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

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## Summary

Article V of the U.S. Constitution provides two ways to amend the nation's fundamental charter. Congress, by a two-thirds vote of both houses, may propose amendments to the states for ratification, a procedure that has been used for all 27 current amendments. Alternatively, on the application of the legislatures of two-thirds of the states, 34 at present, Article V directs that Congress "shall call a Convention for proposing Amendments...." This alternative, known as an "Article V Convention," has yet to be implemented. This report examines the Article V Convention alternative, focusing on related contemporary issues for Congress. A companion report, CRS Report R44435, *The Article V Convention to Propose Constitutional Amendments: Current Developments*, identifies and provides analysis of recent activity in Congress, the states, and the Article V Convention advocacy community. Another report, CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, examines the procedure's origins and history and provides an analysis of the role of the states in calling a convention.

From the 1960s through the early 1980s, supporters of Article V conventions mounted vigorous unsuccessful campaigns to call conventions to consider then-contentious issues of national policy, including a ban on school busing to achieve racial balance, restrictions on abortions, apportionment of state legislatures, and, most prominently, a requirement that the federal budget be balanced, except in wartime or other extraordinary circumstances. Although they came close to the constitutional requirement, none of these campaigns attained applications from 34 states.

With the failure of these efforts, interest in the Article V Convention alternative declined for more than 20 years, but over the past decade, there has been a gradual resurgence of attention to and support for a convention. Advocacy groups across a broad range of the political spectrum have embraced the convention mechanism as an alternative to perceived policy deadlock at the federal level. Using the Internet and social media to build campaigns and coalitions that once took much longer to assemble, they are pushing for a convention or conventions to consider various amendments, including the well-known balanced budget requirement, restrictions on the authority of the federal government, repeal of the corporate political contributions elements of the Supreme Court's *Citizens United* decision, and others.

This report identifies a range of policy questions Congress might face if an Article V Convention seemed imminent. Some of these include the following: what constitutes a legitimate state application? Does Congress have discretion as to whether it *must* call a convention? What legislative vehicle would be appropriate to call a convention? Could a convention consider any issue, or would it be limited to the specific issue cited in state applications? Could a "runaway" convention propose amendments outside its mandate? Could Congress choose *not* to propose a convention-approved amendment to the states? What role, if any, does the President have? What role would Congress have in the mechanics of a convention, including rules of procedure and voting, number and apportionment of delegates, funding and duration, service by Members of Congress, and other related questions? Congress could consult a range of information resources under these circumstances, including the record of the founders' intentions and actions in establishing the Article V Convention alternative, scholarly works cited in this report, historical examples and precedents, and the body of relevant hearings, reports, and bills produced by Congress, particularly when it examined this question between the 1970s and the 1990s.

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## Introduction

Article V of the U.S. Constitution provides two methods by which the nation’s founding charter may be amended. The first, proposal of amendments by Congress, requires the adoption of an amendment or amendments by a two-thirds vote in both houses of Congress. The second, generally referred to as the “Article V Convention,” authorizes the states to apply for a convention to propose an amendment or amendments. If the legislatures of two-thirds of the states—34 at present—apply for a convention, Congress is directed by the Constitution to convene one. All proposed amendments require the approval of three-fourths of the states—38 at present—in order to become part of the Constitution.

While the Article V Convention option was the subject of advocacy campaigns from the 1960s through the 1980s, it was largely dormant for two decades thereafter. The past 10 years, however, have seen a gradual resurgence of interest in and support for the Article V Convention alternative. Advocacy groups across a wide range of the political spectrum are pushing for conventions to consider various amendments to remedy what they regard as legislative and policy deadlock at the federal level.

Dramatic progress in communications technology during this period has arguably facilitated this development. In the past, the need to mobilize support, coupled with time limitations on most state legislative sessions, guaranteed that an organized movement would require a considerable period to develop public awareness and support and to move the application process forward. The comparatively swift emergence of a range of new convention advocacy organizations suggests that the time-consuming organization and development once considered prerequisite to an effective Article V Convention advocacy movement has been greatly compressed, and that much of the infrastructure previously considered necessary for such a campaign might be avoided altogether.

This report opens with a brief overview of the provisions of Article V of the U.S. Constitution, which established the alternative procedures for proposing amendments to the states. It then addresses, from the standpoint of policy, the role of Congress in calling a convention, the form and function of Article V conventions, the amendments they might propose, the ratification process, and such ancillary issues as the role of the President. A companion report, CRS Report R44435, *The Article V Convention to Propose Constitutional Amendments: Current Developments*, provides tracking and policy analysis of current activity in Congress, the states, and the Article V Convention advocacy community. CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, provides comprehensive information and analysis of the convention mechanism, including a detailed examination of constitutional and statutory provisions, origins and original intent at the Constitutional Convention, case studies of major campaigns for an Article V Convention, and a review of the role of the states in the process.

## Background: Article V of the U.S. Constitution

As noted directly above, Article V of the U.S. Constitution provides two procedures to amend the nation’s fundamental charter. The first, “Proposal by Congress,” authorizes proposal of amendments by Congress:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, ... which ... 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>

The second, the “Article V Convention” alternative, requires Congress, “on the Application of the Legislatures of two thirds of the several States”—34 at present—to call “a Convention for Proposing Amendments....”

Amendments ratified by the states under either procedure are indistinguishable and have equal force; they are both “valid to all Intents and Purposes, as Part of this Constitution....”<sup>2</sup> Both modes of amendment share key constitutional requirements.

- Amendments proposed either by Congress or an Article V Convention must be ratified by the legislatures or conventions in three-fourths of the states—38 at present.
- Congress has authority to choose the method of ratification in the states. The options are ratification by ad hoc conventions called by the states for the specific purpose of considering the ratification, or ratification by the legislatures of the states. Here again, the three-fourths requirement applies in both instances.<sup>3</sup>

In addition, over the past century, three elements not included in the Constitution have been customarily incorporated in the ratification process when Congress proposes amendments. As precedents, they would likely be followed, but would not necessarily be required for an amendment or amendments proposed by an Article V Convention.<sup>4</sup>

- First, amendments are not incorporated into the existing text of the constitution as adopted in 1788, but are included as supplementary articles.<sup>5</sup>
- Second, Congress may set a time limit on the ratification process. Beginning with the 18<sup>th</sup> Amendment, proposed in 1917, and continuing with the 20<sup>th</sup> through 26<sup>th</sup> Amendments, Congress set a seven-year time limit on ratification. Proposed amendments covered by this provision must be approved by the requisite number of states in order to become part of the Constitution.
- Finally, the Constitution does not require approval of proposed amendments by the President. Nor are amendments duly proposed by Congress or an Article V Convention subject to the President’s veto or pocket veto.<sup>6</sup>

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<sup>1</sup> U.S. Constitution, Article V.

<sup>2</sup> Ibid.

<sup>3</sup> To date, Congress has specified ratification by convention only for the 21<sup>st</sup> Amendment, which repealed the 18<sup>th</sup> “Prohibition” Amendment.

