

# Constitutional & Original Intent Analysis of Amending the Constitution in the 21<sup>st</sup> Century

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*The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress...”<sup>1</sup> Article V, U.S. Constitution*

Article V Convention is a structural fix aimed at making corrections at the federal level. It is a Constitutional remedy inserted into the Constitution to allow the people to provide for further protections within the federal framework. It is a legal way to amend the Constitution as we recognize threats to Liberty and seek to improve the safeguards of our republican system. Article V Convention aims to make structural changes or further clarifications to the operations of the federal government and its relation to the States. A convention seeks to fix what is assumed to be broken or lacking in the federal system. Since it involves an actual change to the Constitution itself, one could reasonably argue that it should be used only in the rarest of circumstances and is for that reason one of the most difficult to carry out.

Our framers anticipated the need to amend the Constitution as our awareness of Liberty expanded and perhaps our need for government diminished. Listen to Thomas Jefferson’s view on amending the Constitution. It appears clear that he felt it was needed, but not to be taken lightly:

*"I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors."*<sup>2</sup>

It is also interesting to note Jefferson's reliance on the "enlightenment" of the people to become more distant to the "barbarous ancestors," clearly implying that amendments should be for the expansion of Liberty and not for the further bondage of the people.

I'm quite sure our framers never intended for us to continually amend the Constitution to expand federal power or for light or transient reasons. If that had been the case, our framers would have allowed the federal government to freely amend the Constitution without a final check of the States and the people. They wouldn't have made the process so difficult to complete.

It is important to note that the provisions for amending the Constitution do not make the Constitution a "living, breathing, document." The "living, breathing, document" nomenclature has very little to do with formal and Constitutional means of amending the Constitution and everything to do with the reinterpretation of words OUTSIDE of the amendment process. This "living, breathing, document" classification is not only patently false, but insidiously dangerous as it allows the government and their courts to functionally amend the Constitution without submitting to the constitutional process. Historically, these "lexical amendments" have not been to advance Liberty but to expand government power. This fallacy of Constitutional interpretation proves

the very need for a formal and arduous means of Constitutional Amendments. You cannot have a foundation that ever changing. You might as well attempt to build your house upon vanilla pudding. The Constitution is a foundational rock that can be added upon to expand the Liberty building. And a rock of this magnitude shall not be moved, or else the entire building will crumble.

There are numerous sources available discussing Article V convention. What does the Constitution say about Article V? What do the framers say about Article V? I recommend the *Journal of the Federal Convention Kept by James Madison (ed. by E.H. Scott; R. R. Donnelly & Sons Co., Chicago, 1893)* and *The Founders' Constitution* at <http://press-pubs.uchicago.edu/founders/> which contains many writings of the founders in digital form, including Madison's journal of the constitutional conventions.

Though I have never taken a stance in opposition to this constitutionally authorized remedy, I have been personally attacked and ridiculed for pointing out the fact that we must consider some inherent dangers and take measures to prepare for them. Many act as if Article V is a panacea to our current constitutional crisis and to consider that there may be difficulties is somehow seen as foolish. Contrary to those viewpoints, there was much debate in 1787 surrounding the proposals for amending the Constitution. The founders were not of one mind on this issue and many saw dangers in the proposal. For instance George Mason, Edmund Randolph and Elbridge Gerry were so concerned about a tyrannical Congress controlling the process that they refused to sign the Constitution that came out of the convention.

*"Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account." - George Mason, June 11, 1787<sup>3</sup>*

In this present writing, I want to present for the reader's consideration some of the issues that concerned the founders, in particular the potential of a Congress that "may abuse their power."

Indeed there will undoubtedly be occasions where an Article V convention may be necessary. If we are going to have an Article V convention, we should want to know the CHALLENGES that we will have to overcome? And if there are indeed threats to the process, we need to deal with those threats honestly and openly rather than jump in feet first, eyes closed, and hope for the best. To use a metaphor shared with me by a 30-year attorney, surely warning your child not to “play in the streets” could not be considered foolish. I would view that as good parenting, even if a car never comes by.

