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HB2065, Hearing in the House Federal and State Affairs Committee
Opposing HB2065, with written and oral testimony
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I am John Axtell, from Wichita. I am the volunteer coordinator for Kansas Campaign for Liberty.

Honorable Chairman Kessler and committee members, I oppose HB2065 for several reasons.

First, the enforcement of section 4(d), which says that unauthorized votes will be voided, is not realistic. Once an unauthorized vote is cast, the convention will continue for some time relying on the unauthorized vote, and when Kansas announces that the vote is void, this will possibly cancel all progress made since the unauthorized vote was cast. The convention will certainly not pass rules allowing this.

So, even disregarding much bigger issues with this bill and the Convention of States, this bill is impractical for that reason.

More importantly, the much bigger issue is that nothing about the convention can be constrained by Kansans, not the delegate actions, nor the topics considered, or anything else about the convention. Federal courts will find that delegates may ignore this bill and may do exactly as they wish.

A recent event shows why this is true and the convention cannot be constrained.

I think we all know about the lawsuit that has been filed in federal court, that is based on the idea that the Kansas Legislature can ignore the Kansas Constitution when applying for a constitutional convention under Article V.

This lawsuit proves what we have been saying for years. This process of applying for and holding a convention under Article V “cannot be constrained by the people of Kansas”.

These words, “cannot be constrained by the people of Kansas”, are not my words. They are from the 2019 letter from then AG Derek Schmidt, a letter which is based partly on the 1975 Dyer vs. Blair federal court case, which is the legal basis for the lawsuit.

Based on a careful reading of the Dyer case, we can conclude three things. First, the plaintiffs will likely win. Second, the Kansas Constitution is NOT unconstitutional. Third, the federal court will allow the convention delegates to ignore the Kansas Constitution and any delegate rules passed by the Kansas legislature.

Let me explain.

The important statement by the Dyer court said that the legislature, when participating in a federal process, is free to “accept or to reject” the supermajority requirement in the state constitution.

The legislature is free to reject the state constitution, so the plaintiffs in the lawsuit against the Kansas Constitution will likely win. That is the first fact.

However, the legislature is also free to accept the state constitution, which means that the state constitution's supermajority requirement is not unconstitutional. The argument that the Kansas Constitution is unconstitutional was an attempt to justify the lawsuit. Without this argument, the lawsuit is seen for exactly what it is: Convention of States proponents asking federal court to allow them to ignore the Kansas Constitution to get their way. That is the second fact.

The Dyer court said that the legislature was participating in a federal process when voting in their own statehouse under Article V, and may therefore ignore the state constitution. Certainly delegates attending a convention under Article V are also participating in a federal process, and therefore federal court will also allow them to ignore state constitutions and delegate bills.

This is certainly true.

If a state legislature, created under the Kansas Constitution and elected and employed by Kansas citizens, can participate in a federal process when meeting under oath to support the Kansas Constitution, in a building in Topeka paid for by taxpayers, then certainly Kansas delegates will also be participating in a federal process when attending the convention in DC or Philadelphia or wherever.

Therefore, again, federal courts will say the delegates are also free to ignore state constitutions and delegate bills. That is the third fact.

In addition to the above testimony, I have also provided an extensive discussion in subsequent pages of how the Constitutional Convention of 1787 exceeded the authority under which they were sent by the states and called by the Congress, and even exceeded the authority granted them under the Articles of Confederation.

In summary, the bill is impractical. Any attempt to void unauthorized votes will be impractical.

And, most importantly, the lawsuit against the Kansas Constitution only proves what we have been saying for some time, which is that a constitutional convention "cannot be constrained by the people of Kansas", and therefore federal courts will find that the delegates, like the legislature, also may absolutely do as they please.

The lawsuit is proof that no rules – not even the Constitution itself – will be honored in an Article V constitutional convention.

The people of Kansas deserve better.

I urge you to vote against HB2605.

A look at our history reveals that there are other risks in this process.

Delegates to the Convention of 1787 acted beyond the authority delegated to them by the states and Congress, and there is no guarantee that a modern constitutional convention will be different.

I preface my testimony in this section by saying that I have great respect for the founders and the US Constitution they created. This information is presented to firmly substantiate that delegates acted beyond the authority granted to them by the states and Congress.

Delegates knew that they had acted beyond the authority granted by the states and Congress.