<sup>4</sup> A fourth element applies specifically to amendments proposed by Congress. The Constitution requires only that amendments be proposed by the vote of “two thirds of both Houses....”, but Congress expanded this requirement by internal rulemaking, so that a congressional vote to propose an amendment must be approved by *two-thirds of the Members present and voting, a quorum being present*, in both chambers. Although it was established by internal action, this requirement was ruled to be constitutional by the Supreme Court in its 1920 decision in *National Prohibition Cases*, 253 U.S. 350, 386 (1920).

<sup>5</sup> As a Member of the House of Representatives, James Madison sponsored the amendments now known as the Bill of Rights, suggesting that they should be incorporated in the body of the Constitution. Congress decided instead to place them at the end of the Constitution as additional articles when ratified. This precedent has been followed for all subsequent amendments.

<sup>6</sup> This issue was determined as part of the Supreme Court’s 1798 decision in *Hollingsworth v. Virginia*, 3 Dall. (3 U.S.) 378 (1798). In 1978, President Jimmy Carter signed a joint resolution (H.J. Res. 638, 95<sup>th</sup> Congress) extending the deadline for ratification of the proposed Equal Rights Amendment as an indication of his support for the measure. For

Thirty-three amendments have been proposed to the states by Congress to date, beginning with 12 amendments proposed in 1789, 10 of which were ratified as the Bill of Rights. Twenty-seven of the 33 were approved by the states; 26 of them are currently in effect, while one, the 18<sup>th</sup> Amendment that prohibited the “manufacture, sale, or transportation of intoxicating liquors,” was ultimately repealed by the 21<sup>st</sup> Amendment.

By comparison, the Article V Convention option has yet to be successfully invoked, although not for lack of activity in the states. Proponents of various amendments took concerted efforts to secure the necessary number of applications several times in the 20<sup>th</sup> century. The most successful example to date was the early-20<sup>th</sup> century campaign for an amendment to provide popular election of U.S. Senators. Although only 25 of 48 states applied for a convention, this effort is frequently credited with “prodding” the Senate to join the House of Representatives in proposing what became the 17<sup>th</sup> Amendment in 1912.<sup>7</sup> Two Article V Convention campaigns of the 1960s-1980s came even closer to the constitutional requirement, but were ultimately unable to attain applications from the legislatures of two-thirds of the states.

## **The Article V Convention in the 21<sup>st</sup> Century: Renewed Interest**

During the last third of the 20<sup>th</sup> century, two campaigns came close to achieving the constitutional threshold of 34 state applications for an Article V Convention. The first sought a convention to consider an amendment authorizing states to use criteria other than strict equality of population in apportioning districts in one chamber of their legislatures. The second advocated a convention to consider an amendment to require a balanced federal budget under most circumstances. Both campaigns ultimately failed to attain their goal. Various reasons are cited for their failure, including second thoughts in state legislatures; for the apportionment amendment, the death of Senator Everett Dirksen, its principal advocate; changing public attitudes concerning the issues; and, in the case of the balanced federal budget amendment campaign, congressional legislation to address concerns over the persistent budget deficits.<sup>8</sup> Many advocates assert, however, that convention applications remain valid indefinitely and that those submitted at any time in the past still count toward the constitutional threshold. Three decades have passed since the high-water mark of the balanced budget amendment convention campaign in the 1980s; consequently, few current Members of either chamber have had the occasion to consider the prospect of an Article V Convention. This situation may, however, be changing, as new communications technology and changing patterns in issue advocacy may offer convention proponents ways to counteract traditional deterrents to the convention alternative.

### **Traditional Deterrents to an Article V Convention**

In the past, several factors tended to impede the progress of campaigns for an Article V Convention.

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additional information, see CRS Report R42979, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, by Thomas H. Neale, p. 10.

<sup>7</sup> For further information on the prodding effect and the 17<sup>th</sup> Amendment, see CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, by Thomas H. Neale, pp. 9-10.

<sup>8</sup> For further information on these campaigns for an Article V Convention, see *ibid.*, pp. 10-14.

The Constitution's stringent requirement that a super-majority of two-thirds of the state legislatures must apply for an Article V Convention has always served as the principal deterrent to calling a convention that did not enjoy broad support. This was intended by the founders; as Supreme Court Justice and constitutional scholar Joseph Story noted, "[t]he 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."<sup>9</sup>

Moreover, it was not easy, even after the advent of mass electronic communications in the 20<sup>th</sup> century, to mount a campaign able to secure convention applications from a large number of states. As late as the 1960s through the 1980s, it took time for a grass-roots movement to emerge, communicate with like-minded individuals and groups, coalesce around an agreed-upon program, establish a national structure of groups sharing the same interest to promote a particular cause, and gradually to develop the ancillary skills necessary for nationwide advocacy, most importantly in the state legislatures.

The measured pace of the legislative process in the states also traditionally served as a check to a convention. While most state legislatures convene annually, their sessions are frequently limited by law. Thirty-two states place some form of time constraint on their sessions, frequently limiting them to as little as 60 to 90 session days.<sup>10</sup> Convention advocates arguably faced a daunting task in securing timely action on a convention proposal, given the generally hectic pace and urgent demands faced by most state legislators during their sessions. In the case of the balanced budget amendment campaign, seven years of organized activity were needed to gain applications from 32 state legislatures.

## **Factors Contributing to the Revival of the Article V Convention**

As noted previously, from the 1960s through the early 1980s, supporters of the Article V Convention alternative mounted campaigns to consider diverse issues. Although these gained broad support, none attained the constitutional threshold of 34 state applications. The failure of these efforts was followed by nearly three decades of relative inactivity. In the 21<sup>st</sup> century, however, the convention alternative began to experience a revival among groups that span the political spectrum. Advocacy organizations as disparate as the Tea Party and Occupy Wall Street view the convention as an alternative to perceived policy deadlock at the federal level.<sup>11</sup>

A major contributing factor in facilitating these advocacy "start-ups" has been progress in communications technology in recent years. The emergence and subsequent ubiquity of the Internet, email, and social media provided a new and compelling model for issue-driven mass policy advocacy campaigns. The emergence of social media-driven groups such as MoveOn.org, the Tea Party movement, and Occupy Wall Street provide the most obvious examples.<sup>12</sup> Their

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<sup>9</sup> Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co., 1833), §1821, in *The Founders Constitution*, web edition, at <http://press-pubs.uchicago.edu/founders/documents/a5s12.html>.

<sup>10</sup> *The Book of States*, 2015 edition, volume 47 (Lexington, KY: Council of State Governments, 2015), pp. 66-67.

<sup>11</sup> These groups and their convention agendas are examined in a companion CRS Report, R00000, *The Article V Convention to Propose Constitutional Amendments: Current Developments*, by Thomas H. Neale.

<sup>12</sup> MoveOn.org emerged in 1998 as an ad hoc online coalition supporting President Bill Clinton; it later grew to a membership of 5 million. The Tea Party movement originated in late 2008 through online discussions among conservative-oriented social networking websites and frequent conference calls. On February 9, 2009, a television cable network business commentator made an on-air call for rallies to oppose government spending. His emotionally charged remarks were picked up by various websites and went viral. In two months, the newly-named Tea Party movement was able to rally over 600,000 supporters in demonstrations around the nation. Occupy Wall Street



swift rise, when combined with widespread publicity, proved that a contemporary campaign, using today's communication strategies and devices, could move the issue of an Article V Convention to a substantial level of public awareness on a shorter cycle than was previously possible.