Article V is like conducting open heart surgery on the Constitution. We should be fully informed of all the benefits AND RISKS before we enter into such a serious procedure. Patrick Henry said in 1775:

*“...it is natural to man to indulge in the illusions of hope. We are apt to shut our eyes against a painful truth, and listen to the song of that siren till she transforms us into beasts. Is this the part of wise men, engaged in a great and arduous struggle for liberty? Are we disposed to be of the number of those who, having eyes, see not, and, having ears, hear not, the things which so nearly concern their temporal salvation? For my part, whatever anguish of spirit it may cost, I am willing to know the whole truth; to know the worst, and to provide for it.”<sup>4</sup>*

I want to know the truth, no matter how unpleasant or frightening it might be, so we can be prepared to deal with these difficult issues.

I want to bring forward several of the challenges that I see that must be addressed before we run headlong blindly into the most constitutionally invasive means of controlling the federal government -Article V Convention.

### **WHO are the delegates and what is their motivation?**

In the convention debates of 1787, James Madison supported the idea of Congress proposing amendments but he expressed concern over a convention process as to “*How was a Convention to be formed? by what rule decide? what the force of its acts?*”<sup>5</sup>

Later in 1788 Madison reveals his biggest concern – Who will be the delegates and what will be their motivation?

*“If a General Convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having a greater latitude than the Congress appointed to administer and support as well as to amend the system; it would consequently give greater agitation to the public mind; an election into it would be courted by the most violent partizans on both sides; it wd. probably consist of the most heterogeneous characters; would be the very focus of that flame which has already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumeable that the deliberations of the body could be conducted in harmony, or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious circumstance, I should tremble for the result of a Second, meeting in the present temper of America, and under all the disadvantages I have mentioned. . .”<sup>6</sup>*

In Federalist 49 Madison discusses two options for choosing delegates to a convention: either through the Legislators or through popular vote of the people. In each case he believed there was cause for concern. Those concerns are all very relevant to us today. We must use this wisdom to protect our Constitution from those who would destroy it.

In modern terms, when delegates are chosen by the legislators, what we could see are appointments based upon party loyalty rather than upon Constitutional expertise and dedication to sound Liberty principles. When the delegates are chosen by popular vote, typical election dynamics could determine the outcome. Voters would vote

based upon party popularity and perhaps even a “lesser of two evils” and the same corrupt politicians would now be “fixing” the very problems they created. The ultimate result of both options would be, as Madison states, *“The same influence which had gained them an election into the legislature, would gain them a seat in the convention... They would consequently be parties to the very question to be decided by them.”*<sup>7</sup>

According to Madison, the real difficulty with delegates boils down to “motivation.” What will be the motivating force behind the delegates and their amendments? Madison recognized, and we should remember, that the only reason we have our current Constitution is that the framers had just come from a bloody revolution which kept the delegates focused upon LIBERTY. It is this focus that forced them to set aside their party politics and personal motivations:

*“We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the antient government;”*<sup>8</sup>

Madison is telling us that without some overriding and unifying motivation, the convention would likely degrade into a morass of factional passions, the same tired Republican vs. Democrat drama we see today. If we cannot get delegates that are properly constitutionally minded, rather than driven by political gain and greed, Article V will never serve the cause of true Liberty. Therefore, the selection of delegates is a very important aspect to consider.

A second question to ask is...

### **How Long Will It Take?**

One big difference between the choices of nullification and Article V Convention is the time each takes to implement. Any advocate of Article V must admit that this is a LONG TERM goal and not a quick fix.

To call a convention, choose delegates, and agree on amendments; an Article V convention could take a long time, maybe up to 5 to 10 years. Adding to the time frame is the Article V requirement of 3/4 ratification by the States. That means EVERY AMENDMENT must be agreed upon (debated, with amendments), individually, by 3/4 of the States to ratify.

