the political ambitions of leaders of this nation in using a convention to assume massive political power are obviously absurd.

The only evidence opponents to the calling of an Article V Convention as authorized under Article V of the United States Constitution have ever produced supporting their position is the so-called Burger Letter said to have been written in 1988. This so-called Burger Letter expresses former Chief Justice Warren E Burger's supposed opposition to a constitutional convention meaning his opposition to an unconstitutional, unauthorized convention (not authorized under the terms of Article V), which would write a new constitution.

In the mistaken and unsupported belief, an Article V Convention is identical to a constitutional convention; opponents have used this so-called Burger Letter as the centerpiece of their opposition to an Article V Convention. Tom DeWeese, an outspoken opponent to an Article V Convention, has referred to the letter as "a major and damning piece of evidence against a call for a Con Con because it verifies our fears that states cold not control the subject matter discussed at the convention." DeWeese ignores the fact that under the terms of Article V, Congress has the exact same power of proposal as an Article V Convention. Regardless of whatever body proposes amendment, the states do not control the subject matter of any amendment proposal discussed. These opponents know this and attempt to confuse the issue by referring to powers of Article V as applying to a constitutional convention, which they know, does not apply because Article V does not allow for a constitutional convention. The Founders knew well the issue of lack of control of agenda when they wrote Article V in 1787. For this reason the Founders gave the states ultimate control of any proposed amendment, be it by Congress or convention-- ratification. Without ratification, no amendment proposal can become part of the Constitution. Hence, regardless of agenda, the states control any amendment proposal by means of public ratification votes.

When examined, the entire public record regarding Burger's comments about the amendatory process presents several problems associated with the authenticity of so-called Burger Letter. For one, the supposed statements made in the letter do not agree with other public statements made by Burger. Further, different references cite different dates as to when the letter was written. Indeed, the only reference made about the Burger Letter that states Burger wrote the letter in 1988 is from Phyllis Schlafly herself.

Therefore, it cannot be accurately verified Chief Justice Warren E. Burger wrote the letter in 1988.

The text of so-called 1988 Burger Letter clearly shows it was written in response to a letter sent by Mrs. Schlafly to Justice Burger. While Mrs. Schlafly has published the so-called Burger Letter on her website available for public review and [cited it in her arguments against a convention in 2008](#) and [earlier in 1996](#), the full public record regarding communication between her and Justice Burger has been deliberately hidden by Mrs. Schlafly. She has never published the letter written by her to Justice Burger in 1988. Additionally, there are at least two other unpublished 1986 letters written by Mrs. Schlafly to Justice Burger. Therefore, there is no complete public record of all written communications between Mrs. Schlafly and Justice Burger.

According to statements on at least [two anti-convention websites published years apart](#) [see page 7 under NOTEWORTHY OPINIONS], the so-called Burger Letter was written in 1983. Tom DeWeese, in a January 17, 2009 [column](#), affirmed the 1983 date. DeWeese later tried to assert he made a typographical error in his column in a [follow up column](#) but this offer of a “typographical error” does not explain the other Internet sites references to a “1983 letter” made years before the DeWeese statement.

FOAVC believes this “major and damning piece of evidence” of the so-called Burger Letter may not be authentic because statements made in it, as well as facts surrounding it, do not agree with easily verified public record. On January 16, 2009, FOAVC released [a video on You tube](#) summarizing our concerns about this letter. The so-called Burger Letter may exist. FOAVC only questions whether Warren Burger was the person who wrote it.

In our video FOAVC questioned the authenticity of the so-called Burger Letter for the following reasons:

---The letter, according to Mr. DeWeese and other sources, written in 1983 describes Chief Justice Warren Burger as “retired.” Fact: Burger served on the Supreme Court from 1969 to 1986.

---The letter refers to Burger as [chairman of a committee](#). The committee did not exist until 1985, two years after the date of the supposed letter.

---The source of the letter according to one [Internet](#) source was Doug Kelly a known John Birch Society operative and not Phyllis Schlafly the supposed recipient of the Burger letter.

---The letter says Justice Burger spoke on the issue of an Article V Convention “many times.” Because he was active on the court at the time of the letter (1983), it is unlikely Burger would have made such statements, as it would have compromised his judicial objectivity.