Also noted earlier in this report, renewed interest in the Article V Convention alternative has arguably been driven by public perceptions of policy deadlock on the national level and discontent with the nation's direction. One political analyst recently argued that the nation is in a period of unusual political volatility, reflected in part by "eleven straight years in wrong track pessimism in national polling. This is the longest period of pessimism ever measured."<sup>13</sup> In late 2014, moreover, the Pew Research Center found that 81% of respondents expected political divisions to grow deeper and to continue. Eighty-six percent of respondents believed the nation would experience continuing partisan gridlock, but only 20% believed that there would be progress on the most important national problems in the near future.<sup>14</sup>

Critics might argue that, notwithstanding these conditions, the convention movement, in its present incarnation, has yet to attract widespread support among the general public or to influence action on this issue by more than a few state legislatures.

## **Issues for Congress in the Context of Renewed Interest in the Article V Convention**

Article V delegates important and exclusive responsibilities related to the amendment process to Congress. First among these is the right, on the vote of two-thirds of the Members of the House and Senate, to propose amendments to the states for their consideration. Article V also vests in Congress the obligation to summon a convention to consider amendments on application of the legislatures of two-thirds of the states, and then refer any amendments proposed by the convention to the states for the ratification process.

Among the many competing demands for its time and energy, what compelling interest might draw the attention of Congress to the Article V Convention alternative? As noted previously in this report, advances in communications technology and public concern over perceived policy deadlock have arguably contributed to the rise of groups advocating an Article V Convention on a wide range of issues. Whether this activity can be translated into widespread state legislative action calling for a convention remains an open question: to date, none of the newly emerged Article V Convention advocacy groups has been able to persuade more than a limited number of state legislatures to adopt their proposals. The potential arguably exists, given the existing situation, that a policy "prairie fire" could ignite, bringing the convention issue to the forefront with unprecedented speed and presenting Congress with a range of substantial and urgent policy considerations. The next section of this report will identify and provide an analysis for Congress of the most important policy questions Congress might be called on to address.

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originated with Canadian activists on July 13, 2011; by September 17, it had begun its protests in New York City, and within a month, it claimed to have mounted demonstrations in 70 major cities around the country.

<sup>13</sup> Glen Bolger, "Republican Incumbents Beware: There's Something Happening Here, What It Is Ain't Exactly Clear," GCA Public Opinion Strategies, September 16, 2015, at <http://pos.org/2015/09/REPUBLICAN-INCUMBENTS-BEWARE-THERES-SOMETHING-HAPPENING-HERE-WHAT-IT-IS-AINT-EXACTLY-CLEAR/>.

<sup>14</sup> Pew Research Center, "Few See Quick Cure for Nation's Political Divisions," December 11, 2014, at <http://www.people-press.org/2014/12/11/few-see-quick-cure-for-nations-political-divisions/>.



## The Role of Congress in the Article V Convention

The state legislatures are indispensable actors in the Article V Convention process—nothing can happen unless 34 or more apply for one. Congress is equally indispensable to the process by which a convention is summoned, convened, and defined. The Constitution, with characteristic economy of phrase, simply directs that “Congress ... on the application of the Legislatures of two thirds of the several States, shall call a Convention for the proposing of Amendments....” Beyond this language, however, observers have identified subsidiary issues for consideration by Congress, of which five may be among the most important:

- What is the overall role of Congress in the convention process? Would it call a convention and then stand aside, or would it be the “guardian” of a convention?
- More specifically, what is Congress’s obligation under Article V to call a convention if it receives sufficient state applications?
- What sort of convention does Article V authorize?
- If an Article V Convention proposes an amendment or amendments, does Congress have any discretion as to whether they must be submitted to the states for consideration?
- What is the constitutional status of an Article V Convention?

### Congress: “Clerk” or “Guardian” of the Convention Process?

Article V’s barebones provisions provide little guidance as to the general role of Congress in the convention process. Supporters of a minimalist interpretation would assign a purely ministerial or clerical role to Congress: it should call the convention; establish minimal requirements as to form, procedures, and agenda; and then refer whatever amendment or amendments are proposed to the states in timely fashion. In other words, call a convention, make the arrangements, and then stand aside. There is justification for this “hands off” course of action from the founders themselves: the records of the Philadelphia Convention show that the Article V alternative was deliberately placed in the Constitution as a check to an intransigent or unresponsive Congress. Alexander Hamilton explained the Article V Convention process in unmistakable terms, “[t]he words of this article are peremptory. The Congress ‘shall call a convention.’ Nothing in this particular is left to the discretion of that body.”<sup>15</sup> This point of view is generally held, with variations, by proponents of the Article V Convention. For instance, a 2010 Goldwater Institute study summarized this position as follows:

The ministerial nature of congressional duties and the requirement that it call a convention at the behest of two-thirds of the state legislatures supports the conclusion that ... Congress acts primarily as the legislatures’ agent. From the nature of that role, it follows that Congress may not impose rules of its own on the states or on the convention.... In the state application-and-convention procedures, the states are in the position of the property owner, Congress in the position of the manager, and the convention for proposing amendments in the place of the contractor.<sup>16</sup>

<sup>15</sup> Alexander Hamilton, in *The Federalist*, Number 85, “Conclusion,” (Cambridge, MA: the Belknap Press of Harvard University Press, 1961), p. 546.

<sup>16</sup> Robert G. Natelson, *Amending the Constitution by Convention: A Complete View of the Founders’ Plan*, Goldwater Institute, Policy Report No. 241, September 16, 2010, pp. 20-22. The Goldwater Institute identifies itself as a public policy research organization focusing on research oriented to individual rights, the free market economy, and limited constitutional government.

In contrast to this assertion, some scholars hold that Congress should be the “guardian” of an Article V Convention, exercising broad authority over the process. Their assertions will be identified and analyzed with respect to more specific questions as they are raised in this report. The House Judiciary Committee considered both points of view in its 1993 print, *Is There a Constitutional Convention in America’s Future?* The committee suggested that Congress would have a role beyond that of calling the convention and then standing aside; the report suggested, however, that the extent of that function would be open to considerable discussion:

Congress, according to most commentators, has only two roles in the Convention process: To Call the Convention and to choose a method of ratification. However, all are agreed that a range of ancillary functions are necessary and proper to carry out the primary roles. The disagreement begins in deciding the limits of the ancillary functions.<sup>17</sup>

An American Bar Association study of the Article V alternative sought to achieve a balance, suggesting a limited, but important role for Congress: “to be sure, Congress has discretion in interpreting Article V and in adopting implementing legislation. It cannot be gainsaid that Congress has the primary power of administering Article V. We do not believe, however, that Congress is, or ought to be, the final dispositive power in every situation.”<sup>18</sup>

## Calling a Convention: The Requirement

Moving beyond the fundamental issue of its role in the Article V Convention process, the Constitution instructs Congress in plain language to call an Article V Convention once the legislatures of two-thirds of the states have submitted applications: Congress “... *shall* [emphasis added] call a Convention for proposing Amendments.....” While a legal analysis is beyond the scope of this report, most legal scholars conclude that Congress must call a convention. The founders’ intentions in this respect seem unmistakable: as noted previously, no less an authority than Alexander Hamilton wrote that, once the threshold is met,