When our country was born, only 13 colonies were involved and the total population in America was about 3 million. It took nearly 20 years of crisis to reach a boiling point in 1776. It then took from 1776 to 1790 (14 years) for the final State, Rhode Island to finally ratify the Constitution. That was not so much due to primitive means of communication as it was to debate and wrangling over various provisions and a battle for a Bill of Rights. Today we have 50 States and a population of almost 310 million! Some may ask do we even have that much time? If we do (or do not!), it would be prudent during that time to use nullification to put the brakes on at the State level until corrections (if truly needed) can be made at the federal level.

Here is the big question regarding Article V conventions...

### **What Does Congress Think An Article V Convention Should Look Like?**

As noted above, several founders considered this a major issue with the Article V process. It would indeed be foolish (and rather arrogant) to dismiss the concerns of the very men who wrote the Constitution itself. There have been many discussions on what the Constitution says about Article V, what the framers say about Article V, but the REAL LIFE question is what Congress will actually DO if we call a convention.

The good news is we don't have to guess what Congress thinks about an Article V convention. On July 9, 2012, The Congressional Research Service (CRS), quite often the opinion factory of Congress, published a report titled, "The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress. In this document the CRS tells us what Congress thinks and has thought about Article V conventions since the 1950's.

Let us begin by reviewing the relevant sections of Article V:

*"The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this*

*Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress...”<sup>9</sup>*

The first thing we must point out is that the Article V provision is not a means of “bypassing” the Congress. Congress is very obviously part of the process. A “Convention of States” that proposes to operate on its own and “bypass” Congress is an unconstitutional and rogue process.

Clearly, Article V requires Congress, on the application of two thirds of the States, to “call” a convention for “proposing amendments.” Once the convention is called, the proposed amendments must be ratified by three quarters of the States. Congress is authorized to choose what method of ratification in the States, by either ad hoc conventions called by the States for the specific purpose of considering ratification, OR ratification by the legislatures of the States. But this is a process and there are certain details in the procedure that are not mentioned in the text of the Constitution. Congress is more than willing to fill in those blanks. According to the CRS report, Congress has already altered the Article V process by inserting three additional elements NOT in Article V of the Constitution:

1. The Congressional vote to propose an amendment must be approved by two thirds vote of members present and voting, providing a quorum is present;
2. Amendments are not incorporated into the existing text of the Constitution as declared in 1788 but included as “supplementary articles”; and
3. Beginning in the 20<sup>th</sup> century, Congress has required that ratifications must be contemporaneous, meaning every amendment must be ratified within a seven year deadline.<sup>10</sup>

But what does Congress see as its key role in an Article V convention? The CRS points out that Congress believes that Article V delegates important and exclusive authority to Congress over the Article V Process. The CRS shows us the authority Congress claims Article V delegates to them:

1. The Right to propose amendments directly;
2. The Responsibility to “call” conventions; and
3. The Responsibility to submit proposed amendments to the States for ratification.<sup>11</sup>

The problem that exists is that the Constitution is silent on the mechanics of HOW Congress is to complete their three tasks. The CRS points out that Congress has traditionally laid claim to a broad spectrum of responsibilities. In addition to the three authorities listed above, the CRS lists six more which Congress declares that fall within their purview:

1. Receiving, Judging, and Recording State Applications;
2. Establishing procedures to summon a convention;
3. Setting a time allotted for deliberations;
4. Determining the number and selection of delegates;
5. Setting INTERNAL convention procedures; and
6. Arranging for formal transmission of proposed amendments to the States.<sup>12</sup>

Congress asserts that when considering all that needs to be done, they have an “indispensable and defining role”<sup>13</sup> in the Article V Convention process. A large part of that indispensable and defining role of Congress, as shown by the CRS through Congressional precedent, will be filling in those procedural blanks. There are many issues addressed in this thirty-two page report. We will, however, only deal with five major questions:

1. Is Congress obligated to call a convention?
2. What kind of convention will it be, a general or limited convention?

3. Does Congress have to submit all proposed amendments for ratification?
4. Who are the delegates and what is their motivation?
5. What role does the President play in an Article V Convention?

To fill in the blanks Congress will ask and amazingly, Congress will also *answer* these questions as well.