---Burger states there is no way to control the agenda of an Article V Convention. This statement, if made by Burger, shows a complete ignorance regarding the ratification procedure of Article V specifically intended to control any amendment agenda of either Congress or a convention. Does it make sense a chief justice of the Supreme Court of the United States would be that ignorant about the Constitution?

---In the letter, Burger perpetuates the myth about the 1787 convention acting on its own to create the Constitution. The [public record](#) disproves this claim. Would a chief justice of the United States make such an obvious blunder so easily checked in public record? Moreover, would he repeat this mistake once it became public?

---Burger mentions state rescissions of Article V applications made in 1983. Fact: [the public record clearly shows](#) there were no rescissions submitted to Congress in the year 1983.

Following the release of our video, FOAVC continued to research the history of the so-called Burger Letter. Our research has revealed even more questions of authenticity rather than providing answers to questions already raised.

---In the 2005 biography “Phyllis Schlafly and Grassroots Conservatism” written by Donald T. Critchlow, the letter [is mentioned](#) on p.285 and described as a “one-page letter opposing a constitutional convention.” However, [the footnotes \(52,53\)](#) of the book (based on references to actual archive files of the Eagle Forum) refer to *two letters written in 1986 and do not refer to a 1988 letter.*

In a February 2, 2009 [You tube response](#) to the FOAVC video, a writer only identifying herself as Thelema314 stated, “For what it's worth, I'm the member of Phyllis Schlafly's staff that scanned this letter and two others for her website. The letter is dated June 22, 1988. I can't explain the 1983 date on your source, but the original is clearly 1988. Thelema314 then continued in another comment after being asked why Donald T. Critchlow did not cite it in his 2005 book, “Not that hard to believe - the original letter has been in our basement archives for forever. It could be that the first electronic version had the typo and no one else looked at the original. As to Don's book, he admits that he didn't know of the letter's existence. There's a \*lot\* of materials in our archives, even our archivist finds new things from time to time.”

In sum, any references that cite the letter as written in 1983, according to Phyllis Schlafly, can all be explained as typographical errors even though they span some 15 years in time and were written by several independent sources none of which are aligned with FOAVC. These sources include one author writing a bibliography on Schlafly with full access to the Eagle Forum files. The author was specifically writing about a letter from Burger to Phyllis Schlafly which he referred to as the “one-page letter” and referred as “one of her most effective anti con-con pieces.” None of the opponents has ever cited any other Burger Letter as evidence to support their cause except this so-called 1988 Burger Letter. They state the letter was actually written in 1983. As to the question of authenticity raised by the author of her own bibliography, a person said to represent

Phyllis Schlafly states the author of her bibliography knew nothing of the letter. This, despite the fact the author writes about it in his book, cites it as the “one page letter” but then references two letters dated in 1986.

Besides raising even more questions about the 1988 letter, these two 1986 letters, one written in [April, 1986](#) and another written in [August, 1986](#), present an entirely different point of view than the so-called Burger letter of 1988. Unlike the unverified [so-called 1988 letter](#), these two letters must be authentic. Federal law requires all official correspondence of federal officers (such as Chief Justice Burger) be in the National Archives. Hence, unlike the so-called 1988 Burger Letter, these two letters are verifiable.

These 1986 letters are significant. In 1986, Justice Burger was still Chief Justice of the Supreme Court. He did not retire until September 1986. As such, Phyllis Schlafly, by use of written correspondence, was attempting to solicit and influence the opinion of a sitting federal judge in regards his official position on a clause of the Constitution of the United States. While still serving as chief justice, Justice Burger might have been required to rule on a federal lawsuit connected with Article V. More importantly, in 1982 the court had before it, [NOW v Idaho 459 U.S. 809 \(1982\)](#), which involved Article V of the Constitution while Burger was chief justice. The case involved the ratification of the proposed ERA amendment. The court declared that case moot.