... the Congress will be obliged ... to call a convention for proposing amendments. 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* [emphasis added]. And of consequence, all the declamation of disinclination to a change vanishes in air.<sup>19</sup>

Constitutional scholar Russell Caplan confirmed the founders’ unanimity on the issue; he noted that, “[t]he founding generation spoke with one voice on this duty,” and went on to quote the writings of John Marshall, James Iredell, John Dickinson, and James Madison, in which they all asserted the obligation of Congress to call a convention once the two-thirds threshold was attained.<sup>20</sup>

Given the founders’ intentions, on what grounds could Congress decline to call a convention? Several factors concerning state applications might be used to represent them as defective and therefore invalid. For instance, many constitutional scholars hold that applications proposing a specifically-worded amendment are invalid. As one observer noted, “these resolutions seek to make the ‘Convention’ part of the *ratifying* [emphasis in the original] process, rather than part of

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<sup>17</sup> U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in America’s Future?* 103<sup>rd</sup> Congress, 1<sup>st</sup> session, Serial No. 1 (Washington: GPO, 1993), pp. 28-29.

<sup>18</sup> American Bar Association, Special Constitutional Convention Study Subcommittee, *Amendment of the Constitution by the Convention Method under Article V* (Chicago (?): American Bar Association, 1974), p. 21.

<sup>19</sup> Hamilton, *The Federalist*, p. 546.

<sup>20</sup> Russell L. Caplan, *Constitutional Brinkmanship, Amending the Constitution by National Convention* (New York: Oxford University Press, 1988), pp. 115-117.

the deliberative process for ‘proposing’ constitutional amendments.... They are applications for a convention powered solely to approve or disapprove the submission to the states of particular amendments ‘proposed’ elsewhere.”<sup>21</sup> Another reason for hesitation in calling an Article V Convention centers on the issue of its scope—general versus limited. A further potential impediment is the question of contemporaneity: Are applications perpetually valid, or do they expire after a certain length of time?<sup>22</sup> Convention proponents generally claim that state applications never expire,<sup>23</sup> while the 2010 Goldwater Institute’s study asserted that Congress lacks the authority to decide this question:

... Congress may not impose rules of its own on the states or on the convention. For example, it may not limit the period within which states must apply. Time limits are for principals, not agents to impose: if a state legislature believes its application to be stale, that legislature may rescind it.<sup>24</sup>

In a 1957 report to the House Judiciary Committee, committee counsel Cyril Brickfield suggested that Congress might not be obliged to summon an Article V Convention, even if the requisite number of state applications were submitted: “[i]t is doubtful, however, that there is any process or machinery by which the [C]ongress could be *compelled* [emphasis added] to perform this duty.”<sup>25</sup> Congress, he noted, had the mandate to perform, but “its failure to do so apparently gives rise to no enforceable (sic) cause of action.”<sup>26</sup>

Still another potential option would be preemption of the call for a convention. Supporters of this tactic maintain that Congress can legally respond to state applications by proposing its own relevant amendment. During the 1980s campaign for a convention to consider a balanced budget amendment, the National Taxpayers’ Union exemplified this opinion, asserting that the convention movement was designed to force Congress to propose an amendment, that the call for a convention was “just a way of getting attention—something akin to batting a mule with a board.”<sup>27</sup> The House Judiciary Committee offered support to this argument in its 1993 print, *Is There a Constitutional Convention in America’s Future?* The committee noted that during the 1980s a number of states had forwarded conditional applications that specifically stated their petitions would be canceled in the event Congress proposed a balanced budget amendment that incorporated the general principles embodied in their proposals.<sup>28</sup>

In the final analysis, it may be difficult to conceive that Congress would fail to heed the deliberate call of the nation’s citizens, acting through the agency of their state legislatures and meeting the clearly-stated requirements of Article V. As Cyril Brickfield noted, however, “[p]ublic opinion

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<sup>21</sup> Arthur Earl Bonfield, “Proposing Constitutional Amendments by Convention: Some Problems,” *Notre Dame Law Review*, volume 39, issue 6, 1963-1964, pp. 662-663.

<sup>22</sup> The question of application contemporaneity is examined more closely in CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, pp.18-19.

<sup>23</sup> See, for instance, “What Does Contemporaneous Mean As It Relates to Counting Applications,” Friends of the Article V Convention (FOAVC) website, at <http://www.article-5.org/file.php/1/Articles/FAQ.htm#Q4.06>.

<sup>24</sup> Natelson, *Amending the Constitution by Convention: A Complete View of the Founders’ Plan*, p. 212.

<sup>25</sup> U.S. Congress, House of Representatives, Committee on the Judiciary, *Problems Relating to a Federal Constitutional Convention*, by Cyril F. Brickfield, 85<sup>th</sup> Congress, 1<sup>st</sup> sess., Committee Print (Washington: GPO, 1957), p. 27.

<sup>26</sup> *Ibid.*

<sup>27</sup> Baltimore Evening Sun, March 11, 1983; quoted in *Is There a Constitutional Convention in America’s Future?*, p. 13.

<sup>28</sup> *Ibid.* For additional information on conditional applications, see CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, pp. 17-18.

and, ultimately, the ballot box are the only realistic means by which the Congress can be persuaded to act.”<sup>29</sup> In its 1993 print, the House Judiciary Committee speculated that congressional failure to call a convention in the aforementioned circumstances might trigger court challenges that could lead to a constitutional crisis.<sup>30</sup> Another legal scholar expressed doubts that the courts would intervene: “... even conceding the reach of the judicial power as exercised these days, I find it difficult to believe that the Supreme Court would issue an order compelling Congress to carry out a duty which can hardly be called a simple ministerial duty, or would, in the alternative, take it upon itself to prescribe the procedures for a convention. I much prefer to rely on the integrity of Congress in carrying out a constitutional duty.”<sup>31</sup>

## Constitutional Status of an Article V Convention

Another question turns on the status of an Article V Convention: where does it fit in the constitutional framework? Some commentators assert that it would be a near-sovereign body. Others claim that it is an instrument of state constitutional authority, hence the title “a Convention of States” frequently used by advocacy groups. Still others suggest that it fits comfortably within the constitutional matrix, fully incorporated within the framework of checks, balances, and separation of powers.

One commentator, law professor Michael Stokes Paulsen, invoked “original intent” and the founders’ understanding of such a gathering to claim a unique status for the Article V Convention. He asserted that that the founders would have considered a “convention” to be a body that enjoyed broad powers, similar to the Constitutional Convention itself:

“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.<sup>32</sup>

His interpretation comported with that of Cyril Brickfield, who identified a doctrine of “conventional sovereignty” in his 1957 study for the House Judiciary Committee:

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.<sup>33</sup>

Brickfield also presented contrary arguments, however, reporting that conventional sovereignty was not a universally accepted doctrine, primarily on the grounds that an Article V Convention can only be summoned subject to conditions set out in the Constitution:

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<sup>29</sup> Brickfield, *Problems Relating to a Federal Constitutional Convention*, p. 28.

<sup>30</sup> *Is There a Constitutional Convention in America’s Future?*, p. 14.