### **Must Congress Call a Convention?**

First let's see if Congress believes it must call a convention or not. Article V says, "Congress SHALL call a convention..." (emphasis mine) Alexander Hamilton said in Federalist #85:

*"By the fifth article of the plan, the Congress will be obliged "on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof." The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air."<sup>14</sup>*

All things considered, the directive seems very clear. However, things are never that clear when dealing with politicians and governments. The catch is Congress has given itself the authority to determine the validity of the States' applications. In determining the **validity** of the applications, they also set the standards for that validity. The CRS report instructs that Congress is able to declare a petition "defective" and therefore invalid.<sup>15</sup> Invalid applications cannot be used to call a convention. And we begin to see just how powerful Congress really can be.

So what does Congress consider a valid application to look like? The CRS says "most constitutional scholars" hold that "applications

proposing a specifically worded amendment” are invalid.<sup>16</sup> Why? Because, these scholars claim, the purpose of the convention is not to ratify an amendment but to deliberate and propose amendments. To allow only specific amendments to be addressed in a convention would, according to these scholars, eliminate a vital step in the process of an Article V Convention. So, according to Congress if the State has an amendment for a specific purpose with specific wording, the State’s application is invalid. Do you agree with this opinion?

Congress grants itself another power regarding State applications by declaring that applications must have an expiration date. If Congress declares the application too old, the States must resubmit.

Finally, Cyril Brickfield, counsel to the House Judiciary Committee from 1951-1961, told Congress they didn’t really need to call a convention if they didn’t want to, even if all the applications were received.

*“...it is doubtful, however, that there is any process or machinery by which Congress should be compelled to perform this duty.”<sup>17</sup>*

Brickfield pointed out that in 1920 Congress was mandated by the Constitution to reapportion the House of Representatives, but did not and nothing happened. He claims this failure to act set a precedent that even if Congress fails to call a convention, even when thirty-four States properly petition, there really is *“no enforceable cause of action.”<sup>18</sup>* By reminding Congress of Brickfield’s advice, the CRS is prompting Congress, *“don’t worry; there is no reason to call a convention if you don’t want to because there is no recourse available to the States if you refuse.”*

One could obviously argue that the States could sue Congress in federal court to force a convention. How long would that take? What guarantee would the States have that the courts would rule in their favor? After all, the Supreme Court has already upheld Congressional add ins to Article V. Aren’t the federal courts filled with judges who are appointed by the federal government? Do we think there is a likelihood that they would rule in favor of the States and against its own interest? Is this a gamble worth taking?

According to Congress, the CRS report shows, the answer to the question, “Must Congress Call a Convention?” is a resounding “NO!” Yes, the Constitution demands it. Yes the founders said Congress was obligated. BUT Congress sets the standards for applications, so they can simply refuse applications to avoid a convention. And, according to the CRS, precedent has been set in the 1920’s that says Congress can simply REFUSE and the States have no recourse.

I hope we are seeing a pattern here. I hope we can recognize that Congress feels Article V gives them a ruling authority and supremacy over the States. I hope we can listen and learn from Congress’ own actions how they believe this Article V Convention will practically play out. As we can see by the very first question, the practical application of a convention has nothing to do with the Constitution and nothing to do with framer’s intent. It is clear that, in fact, an unconstitutional mindset which has gripped Congress for years (isn’t that the reason we are having this discussion?) could be a significant threat to the Article V process, just as George Mason believed it would be!

*“Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.”<sup>19</sup>*

Remember that Congress has the responsibility of “calling” a convention upon application from two thirds of the States. We have already learned that Congress, even from a minimalistic perspective, has placed itself in a supervisory role over all Article V procedures. It was clear by the CRS report that Congress believes it not only receives petitions, but it also sets the criteria for legitimate petitions and then has the authority to determine whether those petitions meet Congressional standards and are valid. In this way, Congress can choose to call a convention or not, based upon acceptance or denial of the States’ applications.