Some delegates to the convention **reported that they did not have the power to do what they were doing, and should not proceed.** These include the following:

- William Paterson (New Jersey delegate) **"We ought to keep within its limits, or we should be charged by our constituents with usurpation . . . let us return to our States, and obtain larger powers, not assume them of ourselves."** - Madison's notes of the 1787 convention, 16 June 1787.
- Charles Pinckney (South Carolina delegate) & Elbridge Gerry (Massachusetts delegate) "General PINCKNEY expressed a doubt whether the act of Congress recommending the Convention, or the commissions of the Deputies to it, would authorize a discussion of a system founded on different principles from the Federal Constitution. Mr. GERRY seemed to entertain the same doubt." - Madison's notes of the 1787 convention, 30 May 1787
- John Lansing (New York delegate) "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. " - Madison's notes of the 1787 convention, 16 June, 1787, comments of Delegate John Lansing, Jr. from New York, who LEFT the Convention July 10th after realizing they exceeded their authority.
- Luther Martin (Maryland delegate) **"...we apprehended but one reason to prevent the states meeting again in convention; that, when they discovered the part this Convention had acted, and how much its members were abusing the trust reposed in them, the states would never trust another convention."** - Letter by Luther Martin, opposing ratification of the 1787 Constitution, http://oll.libertyfund.org/titles/1905#Elliot_1314-01_3767

Others reported that they did not have the authority to proceed, but should do so any way:

- Edmund Randolph (Virginia delegate) "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." - Madison's notes of the 1787 convention, 16 June 1787.

- Edmund Randolph (again) **"There are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it."** - Farrand's Records of the 1787 convention, 16 June 1787.
- Alexander Hamilton (New York delegate) "The States sent us here to provide for the exigencies of the Union. **To rely on and propose any plan not adequate to these exigencies, merely because it was not clearly within our powers, would be to sacrifice the means to the end.**" – Madison's notes of the 1787 convention, 18 June 1787.
- James Madison (Virginia delegate) "...it is therefore essential that such changes be instituted by some informal and unauthorized propositions...." – Madison, Federalist 40.
- George Mason (Virginia delegate) Mr. Mason justified exceeding their powers, "there were besides certain crises, in which all the ordinary cautions yielded to public necessity." - Madison's notes of the 1787 convention, 20 June 1787.
- James Wilson (Pennsylvania delegate) **"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 it to their consideration, who may either adopt or reject it, as they please." - Pennsylvania Ratifying Convention, 26 Nov. 1787.

No delegate said that they operated strictly within the bounds of their charters!

Judge Caleb Wallace, who favored the new Constitution, was so concerned about the convention exceeding its authority that he advocated for tossing out the new constitution, then obtaining the proper authority from the states, and then re-doing the entire convention: "I think the calling another continental Convention should not be delayed . . . for [the] single reason, if no other, that it was done by men who exceeded their Commission, and whatever may be pleaded in excuse from the necessity of the case, something certainly can be done to disclaim the dangerous president [i.e., precedent] which will otherwise be established." - Judge Caleb Wallace to William Fleming, 3 May 1788

"We the people" are the authority under which delegates acted beyond their delegated authority, citing first principles and the ideas in the Declaration of Independence. With the full sovereign authority of the people, the convention could act against the legislatures and the charters under which they were sent:

- Madison - **"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."** - Madison's notes of the 1787 convention, 31 Aug 1787.

- Madison - “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’” - Madison, Federalist 40.

Delegates went beyond proposing amendments. They amended the Articles of Confederation by changing the ratification requirement without seeking ratification from the states.

Madison, in Federalist 40, openly admits to delegates violating their charters, “In one particular it is admitted that the convention have departed from the tenor of their commission. Instead of reporting a plan requiring the confirmation *of all the states*, they have reported a plan which is to be confirmed and may be carried into effect by *nine states only*.”

This is more than a mere change to rules.

The unanimous requirement for ratification is clearly stated in Article 13 of the Articles of Confederation. The change to require only nine states for ratification is essentially an amendment to the Articles, enacted by the delegates alone!

It is interesting that Madison argued for this change (in Federalist 40) saying that the new government should not be held hostage to the whims of Rhode Island, which refused to send delegates to the convention, since it comprised only 1/60 of the population of the federation. Yet the new ratification standard only required nine states to ratify, possibly leaving out as much as 48% of the population (according to the 1790 census, New York, Pennsylvania, Massachusetts, and Virginia totaled 48% of the population of the new federation).

Any of these same three authorities – the states, the Congress, and “We the People” – can also be invoked during a constitutional convention under Article V could.

Madison was clear that a second constitutional convention could also be runaway, even to the point of dissolving the union altogether. In a letter to Jefferson, as the ratification of the Constitution was nearing the nine state threshold, Madison warned of the opportunity for a new convention to be called, with the intention of dissolving the union: “...if a second Convention should be formed, it is as little to be expected that the same spirit of compromise will prevail in it as produced an amicable result to the first. It will be easy also for those who have latent views of disunion, to carry them on under the mask of contending for alterations...” – The Writings of James Madison, Volume V, pp. 121-122.

Delegates at state constitutional conventions have also invoked the authority of “We the People”.

State constitutional conventions have been held where delegates refused to be bound by orders from the state government, and their right to do so has been upheld due to their authority coming directly from the people.

The Second Body of Law (Corpus Juris Secundum) includes case history of state constitutional conventions where delegates went beyond the authority they were granted by the legislature. In these cases, delegates to state constitutional conventions invoke the same sovereign authority of “We the People” as did the delegates to the Constitutional Convention of 1787:

Summary, from Corpus Juris Secundum 16 C.J.S 9: **“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.”**