<sup>31</sup> Paul G. Kaupfer, “The Alternative Amendment Process: Some Observations,” *Michigan Law Review*, vol. 66, issue 5, March 1967-1968 (sic), pp. 905-906.

<sup>32</sup> 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.

<sup>33</sup> Brickfield, *Problems Relating to a Federal Constitutional Convention*, p. 16.

... [T]hose who assert the right of the Congress to bind a convention contend that the convention is, in no proper sense, 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.<sup>34</sup>

Some contemporary advocates assert that Article V was intended by the founders to place the convention firmly in the hands of the states, with only a minimal role assigned to Congress, noting that “the Founders retained the Articles of Confederation model. In other words, during that procedure, the state legislatures are the principals, and Congress and the convention for proposing amendments are their agents.”<sup>35</sup> Former Solicitor General Walter Dellinger, however, expressed concern about the role of the state legislatures in the Article V Convention process. Writing at the height of the 1980s debate over the campaign for a convention to consider an amendment requiring a balanced federal budget, he asserted that the framers deliberately sought to provide a means of amending the Constitution that would be insulated from excessive influence, not only from Congress, but from the state legislatures as well. He asserted that a convention, once summoned, possessed sufficient constitutional authority to undertake its own deliberations and make its own decisions, referential to, but not dominated by the state legislatures that summoned it or the Congress that would propose any amendments it produced. Dellinger reasoned that, while a convention “should be influenced in its agenda by the grievances that led the states to apply for its convocation, the authority to determine the agenda and draft the amendments to be proposed should rest with the convention, rather than with Congress or the state legislatures.”<sup>36</sup>

## **What Sort of Convention Does Article V Authorize?**

One of the issues that has provoked the most controversy is the nature of the convention contemplated by the Constitution. What did the founders envision when they drafted the convention alternative?

### **Alternative Convention Models**

Three alternative models for the Article V Convention are generally recognized:

- The general convention, which would be free to consider any and all additions to the Constitution, as well as alterations to existing constitutional provisions.
- The limited convention, which would be restricted by its “call,” or authorizing legislation, to consideration of a single issue or group of issues, as specified by the states in their applications.
- The “runaway” convention, frequently identified by convention opponents as one of the dangers inherent in the process, is essentially a limited convention that departs from its prescribed mandate and proceeds to consider proposals in a range of issues that were not included in the original “call.”

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<sup>34</sup> Ibid.

<sup>35</sup> Natelson, *Amending the Constitution by Convention: A Complete View of the Founders’ Plan*, p. 26.

<sup>36</sup> See Walter E. Dellinger, “The Recurring Question of the ‘Limited’ Constitutional Convention,” *Yale Law Journal*, volume 88, issue 8, July 1979, pp. 1623-1640, especially p. 1635.

Each of these variants has been the subject of scholarly attention and gained both proponents and detractors over the years.

## The General Convention

The first state applications for an Article V Convention, submitted in 1789, as government under the Constitution was just beginning, requested a general convention. Since that time, the general convention option has arguably generated less opposition than either of the other convention models presented in this report. Advocates 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 Convention for proposing *Amendments* [emphasis added]...." Few sources suggest that a general convention would be contrary to the intent of Article V: "no one appears to take the position—quite untenable as a matter of Article V text, history or practice—that a constitutional convention *must* be limited to a single subject. Article V at the very least *permits* a general convention [emphases in the original]."<sup>37</sup> Similarly, the American Bar Association's 1974 accepted the validity of a general convention as a given:

... we consider it essential that implementing legislation not preclude the states from applying for a general convention. Legislation which did so would be of questionable validity since neither the language nor history of Article V reveals an intention to prohibit another general convention.<sup>38</sup>

Not all observers support the wisdom of a general convention, however. Writing in *Constitutional Brinkmanship*, Russell Caplan presented a contrary view. He warned against unlimited conventions, more from a practical standpoint than from constitutional principle. Noting state conventions of the 1960s and 1970s that were called to propose constitutional revisions, he asserted that these assemblies frequently transcended their mandates unless strictly limited by their convening documents:

The trend toward aggrandizement of power at a convention is supported by modern experience in the states. When delegates are presented with the choice of writing a new constitution or submitting a number of amendments to the existing document, they have exhibited a desire to become part of history by framing a new constitution.<sup>39</sup>

Some scholars have adopted the position that *any* Article V Convention would be general, notwithstanding language to the contrary in the convention call. They assert that the language of Article V places no limitation on either the number *or* the scope of amendments that that would be within a convention's purview. Constitutional scholar Charles Black offered emphatic support of this viewpoint in the 1970s: "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.'"<sup>40</sup>

Defenders of the general convention could counter opponents by asserting that the founders included ample checks on the work of a general or unlimited convention. They could point to the requirement that any proposed amendment or amendments would face the same requirements as those proposed by Congress. They might also note that Congress retains the considerable

<sup>37</sup> Michael Stokes Paulson, "A General Theory of Article V: The Constitutional Lessons of the 27<sup>th</sup> Amendment," *Yale Law Journal*, vol.103, no. 3, December 1993, pp. 737-738.

<sup>38</sup> American Bar Association, *Amendment of the Constitution by the Convention Method under Article V*, p. 18.

<sup>39</sup> Caplan, *Constitutional Brinkmanship*, p. 147.

<sup>40</sup> Charles Black, "Amending the Constitution: A Letter to a Congressman," *Yale Law Journal*, volume 82, number 2, December 1972, p. 199, at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3579&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3579&context=fss_papers).



authority to choose whether such amendments will be considered by the state legislatures or ad-hoc conventions called for the specific purpose of ratification. In the final analysis, as one observer noted, "... a convention can only *propose* [emphasis in the original] amendments, not ratify them."<sup>41</sup>

## The Limited Convention

The concept of a limited convention has commanded considerable support in the debate over the Article V alternative. A range of constitutional scholars maintains that, contrary to Charles Black's assertion, quoted earlier, a convention *may* be limited to a specific issue or issues contained in state applications; in fact, some observers maintain that it *must* be so limited. A fundamental assumption from their viewpoint is that the framers did *not* contemplate a general or large-scale revision of the Constitution when they drafted Article V. The late Senator Sam Ervin, who supported the Article V alternative and championed advance congressional planning for a convention, expounded this point of view:

... there is strong evidence that what the members of the [original constitutional] convention were concerned with ... was the power to make specific amendments.... [The] provision in article V for two exceptions to the amendment power<sup>42</sup> underlines the notion that the convention anticipated a specific amendment or amendments rather than general revision.<sup>43</sup>

Another commentator, championing state authority in the convention issue, asserted that the founders' intention in establishing the alternative amendment process was to check the ability of Congress to impede proposal of an amendment that enjoyed widespread support. He claimed that a convention limited to an issue specified by the states in their applications would be constitutional, but that a convention could be limited by the states, but not by Congress:

Congress may not impose its will on the convention.... The purpose of the Convention Clause is to allow the States to circumvent a recalcitrant Congress. The Convention Clause, therefore, must allow the States [but not Congress] to limit a convention in order to accomplish this purpose.<sup>44</sup>

The primacy of the states in this viewpoint thus suggests that a convention could be open and general, or limited, depending on the applications of the legislatures.