To understand Congress's next position, we will have to operate on the premise that a sufficient number of valid applications have been received and now Congress is going to decide what kind of convention there will be; a limited convention or a general convention. Just so there is no confusion, I am aware of what the Constitution says and what our framers say. But we must look closely at what Congress says so we can be prepared to deal with this reality if a convention is to be called. If someone said that they were coming to your house to punch you in the face, you would likely take reasonable actions to deal with the forthcoming events. Like get your Louisville slugger positioned close to the door! So, yes, I know what the founders believe. I know what I believe. What is germane to the present discussion is what **Congress** believes, or more importantly, what they have already declared that they will or can do in regards to a convention. Because we have **seen** what Congress believes and what the Constitution **requires** are rarely the same. Moving on...

It is important to remember certain conclusions that Congress has already drawn.

1. Congress is the controlling authority in determining the validity of applications, thus giving Congress a controlling supremacy over the States.
2. Congress has been advised by "experts" that applications that assert specifically worded amendments are invalid because the purpose of the convention is to *propose* amendments, not *ratify* them.
3. Congress has the power to choose to not call a convention if they don't want to, even with sufficient valid petitions, because precedent has been set in the 1920's that establishes there is no recourse available to the States for Congressional failure to act.

So to summarize, the federal government has deemed itself superior to the States *yet again* by defining the rules of the game.

### **Type of Convention: General or Limited?**

A general convention is one where all and *any* amendments proposed by the States are accepted and considered for ratification. A limited

convention is where the States pre-determine the issues to be addressed and only amendments regarding those issues are considered for ratification. The question is what body actually governs the process? Who maintains the limited or general convention?

The Congressional assertions, as shown by this CRS Summary, place Congress in a position of supremacy over the States in an Article V convention. I believe that we can see, through this CRS report, that Congress has no intentions of allowing the States to have any control over the convention.

The CRS summary shows Congress believes that the kind of convention they call really depends upon one deciding factor: who has supremacy in the convention, Congress or the States. Consider the following:

The CRS notes that the language of Article V is broadly inclusive; *“...on application of the legislatures of two thirds of the Several States, Congress shall call a convention for proposing Amendments...”*<sup>20</sup> This places no limitation on the number and scope of Amendments that would be considered by the convention. One of the scholars chosen by the Congress to help formulate their argument asserts that limited conventions would be constitutionally impermissible, because no language found in Article V authorizes a limited convention. He states, *“Congress can’t be obliged, no matter how many States ask for it, to summon a convention for limited purposes.”*<sup>21</sup> This means, as the CRS points out, any number of State applications for a convention that make application for specific amendments are null and void.

On the other hand Walter Dellinger, former Solicitor General, advised Congress in 1979 that if the States want to trespass any original limitations on the convention then they have the power to do so;

*“...any new Constitutional Convention must have the authority to study, debate, and submit to the States for ratification whatever amendments it considers appropriate...if the legislatures of thirty-four States request Congress to call a general convention, Congress has a Constitutional duty to summon such a convention, if those thirty-four States so recommend in their applications that the convention consider only a*

*particular subject, Congress 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.”<sup>22</sup>*

According to past actions and conclusions of Congress, as presented by the CRS, Congress believes the only sure way to guarantee the convention structure is to place Congress in control of the amendment procedure. Congress will then be the governing body of the Convention, making sure all the States stay on track within the proposed limitations, either general or limited. Then what we have done is place Congress in a position superior to the States AGAIN! Then Congress will be in the position to determine from day one, regardless of the wishes of the States, that we will have a convention based on Congress’ own limits because that is the avenue that gives them the most power and control

In fact the CRS asserts that allowing the convention to be supreme over Congress, and consequently supreme over the entire federal government, would create a general convention, not a limited one.

*“In this theory, a convention is, 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...The Convention is possessed of sovereign powers and is therefore supreme to all other government branches and agencies.”<sup>23</sup> US Congress, House of Representatives, Committee on the Judiciary, Cyril Brickfield, 1957.*

Ultimately the States’ views are moot, since the CRS asserts that Congress believes it has the authority to control the scope and content of any convention, limited or otherwise.