While the 1986 letter were written after NOW v state of Idaho it is still possible by expressing any public opinion regarding Article V Burger may have violated Supreme Court [Rule 7](#). This rule forbids certain actions by members of the court specifically that a member of court “participated in a professional capacity in any case that was pending in the Court [the Supreme Court] during the employee’s tenure.” In his 1986 letters written on official Supreme Court stationary and listing Burger’s official position as chief justice, Burger refers to using “official channels” regarding Article V. At the very least, because of this comment, Burger would have been [required to disqualify himself](#) should a case involving the amendatory process been placed before the court as his impartiality had been compromised by his correspondence with Phyllis Schlafly.

Phyllis Schlafly has never released copies of the letters she wrote to Justice Burger so the public record of exchange between them is incomplete. There is mention of “meetings” between her and Justice Burger in the 1986 letters. There is no way of knowing what these meetings involved or what took place between Mrs. Schlafly and Justice Burger at these meetings. Clearly however what ever did take place involved Burger’s opinion about Article V. Further, it is unknown what Schlafly stated in her letters to him to induce Burger to make the responses he did in his letters. Obviously, as Mrs. Schlafly corresponded with Justice Burger repeatedly she was seeking a specific political answer from Justice Burger. Obviously, she was not satisfied with those given by him in his official position as Chief Justice of the United States when such an opinion would have carried the most judicial as well as political weight.

It may be in her letters Mrs. Schlafly strayed into areas with her presentations that were ill advised. There are [federal criminal laws](#) which prohibit such action if Mrs. Schlafly

were to offer “anything of value” in her letters, but as she has never released the full record of these letters, it cannot be determined whether her actions were in criminal violation of any federal law. Most likely she did not violate federal criminal law, but clearly both she and Warren Burger exercised bad judgment in placing Burger in a position in which he may have violated Supreme Court rules or been forced to recuse himself while functioning as Chief Justice. Further the mention of repeated meetings between Burger and Schlafly where additional efforts at influencing a sitting federal judge raises, at the least, questions of propriety particularly on the part of Schlafly.

Public record shows Warren Burger’s position was not as cut and dry as the so-called 1988 Letter indicates. These public records raise additional questions regarding the authenticity of the so-called 1988 Burger Letter. For example, in one of his 1986 letters, Burger refers to his appearance before the National Press Club (Thursday, December 19, 1985) in which reporters asked him about the constitutional convention. [Burger was asked in a question and answer period](#), if a convention “could abridge rights guaranteed by he founding fathers.

“I don’t think it would pose a threat,” he [Burger] said. But he adds, “It would be a grand waste of time.”

In short, in a 1985 public statement, Burger refutes much of what he was said to have stated in 1988. In sum, Burger’s statement makes it clear he did not favor a convention, but even if held, he did not believe it would pose a threat to removing rights already enjoyed by Americans. Further an [Associated Press Article, August 21, 1987](#) made it clear any comments Burger was addressing about a constitutional convention were not intended to apply to an Article V Convention which is part of the “amendment process” which clearly, in Burger’s mind as expressed in his letter, was different than a constitutional convention. Thus, while the 1988 letter makes it appear Burger was addressing both an Article V Convention as well as a constitutional convention, his 1986 letter makes it clear he was not.

Clearly, the Schlafly letter of 1988 misused the Burger comments of earlier letters and public statements and choose to conveniently ignore any comment by Burger in which he expressed a belief that a convention “would not pose a threat” to Americans. Further, in the 1988 letter, Burger perpetuates the myth about the 1787 convention acting on its own accord. [Easily checked public record](#) refutes this. For example, James Madison directly discusses it in [Federalist #40](#). David Keating, executive vice president of the National Taxpayers Union in an [August 21, 1987 Associate Press article published in the Boston Globe](#) publicly corrected Burger on this mistake. Given this fact, would Burger have repeated the same mistake in a letter certain to become public, thus opening him up for additional criticism? Clearly, the statements made in the so-called Burger Letter are based on earlier public statements of Burger but which either have been misused or are incomplete when verified against Burger’s full public record.