For its part, Congress has historically embraced the limited convention. When considering this question in the past, it has claimed the authority to call the convention, but also asserted a constitutional duty to respect the state application process, and to limit the subject of amendments to the subject areas cited therein. For instance, in 1984, the Senate Judiciary Committee claimed Congress's power both to set and to enforce limits on the subject or subjects considered by an Article V Convention to those included in the state petitions. The committee's report on the Constitutional Convention Implementation Act of 1984 (S. 119, 98<sup>th</sup> Congress), stated:

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<sup>41</sup> Michael A. Almond, "Amendment by Convention: Our Next Constitutional Crisis?" *North Carolina Law Review*, volume 53, issue 3, February 1975, p. 507.

<sup>42</sup> Senator Ervin was referring to Article V's prohibition of amendments that would: restrict the slave trade before 1808; impose a capitation tax outside the census formula previously agreed to (i.e., slaves counted as three-fifths of a person for purposes of taxation and apportionment of House seats; see Article I, Section 2, clause 3); or deprive states of equal suffrage in the Senate.

<sup>43</sup> Sam J. Ervin Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," *Michigan Law Review*, volume 66, issue 5, March 1967-1968 (sic), p. 882.

<sup>44</sup> Caplan, *Constitutional Brinkmanship*, p. 147.

Under this legislation, it is the States themselves, operating through the Congress, which are ultimately responsible for imposing subject-matter limitations upon the Article V Convention.... the States are authorized to apply for a convention “for the purpose of proposing one or more specific amendments.” Indeed, that is the only kind of convention within the scope of the present legislation, although there is no intention to preclude a call for a “general” or “unlimited” convention.<sup>45</sup>

Twenty-six years later, a 2010 study by the Goldwater Institute reached a similar conclusion. Examining the contemporary documents from the time of the 1787 Constitutional Convention, author Robert Natelson asserted that the founders anticipated the Article V Convention device would serve chiefly as an agent of the states. The states would set a convention’s agenda by specifying the questions it would address, with the convention bound to respect the limits of this mandate.<sup>46</sup> Congress, in this viewpoint, facilitates the will of the people acting through their state legislatures: if they call for a convention to consider one or more specific policy proposals, then Congress is obliged to call for an appropriately limited convention. Conversely, if the states were to apply for a general convention, then, by this reasoning, Congress would respect their intentions.

Congress’s acceptance of the limited convention model was signaled by its incorporation of supportive language in most of the more than 20 bills introduced between 1968 and 1992 that sought to anticipate an Article V Convention. For instance, S. 119, the Constitutional Convention Implementation Act of 1984, introduced by Senator Orrin G. Hatch in the 98<sup>th</sup> Congress, was generally similar to many of the convention planning bills introduced during this period. Section 6(a) prescribed a concurrent resolution that would summon an Article V Convention, which would “set forth the nature of the amendment or amendments for the consideration of which the convention is called.” Further, Section 10(b) required subject-matter adherence to the state applications, and reserved the right to decide any related questions to Congress:

No convention called under this Act may propose any amendment or amendments of a nature different from that stated in the concurrent resolution calling the convention. Questions arising under this subsection shall be determined solely by the Congress of the United States and its decisions shall be binding on all the others, including State and Federal courts.<sup>47</sup>

The limited convention model is not without its critics. Yale Professor Charles Black, for instance, asserted that the many hundreds of state applications for a convention to consider amendments on a particular subject matter should be considered null and void. He maintained that state applications requesting a single-issue convention were almost unknown in the 19<sup>th</sup> century, implying that they were not contemplated by the founders. 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.”<sup>48</sup> Professor Black went on to assert that limited conventions would be constitutionally impermissible for the reason that Article V contains no language that would authorize them:

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<sup>45</sup> U.S. Congress, Senate, Committee on the Judiciary, *Constitutional Convention Implementation Act of 1984*, 98<sup>th</sup> Congress, 2<sup>nd</sup> session, S.Rept. 98-594, p. 25.

<sup>46</sup> Natelson, *Amending the Constitution by Convention: A Complete View of the Founders’ Plan*, pp. 11-13.

<sup>47</sup> S.119, 98<sup>th</sup> Congress, “The Constitutional Convention Implementation Act of 1984,” Section 10(b).

<sup>48</sup> *Ibid.*, p. 203.

It [Article V] does *not* [emphasis in the original] imply that a convention summoned for the purpose of dealing with electoral malapportionment<sup>49</sup> 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 purpose of dealing with electoral apportionment alone, and that such a convention would have no constitutional standing at all.<sup>50</sup>

Within his asserted context of convention autonomy, as noted earlier in this report, Walter Dellinger also argued against attempts to restrict a convention to a single issue or package of issues. His view of the convention's authority is among the most expansive advanced by observers of the Article V Convention process:

...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].<sup>51</sup>

In his judgment, an Article V Convention must be free to pursue whatever issue it pleases, notwithstanding any 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 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 must still 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>52</sup>

### ***A Limited Convention Variant: A Convention to Consider a Specifically-Worded Amendment***

Although many observers consider an Article V Convention to consider a specifically worded amendment constitutionally impermissible,<sup>53</sup> this limited convention variant continues to draw support. During the 1980s campaign for a balanced budget amendment convention, a number of state legislatures proposed specific amendment language. Some proposed a convention to consider amendments incorporating “substantially similar” language, while others advocated specifically-worded amendments. The House Judiciary Committee’s study suggested the former could meet constitutional requirements, but that

... an application requesting an up-or-down vote on a specifically worded amendment cannot be considered valid. Such an approach robs the Convention of its deliberative function which is inherent in article V language stating that the Convention’s purpose is to “propose amendments.” If the State legislatures were permitted to propose the exact wording of an amendment and stipulate that the language not be altered, the Convention

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<sup>49</sup> Professor Black was writing in the context of the Article V Convention campaign to overturn the Supreme Court’s decisions 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 to state legislative districts and congressional districts, respectively, ruling that the population of both must be substantively equal.

<sup>50</sup> Black, “Amending the Constitution: A Letter to a Congressman,” p. 199.

<sup>51</sup> Dellinger, “The Recurring Question of the ‘Limited’ Constitutional Convention,” p. 1624.

<sup>52</sup> *Ibid.*, p. 1640.

<sup>53</sup> *Is There a Constitutional Convention in America’s Future?* p. 6.

would be deprived of this function and would become instead part of the ratification process.<sup>54</sup>

Walter Dellinger further argued that specific language proposals “short-circuit” the checks and balances built into Article V by the framers. According to his interpretation, they intended to provide “sub-federal communities,” i.e., the states, the authority to propose a convention to consider amendments, but deliberately avoided giving state legislatures the power to determine the exact text of the amendments to be proposed.<sup>55</sup>

This issue has been recognized in recent Congresses. H.J.Res. 34, introduced in the 114<sup>th</sup> Congress on February 13, 2015, by Representative John Culberson, proposes an amendment that would expand the Constitution’s Article V Convention language. The new language would permit states to apply for a specifically-worded amendment, and would require Congress to authorize a convention to consider such an amendment. Sometimes referred to as the “Madison Amendment,”<sup>56</sup> this proposal would address questions as to the validity of specifically-worded amendments noted earlier in this report. It is also intended to avoid the potential for a “runaway convention”<sup>57</sup> by limiting it to consideration only of the amendment applied for by the states.<sup>58</sup>