*“Congress, however, has historically sought to provide for limited conventions...Once valid applications are received from thirty-four States, Congress has maintained the call for an Article V must come from Congress, and Congress has the authority to limit the subject of Amendments to be considered.”<sup>24</sup>*

The CRS says this requires a “balance of authority.” The States are authorized to apply for a limited convention, but only Congress can guarantee by law the scope and content of the convention.

The Senate Judiciary Committee in 1984 claimed for Congress the power both to set and enforce limits on the subject or subjects considered by a convention. The Goldwater Institute, according to the CRS summary, agrees with this claim of power for Congress stating that Congress holds the power and authority to enforce any kind of convention requested by the States.<sup>25</sup> Therefore, according to Congress and the CRS, the only real guaranteed protection against a “run-away convention” is complete Congressional control. Yet another example of “Trust us, we know better than you. We should be in control.”

It is really interesting how the CRS ends their discussion on the kind of convention we would have. The CRS says, even after all the discussion, “what kind of convention” Congress will call won’t be known until Congress actually calls a convention. In other words, we must call the convention to know what will be in the convention. That path should sound eerily familiar and should give us great pause before traveling it again.

The next question Congress is going to address and answer, now that we have a convention and it has met, is whether Congress is required to accept all amendments proposed by the States in an Article V convention. The CRS reminds us of the precedent established from the 1970’s to the 1990’s, through proposed legislation, indicating that Congress believes they can reserve the right to decide whether an amendment or amendments proposed by a convention should be circulated to the States for approval and ratification.<sup>26</sup> If you believe in a limited convention, then Congress says you must give them the authority to deny the convention the ability to submit any and all amendments.

A CRS report from 1984 states that the Senate has asserted the *“the convention is without authority to propose any amendment or amendments of a subject matter different than that set forth in the concurrent resolutions calling for the convention. In other words, the convention, although a sovereign body, is subject to the limitations of the concurrent resolution by Congress...”*<sup>27</sup> (emphasis mine)

In order to have a limited convention, Congress believes it has the power to set the procedures and set the criteria for a valid amendment. A limited convention requires a powerful governing Congress. But, as Senator Sam Ervin, Jr. asserted, *“unlimited power in the Congress to refuse to submit proposed Amendments for ratification would destroy the independence of the convention.”*<sup>28</sup> Without a governing Congress, the Congress asserts, there is no way to guarantee a limited convention. But to get a limited convention, the States must surrender the independence of the convention.

According to the CRS, the Goldwater Institute believes that Congress must send on to the States all amendments proposed and it is up to the States to limit themselves. Do we still have a limited convention if the States decide not to limit themselves? The CRS then claims the Goldwater Institute proposes that any amendment offered in a convention, beyond the scope of the convention, could be viewed as “policy recommendations” to Congress.<sup>29</sup> So, Congress can decide which amendments are truly amendments and which are “policy recommendations.” That should give them some interesting wiggle room!

Will Congress be merely a clerk for the convention or its controlling authority? After all, the power to make laws is vested solely in Congress. And according to the Congressional precedent and material, Article V gives Congress the power to call a convention and impose requirements on the convention as to its form, procedures, and agenda. The CRS also reminds us that Congress has historically interpreted its authority to “call” as a broad mandate to establish standards and procedures for the entire Article V process. So does Congress have to submit all amendments for ratification or not?

The CRS ends the report on whether Congress must submit all amendments proposed by the convention much in the same way they ended the discussion on the question, what kind of convention; by answering the question with a question.

*“Ultimately the question of whether Congress can refuse to propose an amendment may also depend upon the answer to the previous question, what manner of convention does Article V authorize.”*<sup>30</sup>

If it is a limited convention, Congress has asserted Congressional power to judge and determine which amendments are valid. But what kind of convention will it be? Remember, we won't know until we call one!

### **What is the president's role in Article V?**

Another question: What does Congress believe the role of the president to be in Article V?

It is a very interesting question, very interesting that Congress would even ask it. The CRS admits the most obvious answer to that question is that the president has no role at all. He is not mentioned in Article V and he is not delegated any authority or responsibilities. But you know it can't and won't end there. With politicians and political power on the line it is never that cut and dry.

