The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress

Thomas H. Neale
Specialist in American National Government

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mandate to address a wide range of issues that had supposedly been beyond its purview. Each of these alternative models has had its proponents and detractors over the years.

The General Convention

Supporters of a general convention note that the language of Article V is broadly inclusive: "... on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing *Amendments* (emphasis added)...." They assert that the article places no limitation on the number or scope of amendments that would be within a convention's purview. Constitutional scholar Charles Black offered emphatic support of this viewpoint: "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.'"[83] In fact, he went on to assert that limited conventions would be constitutionally impermissible for the reason that no language is found in Article V that authorizes them:

> It (Article V) does *not* (emphasis in the original) imply that a convention summoned for the purpose of dealing with electoral malapportionment[84] 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.[85]

Consequently, by this reasoning, the many hundreds of state applications for a convention to consider amendments on a particular subject are null and void. Moreover, Professor Black noted that state applications demanding a convention on a single issue were almost unknown in the 19th century; he described the phenomenon as " ... a child of the *twentieth century* (emphasis in the original).... The twentieth century petitions, embodying this theory, are on the point of law implicitly resolved by them, nothing but self-serving declarations, assertions of their own power by the state legislatures."[86]

Writing at the height of debate over the 1980s campaign for an Article V Convention to consider a balanced budget amendment, former Solicitor General Walter Dellinger asserted that the Framers deliberately sought to provide a means of amending the Constitution that is insulated from excessive influence by either the state legislatures, or by Congress.[87] His view of the convention's authority is among the most expansive advanced by commentators on the Article V Convention:

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[83] Charles Black, "Amending the Constitution: A Letter to a Congressman," *Yale Law Journal*, volume 82, number 2, December 1972, p. 199.

[84] Professor Black was writing in the context of the Article V Convention campaign to overturn the Supreme Court decision in *Reynolds v. Simms*, 377 U.S. 553 (1964) and *Wesberry V. Sanders*, 376 U.S. 1 (1964), which extended the "one-person, one vote" requirement respectively to state legislative districts and congressional districts, ruling that the population of both jurisdictions must be substantively equal.

[85] Black, "Amending the Constitution: A Letter to a Congressman," p. 199.

[86] Ibid., p. 203.

[87] See Walter E. Dellinger, "The Recurring Question of the 'Limited' Constitutional Convention," *Yale Law Journal*, volume 88, issue 8, July 1979, pp. 1623-1640.

> ... any new constitutional convention must have the authority to study, debate, and submit to the states for ratification *whatever amendments it considers appropriate* (emphasis added).[88]

According to his judgment, an Article V Convention must be free to pursue any issue it pleases, notwithstanding the limitations included in either state applications or the congressional summons by which it was called:

> 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.[89]

More recently, Michael Stokes Paulsen invoked original intent and the founders' understanding of such a gathering. Asserting that they would have considered a "convention" to be a body that enjoyed broad powers, similar to the Constitutional Convention itself, he suggests:

> "Convention" had a familiar ... public meaning in 1787. It referred to a deliberative political body representing the people, as it were, "out of doors." Representatives or delegates to such a convention might well operate to some extent pursuant to "instructions" of the people thus represented, but a convention was not a pass-through or a cipher, but rather an agency — a deliberative political body."[90]

Perhaps the most assertive expression of the open or general convention argument centers on the doctrine of "conventional sovereignty:"

> According to this theory, a convention is, in effect, a premier assembly of the people, a representative body charged by the people with the duty of framing the basic law of the land, for which purpose there devolves upon it all the power which the people themselves possess. In short, that for the particular business of amending and revising our Constitution, the convention is possessed of sovereign powers and therefore is supreme to all other Government branches or agencies."[91]

Another school of thought, cited by the House Judiciary Committee in a 1957 study, rejects the conventional sovereignty argument, primarily on the grounds that an Article V Convention can only be summoned subject to the conditions of the Constitution:

> ... those who assert the right of the Congress to bind a convention contend that the convention is, in no proper sense of the term, a sovereign. It is, they argue, but an agency employed by the people to institute or revise fundamental law. While there may be a special dignity attaching to a convention by reason of its framing fundamental law, no such dignity or power should attach which would invest it with a primacy over other branches of government having equally responsible functions.[92]

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[88] Ibid., p. 1624.

[89] Ibid., p. 1640.

[90] Michael Stokes Paulsen, "How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention," *Harvard Journal of Law and Public Policy*, volume 34, issue 3, 2011, p. 842.

[91] Brickfield, *Problems Relating to a Federal Constitutional Convention*, 16.

[92] Ibid.

First, Article V delegates important and exclusive authority over the amendment process to Congress. As noted earlier in this report, first among these are the right to propose amendments directly to the states for their consideration on the vote of two-thirds of the Members of the House of Representatives and the Senate and 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 to 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.

Traditional Deterrents to an Article V Convention

It may be argued that there is no immediately pressing need for Congress to examine its Article V options and responsibilities. Historical precedent suggests that attaining petitions from two-thirds of the states in a timely manner is a difficult obstacle, as demonstrated by the several unsuccessful convention drives in the latter part of the 20th century. As noted earlier, these fell short of the two-thirds mark, despite the vigorous efforts of organized support groups over a period of several years, and until recently, there has been little apparent interest in the Article V Convention mechanism in the states since the 1980s. Judging by the historical record, the process might arguably be described as a footnote to constitutional history.

The obstacles to any campaign for an Article V Convention remain daunting even in the face of rapid change: the Constitution sets a considerable hurdle for the Article V Convention process by requiring that applications for a convention be made by the legislatures of at least two-thirds of the several states. Further, as this report demonstrates, there are competing schools of thought on how a convention should be called, what would be an appropriate mandate for the convention, the scope of any amendments it might propose, and, perhaps most important, the role of Congress in all these questions. Moreover, any amendments proposed would face the same task of securing approval of three-fourths of the states before they were ratified.

The measured pace of the legislative process in the states has also traditionally served as a check to haste in calling such a convention.[11] For instance, in the case of the balanced budget amendment convention drive, it took seven years for an organized campaign to gain convention applications from 32 of the necessary 34 states.[12] Nevertheless, given the extraordinary speed and

[11] As Supreme Court Justice and constitutional commentator Joseph Story noted, "The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory." See Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co., 1833), §1821. Available in *The Founders Constitution*, a joint venture of the University of Chicago Press and the Liberty Fund, Web edition, at http://press-pubs.uchicago.edu/founders/documents/a5s12.html.

[12] See under "The Balanced Budget Amendment: 1975-1983" in CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* , by Thomas H. Neale. While most state legislatures convene annually, their sessions are frequently limited by law; 32 states place some form of time constraint (continued...)