

Testimony in Opposition to HJR 2

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Chairperson Roegner, Vice Chairman Lipps, Ranking Member Leland, and members of the committee, I come before you today to discuss HJR 2, a resolution memorializing Congress to call a Convention to propose amendments to the Constitution of the United States.

There is currently a movement in the United States that is gaining momentum. The leaders of the movement are encouraging state governments to petition Congress to call a new constitutional convention for the purpose of reining in the federal government. While this sounds reasonable to the average citizen, it is the opinion of the Institute For Principled Policy, not on our own authority but based on extensive research on the legal, historical, and procedural precedents set by conventions of the United States, colonial America, and Great Britain, that the chartering of a so-called “amendments convention” or “convention of the states” will have the same result as the calling of a convention with plenipotentiary authority.

Proponents have spoken of the “role of the states” and “limiting the Convention”, as well as giving assurances that the state legislatures would be in control of the process of a Convention. These are not supportable by historic precedent or the clear reading of the Constitutional language of Article V. In Article V, states “apply” to Congress with memorializing petitions. Congress, under Constitutional mandate, “shall” call a convention to consider “amendments”.

Other than a petition to begin the process, the states’ role is non-existent until final ratification, and even then Congress controls which way the states may consider ratification: by legislature or convention. In relation to the role of the states, Thomas H. Neale of the Congressional Research Service, in his report for Congress in 2012 (reissued in 2014) entitled “The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress” states it this way:

“First, Article V delegates important and exclusive authority over the amendment process to Congress. the responsibility for summoning a convention for consideration of amendments on application of the legislatures of two thirds of the states and submitting any amendments proposed by an Article V Convention for the states for their consideration.

Second, while the Constitution is silent on the mechanics of an Article V convention, Congress has traditionally laid claim to broad responsibilities in connection with a convention, including (1) receiving, judging, and recording state applications; (2) establishing procedures to summon a convention; (3) setting the amount of time allotted to its deliberations; (4) determining the number and selection process for its delegates; (5) setting internal convention procedures, including formulae for allocation of votes among the states; and (6) arranging for the formal transmission of any proposed amendments to the states.”

Neale comments again in his article:

“Article V states in relevant part that, “The Congress ... on Application of the Legislatures of two thirds of the several states shall call a Convention for proposing Amendments.” Congress’ explicit authority under this provision is to “call” the convention. The powers invested in Congress (setting the framework of the convention) ... are entirely a function of this responsibility, authorized under the “necessary and proper” clause of Article I, section 8, clause 18. (Const. Conv. Implement. Act of 1984, 98th Congress)

Larry Sabato of the University of Virginia’s Center for Politics, an advocate of an Article V Convention, states it this way in his book “A More Perfect Constitution”:

“The states would be the source of the subject matter to be considered by the convention, but Congress would shape the convention’s charge by summarizing and giving structure to thirty-four state petitions calling for the convention. The states and Congress could place limitations on the convention’s mandate, but *they could not really control what would happen at the convention* (italics mine). Once called and in session, the convention would be a “free agency” that would propose whatever it chose.”

I would note for the record that the preceding is not a description of a so-called “runaway convention”: there is no such animal. Conventions are by definition the highest authority in a particular jurisdiction, with “full power” to carry out the mandate that the convention chooses to pursue. The Philadelphia Convention of 1787 is a textbook example of this, and has been cited by others testifying today.

Can a state memorializing resolution be a powerful enough source to limit a plenipotentiary national convention? Many legal and Constitutional scholars, as well as our organization, believe the answer to be clearly, legally and historically an emphatic NO.

Charles Black of Columbia University said the following:

“I believe that, in Article V, the words ‘a Convention for proposing such amendments’ mean ‘a convention for proposing such amendments as that convention decides to propose.....(Article V) does not imply that a convention summoned for the purpose of dealing with electoral malapportionment may kick over the traces and emit proposals dealing with other subjects. It implies something much more fundamental than that; it implies that Congress cannot be obligated, no matter how many States ask for it, *to summon a convention for the limited purposed of dealing with electoral apportionment alone, and that such a convention would have no constitutional standing at all.* (italics mine)”

Duke University Professor and former Solicitor General Walter Dellinger stated:

“If the legislatures of thirty-four states request Congress to call a general constitutional convention, Congress has a constitutional duty to summon such a convention. If those thirty -four states recommend in their applications that the convention consider only a particular subject, Congress still must call a convention *and leave to the convention the ultimate determination of the agenda and*

the nature of the amendments it may choose to propose (italics mine).”

In essence, HJR 2 calls for something that it can't have: a limited, controlled convention wherein the state legislatures set the issue of the debate. The subject matter of the call is not the primary issue here. The issue here is the mechanisms of Article V of the Constitution, the historical precedent of previous conventions, and the real possibility of wholesale changes to our carefully-structured system of governance.

The Institute for Principled Policy would urge the members of this committee to turn down this resolution, and instead work with our Congressional delegation to find ways to curb government overreach at both the federal and state levels. That is a more Constitutional way to balance our budget.

Thank you for your kind attention to this testimony, and I would be happy to take any questions of the committee.