The CRS is quick to point out that there are some compelling arguments that the president actually has an important role to play. Believe it or not, the entire argument, giving the president power in Article V, is based upon the amount of power Congress holds in the convention. According to this argument, the more power **Congress** holds in a convention, the more justification exists for the president to have "veto power." Need we be reminded that the whole purpose of the Article V convention was to *fix* the federal government which was created by the Sovereign States to begin with? Time and time again, the federal government is placing itself in the master position and subjecting the States to their own process!

The argument is that the convention will have the "force of law" and Article 1 section 7 clause 3 mandates:

*"Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."*<sup>31</sup>

Since Article V has the force of law, this argument states that Article 1 section 7 clause 3 cannot be avoided. This position also claims that since Congress's obligation to "call" a convention is clearly a power to spell out the specific terms of the convention, those terms would be similar to the general kinds of legislation that Congress normally deals with. So, this legislative act, according to the CRS, is no different than any other and would require presidential approval.<sup>32</sup> The CRS openly admits there is NOTHING in Article V regarding this.

They say *"there can be little doubt that the Congress is possessed with the authority to issue legislation on the subject matter of the "Constitutional Convention Implementation Act."*<sup>33</sup> Therefore, Article 1 section 7 clause 3 will naturally INCLUDE the President in the Article V process.

Isn't that great!? We not only will have a power struggle between Congress and the States, but we will also have the executive branch attempting to interject itself into the process.

Let me close with another interesting question to consider. What does Congress believe is the proper number and selection of delegates? CRS points out that the formula used to determine the number of delegates is commonly considered the same as for the Electoral College.<sup>34</sup> But are we guaranteed that is how it will work? Who will determine the number and procedure? I think we know if Congress gets its way, they will answer both those questions.

But a more important question may be, "could Senators or Representatives be delegates?" The CRS notes that Article 1 section 6 clause 2 of the Constitution prohibits Senators and Representatives from being appointed to any civil office while holding their office. The House judiciary committee recognized in 1993 that if members of Congress could be delegates, it would constitute a great potential for conflict of interest;<sup>35</sup> these members would be the regulators and the regulated!

However, in true political form, we have a loophole. CRS lets us know that Congress can reasonably claim there is no Constitutional prohibition against members of Congress serving as delegates. In 1974, the American Bar Association "ruled" that the mandate in Article 1

section 7 clause 3 prohibits Congress from holding office in one of the three branches of US government. But since a State delegate is outside this prohibition, there is no reason why a Congressman can't be a delegate as well.<sup>36</sup>

And now we have come full circle. James Madison warned us in Federalist #49, that if we were to hold a convention today the very same people in government that created the problem could be the very same people tasked to fix the problem. Madison warned us that this would not work out well for us. He said our convention would be taken over by political and personal motivations, rather than motivations for the preservation of Liberty.

The only question that remains is this...What kind of convention do you want? One that is completely controlled by Congress and subsequently the executive branch, or one where the sovereignty of the States remains and the States are in control?

Congress says, if you want a limited convention, the only way to guarantee that is to give them control. How do you think that will work out for us?

The argument in favor of an Article V convention of the States has rapidly advanced in the past few years. The Compact For America (CFA), a domestic non-profit "501(c)4" corporation, has a plan that is comprised of the Compact for a Balanced Budget Amendment ("the Compact"), a proposed interstate compact, which, in the words of its proponents, would transform *"the otherwise cumbersome state-initiated amendment process under Article V into a 'turn-key' operation."*<sup>37</sup> The Compact is a comprehensive answer to all the Article V questions posed by offering a "contract" between the participating States to establish the rules and operations "missing" from the text of Article V, thus taking that function away from Congress and putting it into the hands of the States. This compact between the States would assert the States as the controlling parties in the convention and remove enormous power from the hands of Congress. This perspective is completely contrary to the understanding of Article V that Congress has presented over the years. And a recently published version of the CRS Summary on Article V shows that Congress has taken notice and will not relinquish their power without a fight.