The 1986 letters make it clear Burger was addressing the political issue of a constitutional convention rather than the constitutional questions surrounding it. His first comment in

his [April 1986 letter](#) make it clear Burger understood the difference between a constitutional convention and an Article V Convention. (“I went on to say that any particular problem should be dealt with one at a time as needed, and that there was no occasion in my view for a Constitutional Convention.”) Obviously, he could not be discussing the identical subject (a constitutional convention and an Article V Convention) as he presents two different methods for solving a problem meaning he saw two different solutions. His reference to an Article V Convention (“dealt with one at a time”) versus a Constitutional Convention (“no occasion in my view for a Constitutional Convention.”) makes this clear. Phyllis Schlafly and other political allies in her anti-convention campaign of course, ignored this obvious and important distinction made by Burger.

This political opposition by Phyllis Schlafly and others aim exclusively at one amendment proposal out of twenty issues submitted by the states for consideration at an Article V Convention—a balanced budget amendment. The fact two other amendment issues (Apportionment and Repeal of Federal Income Tax) each have enough applications submitted by the states to cause a convention call is ignored by Phyllis Schlafly and her allies. The reason is obvious. These groups politically support these amendment issues and are on public record saying so. Therefore, clearly, the real issue Phyllis Schlafly and others have to an Article V Convention is not with the convention itself, but the possibility an Article V Convention might propose a balanced budget amendment, which they politically oppose. As stated by Tom Deweese, the issue they have is the “inability to control the agenda” of a convention and thus might not be able to stop this amendment proposal. In short, Phyllis Schlafly and her allies want the ability to control the agenda of a convention to suit their political agenda, the very thing they say their political opponents would do at a convention.

Burger’s [second 1986 letter](#) makes it clear he is exclusively addressing the idea of a constitutional convention (which is also opposed by FOAVC). Again, he writes the letter in response to Schlafly’s letter. We have no idea what the “subject of your [Schlafly’s] August 18<sup>th</sup> letter” is. Therefore cannot say how Burger’s comments relate to it. Burger also speaks of a “Second Report” and speaks of his and Schlafly’s “strong views” being “communicated through proper channels.” As we do not have access to the Schlafly letter of August 18, 1986, we can only ask unanswered questions:

--Did Mrs. Schlafly make a specific request of Justice Burger to act in an official capacity?

--What official channels does Justice Burger refer to that he will employ in order to “communicate” his and Schlafly’s “strong views”?

--Is he referring to instructing other federal judges to accept Mrs. Schlafly’s point of view regarding Article V? Does he mean he will ask other members of the Supreme Court to issue a ruling favoring Schlafly despite the fact she did not bother to file a lawsuit to present to the court?

--Is he referring to attempting to bring political or judicial pressure on the White House or Congress thus compromising his judicial objectivity? Is he discussing, for example, issuing a contempt citation against those favoring a convention such as President Reagan?

--Is he speaking of communicating with President Reagan directly? If so, what official power would he ask the president to invoke—commander in chief to take military control of the government or possibly the states?

Without the knowing content of Schlafly's letters, there is no way to determine the answers to these important questions. More importantly, without knowing the content of Phyllis Schlafly's letters it is impossible to know for certain whether Phyllis Schlafly went past the line of federal law prohibiting such actions.

In sum, the so-called 1988 Burger Letter misuses public quotes by Warren E. Burger. The so-called Burger Letter ignores clearly important information to present a distorted view on the position of former Chief Justice on the issue of the amendatory process of the Constitution. Primary among these distortions is the fact Burger drew a clear distinction between a constitutional convention and an Article V Convention. Burger supported using the amendment process (which includes an Article V Convention) to resolve the problems facing this nation and thus actually supported an Article V Convention.

The fact is Phyllis Schlafly has never been completely honest with the American people. She has never released all the letters involved in this exchange between her and Justice Burger. She has not been completely honest in presenting Burger's comments as he actually expressed them in her references to the so-called 1988 Burger Letter. Sources surrounding these letters disagree as to the authenticity of the letter. Given all these facts, it is likely the so-called 1988 Burger Letter is not authentic. More likely, [as indicated by one of the anti-convention websites](#), the so-called 1988 Burger Letter was created by Doug Kelly, a known John Birch Society operative. Kelly took such parts of Burger's 1986 letters and other public comments as needed in order to create a distorted view of Burger's view on the issue of the amendatory process. He did this in order to further a clearly political agenda of the John Birch Society and other allies such as Phyllis Schlafly.