It may be noted, however, that other observers endorse the specifically-worded amendment convention on the grounds that the intentions of the states should be given great weight by Congress when it considers a convention call. Writing in 1978, William van Alstyne suggested that

[i]f two-thirds of the state legislatures might perchance agree on the exact wording of an amendment they would wish to be reviewed in a called convention for discussion and vote, this would seem to me to state the paradigm case in which Congress should proceed with the call—and limit the agenda exactly in accordance with the unequivocal expressions of those solely responsible for the event.<sup>59</sup>

## The “Runaway Convention”

Concern that an Article V Convention might “run away” has been a recurring theme in consideration of the convention alternative for many years; as one scholar noted—“it is an age old fear.”<sup>60</sup> The “runaway convention” has been generally defined as an Article V Convention summoned to consider a particular issue or issues (e.g., a balanced federal budget requirement) that ventures beyond its original mandate to consider policy questions and potential amendments contemplated neither in relevant applications by the state legislatures nor in its congressional summons. For instance, in 1967 Theodore Sorenson commented as follows on proposals for a convention to consider an amendment on apportionment in state legislatures:

No matter how many and how sincere are the assurances from the backers of a new convention that their sole concern is reapportionment, no one can safely assume that

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<sup>54</sup> Ibid.

<sup>55</sup> Dellinger, “The Recurring Question of the ‘Limited’ Constitutional Convention,” p. 1632.

<sup>56</sup> Not to be confused with the 27<sup>th</sup> Amendment, also sometimes identified as the Madison Amendment.

<sup>57</sup> The “runaway convention” is examined in the next section of this report.

<sup>58</sup> H.J.Res. 34 has been referred to the House Judiciary Committee’s Subcommittee on the Constitution and Civil Justice. Rep. Henry Cuellar is a cosponsor.

<sup>59</sup> William W. Van Alstyne, “Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague,” *Duke Law Journal*, volume 1978 (sic), issue 6, pp. 1305-1306, at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2683&context=dlj>.

<sup>60</sup> Almond, “Amendment by Convention: Our Next Constitutional Crisis?” p. 504.

delegates to such a Convention, once safely seated and in action, would wish to go home without trying their hand at improving many parts of this delicately balanced document.<sup>61</sup>

More recently, Virginia state legislator James LeMunyon recalled these anxieties, particularly the frequently-cited concern that the Bill of Rights might be targeted by a “rogue” convention:

The principle [sic] problem for critics is that it may not be possible to limit the agenda of a constitutional convention. In addition to an amendment relating to a balanced federal budget, for example, a “runaway” convention driven by political fringe groups might propose revising or deleting existing portions of the Constitution, including the Bill of Rights.<sup>62</sup>

Other commentators have suggested that concerns over a runaway convention are overstated and alarmist. Critics note that the viewpoint elaborated above assumes an Article V Convention would be monolithic and dominated by a disciplined coalition dedicated to the imposition of an ideologically-focused agenda. The breadth of opinion and viewpoints in a nation as populous and diverse as the United States arguably acts as a deterrent. As one commentator noted:

Delegates to an Amendments Convention would be selected by the people of their state, and so will almost certainly, in the aggregate, represent the political mainstream. The State Legislatures and the Supreme Court would also provide the necessary checks and balances against a Convention that exceeded its mandated scope. Finally, in the event some aberrant proposal does pass congressional and/or judicial scrutiny, it would have to be approved by the people of at least 38 states.<sup>63</sup>

To this should be added the element of time that would inevitably pass during and between the various stages of an Article V Convention. Supreme Court Justice Joseph Story took note of this element as early as 1833:

Time is thus allowed, and ample time, for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action.<sup>64</sup>

The Senate Judiciary Committee, in its 1984 report on S.119 in the 98<sup>th</sup> Congress, argued that an Article V Convention would be more like Congress: broad, inclusive, and essentially moderate. The report echoed Madison’s assurance that the size and variety of the nation would serve as a check to faction.<sup>65</sup> It also noted that the framers did not provide an unchecked grant of power to a convention: every amendment proposed would be subject to the same conditions faced by those proposed by Congress—“... the notion of a ‘runaway’ convention, succeeding in amending the Constitution in a manner opposed by the American people, is not merely remote, it is impossible.”<sup>66</sup>

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<sup>61</sup> Quoted in Caplan, *Constitutional Brinkmanship*, pp. 145-146.

<sup>62</sup> James M. LeMunyon, “A Constitutional Convention Can Rein in Washington,” *Wall Street Journal*, March 31, 2010, at <http://www.wsj.com/articles/SB10001424052702304370304575152231710551888>.

<sup>63</sup> Marianne Moran, “FAQ: Article V Amendments Convention,” National Conference of State Legislatures website, at <http://www.ncsl.org/Portals/1/Documents/leaders/FAQ%20for%20BBA%20NOW%20in%20PDF%20July%2016%202010.pdf>.

<sup>64</sup> Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co., 1833), §1824, volume 3, p. 688. Quoted in *The Founders Constitution*.

<sup>65</sup> James Madison, in *The Federalist*, Number 10, “The Size and Variety of the Union as a Check on Faction,” pp. 129-136.

<sup>66</sup> *Constitutional Convention Implementation Act of 1984*, 98<sup>th</sup> Congress, 2<sup>nd</sup> session, S.Rept. 98-594, p. 29.

## The Role of Congress in Referring Article V Convention Amendments to the States

Although the Constitution states that Congress “*shall* [emphasis added] call a Convention for proposing Amendments,” it is silent on the next steps in the process. Assuming an Article V Convention has met, drafted, and approved a constitutional amendment or amendments, the logical progression of the ratification process is referral of the amendment(s) to the states by Congress for their consideration and approval. The principal question here is whether Congress is *required* to refer amendments adopted by the convention. While a full legal analysis of this question falls beyond the scope of this report, scholars of constitutional law have generally concluded that Congress must at some point refer amendments to the states. It might be assumed that this is implicit, since the framers intended the convention to be an alternative to Congress’s own amendatory power—refusal to refer an amendment to the states would seemingly frustrate their intent. Not all observers agree with this assumption, at least with respect to a blanket requirement to refer any and all amendments to the states: opinion on the issue is broad and diverse.

Congress, in particular, has historically claimed the right to determine the conditions under which a convention-proposed amendment might be referred to the states. From the late 1960s through the 1990s, Congress actively considered legislation to govern Article V Convention procedures. In most of these proposals, Congress reserved the right to decide whether an amendment or amendments would be submitted to the states for approval and ratification. This assertion of authority rested on the assumption that Article V envisions a limited convention. The Senate report to accompany S. 119 in the 98<sup>th</sup> Congress stated this explicitly:

... 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 the convention.... In other words, the convention, although a sovereign body, is subject to the limitations of its constitutional charter—the concurrent resolution by Congress—which itself merely reflects the intent of two-thirds of the States in applying for a convention in the first place.<sup>67</sup>

This proposed legislation was typical in providing that Congress could declare that it would not submit the amendment or amendments in question to the states because the subject matter differed from the issue or subject matter which the convention had been called to address.