CRS published an updated Summary on April 11, 2014, with the same title as the previous document.<sup>38</sup> This version addresses some issues that have developed since their last publication, to include the CFA compact. The CRS points out to Congress that this CFA compact is a “self-described interstate compact” and as such must fall under the authority of Article 1 section 10 clause 3 of the Constitution, otherwise known as the “Compact Clause.” This is functionally a Congressional “check-mate” of the State sovereignty assertion. The Compact Clause reads in part:

*“No State shall, **without the Consent of the Congress...** enter into any Agreement or compact with another State....”<sup>39</sup> (emphasis mine)*

The CFA compact offers an agreement between the States to stop Congress from co-opting the convention process. Congress will respond to this denial of their power with the Compact Clause and say “you can’t have this contract without our approval.” And once again, Congress is not circumvented, but inserted into this process with overriding power over the States. What will be the recourse to resolving this power struggle? No doubt a law suit in federal court. What will be the result of a law suit in federal court where the judges are appointed by the same Congress that is a party to their case? Well, I’m sure it is quite obvious that it is not likely to be in favor of the sovereignty of the States.

Before we open our Constitution up for the tinkerers to perform open heart surgery, we might want to have a serious discussion about how we will safeguard against some of the clear and present dangers lurking in the operating room.

## Citations

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<sup>1</sup> U.S. Const. art V.

<sup>2</sup> Thomas Jefferson (July 12, 1816) a personal letter to Samuel Kercheval, at <http://oll.libertyfund.org/titles/808>.

<sup>3</sup> James Madison, *Records of Federal Convention* citing Col. George Mason, June 11, 1787 at <http://press-pubs.uchicago.edu/founders/documents/a5s2.html>.

<sup>4</sup> *Supra*, at note 5.

<sup>5</sup> James Madison, *Records of the Federal Convention*, Sept. 10, 1787 at <http://press-pubs.uchicago.edu/founders/documents/a5s2.html>.

<sup>6</sup> James Madison, *Copy In Substance Of A Letter To G. L. Turberville, Esq.*, Nov 2, 1788 at <http://oll.libertyfund.org/titles/1937>.

<sup>7</sup> James Madison, "Federalist 49" in *The Federalist Papers*, at [http://avalon.law.yale.edu/18th\\_century/fed49.asp](http://avalon.law.yale.edu/18th_century/fed49.asp).

<sup>8</sup> *Ibid*.

<sup>9</sup> *Supra*, at note 79.

<sup>10</sup> Thomas H. Neale, Congressional Research Service, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*. July 9, 2012 ([www.crs.gov](http://www.crs.gov) R42589) pages 2-3.

<sup>11</sup> *Ibid*, page 4.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*, page 8.

<sup>14</sup> Alexander Hamilton, "Federalist 85" in *The Federalist Papers*, at [http://avalon.law.yale.edu/18th\\_century/fed85.asp](http://avalon.law.yale.edu/18th_century/fed85.asp).

<sup>15</sup> *Supra*, at note 84.

<sup>16</sup> *Ibid*, page 9.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid*.

<sup>19</sup> James Madison, *Record of the Federal Convention*, citing Col. George Mason, Sept 15, 1787 at <http://press-pubs.uchicago.edu/founders/documents/a5s2.html>.

<sup>20</sup> *Supra*, at note 79.

<sup>21</sup> *Supra*, at note 84, page 11.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*, page 12.

<sup>24</sup> *Ibid*, page 13.

<sup>25</sup> *Ibid*, page 14.

<sup>26</sup> *Ibid*, page 18.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid*, page 20.

<sup>31</sup> U.S. Const., art 1 sec 7 cl 3.

<sup>32</sup> *Supra*, at note 84, page 26.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid*, page 29.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

<sup>37</sup> Goldwater Institute, "Compact for a Balanced Budget," at <http://goldwaterinstitute.org/article/compact-balanced-budget>.

<sup>38</sup> Thomas H. Neale, Congressional Research Service, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*. April 11, 2014.

<sup>39</sup> Constitution, Article 1 section 10 clause 3.