Nevertheless, Senator Sam Ervin championed the right of Congress to withhold an amendment on the grounds of “procedural irregularities in the convention or failure of the amendment to conform to the limitations on subject matter imposed by the Congress in the concurrent resolution calling the convention.”<sup>68</sup> He also cautioned that this authority was not unconditional, asserting that,

...unlimited power in the Congress to refuse to submit proposed amendments for ratification would destroy the independence of the second alternative amending process. Therefore, the Congress is explicitly forbidden to refuse to submit a proposed amendment for ratification because of doubts about the merits of its substantive provisions. The power is reserved for use only with respect to amendments outside the scope of the convention’s authority or in the case of serious procedural irregularities.<sup>69</sup>

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<sup>67</sup> Ibid., pp. 40-41.

<sup>68</sup> Ervin, “Proposed Legislation to Implement the Convention Method of Amending the Constitution,” pp. 893-894.

<sup>69</sup> Ibid., p. 894.



The Goldwater Institute’s 2010 study, which focused on the role of the states in the process, similarly found that Congress would be required to refer amendments approved by an Article V Convention to the states, but that the amendments must fall within the convention’s mandate:

Because the convention for proposing amendments is the state legislatures’ fiduciary, it must follow the instructions of its principals—that is, limit itself to the agenda, if any, that states specify in their applications.... If the convention does propose amendments, Congress must send on to the states those within the convention’s call.<sup>70</sup>

The Goldwater Institute study also offered a potential solution to this question: the report recommended that an Article V Convention could offer proposals outside its mandate by proposing policy recommendations. While these would not enjoy the same status as proposed amendments, they would arguably be accorded considerable attention in Congress, the states, and the policy arena at large, and might serve as the foundation for national debate on the issues they address.<sup>71</sup>

As noted earlier, however, other constitutional commentators hold that Congress is obliged to propose any and all amendments approved by an Article V Convention to the states, whether or not they fall within the scope of the convention’s call. Writing in 1967, Morris Forkosch asserted the following:

Congress has its own independent machinery to propose amendments in the first alternative, and to give Congress the power to review the proposals necessarily deprives the second alternative of its independence. As a result, Congress would become supreme, and Article V would automatically read that “The Congress shall call an advisory convention for proposing Amendments....” This would be an adoption of the very system rejected by the 1787 Convention.<sup>72</sup>

Professor Gerald Gunther similarly asserted that the congressional claim of any veto power over amendments proposed by an Article V Convention would directly contravene the framers’ intentions:

In my view, the text, history and structure of Article V make a congressional claim to play a substantial role in setting the agenda of the convention highly questionable. If the state-initiated method for amending the [C]onstitution was designed for anything, it was designed to minimize the role of Congress. Congress was given two ... extremely narrow responsibilities. First, Congress must call the convention when thirty-four valid applications are at hand (and it is of course a necessary part of that task to consider the validity of the applications and set up the machinery for convening the convention). Second, Congress has the responsibility for choosing a method of ratification once the convention submits its proposals. I am convinced that is all Congress can properly do.<sup>73</sup>

He also suggested that any effort by Congress to “veto” an amendment proposed by an Article V Convention might prove to be unsustainable. Convention delegates, jointly or individually, would likely make their case in the court of public opinion, arguing that congressional refusal to propose an amendment or amendments to the states would thwart “the opportunity of the people to be

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<sup>70</sup> Natelson, *Amending the Constitution by Convention: A Complete View of the Founders’ Plan*, p. 24.

<sup>71</sup> *Ibid.*, p. 25.

<sup>72</sup> Morris D. Forkosch, “The Alternative Amending Clause in Article V: Reflections and Suggestions,” *Minnesota Law Review*, volume 51, issue 6, 1966-1967, p. 1079.

<sup>73</sup> Gerald Gunther, “The Convention Method of Amending the United States Constitution,” *Georgia Law Review*, volume 14, number 1, fall 1979, p. 23.

heard through the ratification process.”<sup>74</sup> If the impasse continued, he predicted that Congress could be faced with an embarrassing political dilemma:

... might not Congress find it impolitic to refuse to submit the convention’s proposals to ratification? I suggest that it is not at all inconceivable that Congress, despite its initial belief that it could impose limits, and despite its efforts to impose such limits, would ultimately find it to be the course of least resistance to submit all of the proposals emanating from a convention ... to the ratification process, where the people would have another say.<sup>75</sup>

In the final analysis, the question of whether Congress can refuse to refer an amendment or amendments may also depend on (1) what manner of convention is authorized in Article V, and (2) a convention’s ability to consider amendments beyond its mandate. If only a limited convention is permissible, Congress could arguably decline to propose an amendment that addressed an issue not included in its authorizing resolution. If, however, the states were to apply for a general convention, or if a legal or political decision concluded that even a limited convention could propose amendments beyond its mandate, then Congress would arguably be less justified in refusing to send an amendment to the states.

## **Convention Planning: Format and Procedures Proposals, 1968-1992**

Congress has historically interpreted the constitutional authorization to “call a Convention for Proposing Amendments” as providing considerable discretion in setting standards and procedures for an Article V assembly. From the late 1960s through the late 1980s, when a convention appeared possible and perhaps likely, Congress considered a number of bills that would have established procedures governing such an event.

During the 90<sup>th</sup> through 103<sup>rd</sup> Congresses, between 1968 and 1992, 24 convention planning bills were introduced in the House of Representatives and 26 in the Senate. In general, they would have established a procedural framework for an Article V Convention, should one be called. Proponents argued that constitutional convention procedures legislation would be a valuable “stand-by” tool that would eliminate the uncertainties inherent in first-time consideration of such an event and would also facilitate contingency planning, thus enabling Congress to respond in a timely and orderly fashion should the constitutional threshold for an Article V Convention be attained. The Senate passed two constitutional convention procedures bills early in this period—S. 215, The Federal Constitutional Convention Procedures Act, in the 92<sup>nd</sup> Congress (1971), and S. 1272, a bill of the same title in the 93<sup>rd</sup> Congress (1973)—but the House took no action on either measure. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on the general issue, but no measure ever reached the House floor during this period.

As the prospect of an Article V Convention receded in the late 1980s and 1990s, the number of convention procedures bills introduced declined. No relevant legislation has been introduced since the 103<sup>rd</sup> Congress (1993-1994).

## **Characteristics of Convention Planning Legislation**

Legislative proposals to set standards for an Article V Convention evolved during the quarter-century during which they were introduced. By the mid-1980s, they generally shared a range of quite specific requirements, including standards for state applications, size of the convention and delegate apportionment, delegate qualifications, convention procedures and funding, a set term

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<sup>74</sup> *Ibid.*, p. 9.

<sup>75</sup> *Ibid.*, pp. 9-10.

for the convention, ratification procedures for any proposed amendments, and provisions for judicial review. The House Judiciary Committee's 1993 study noted broad agreement in the scholarly community that, "in the absence of guidelines in Article V itself, Congress must be able to act with respect to these matters pursuant to its power to call a Convention."<sup>76</sup> Some of the guidelines found in most convention planning bills of the period are identified below.

### **State Application Procedures and Contemporaneity Standards**

Most constitutional convention procedures bills prescribed a standard format and content for state applications and set schedules for submissions to Congress and for congressional declarations of receipt. Most proposals also included a contemporaneity provision, setting a time limit, usually seven years, after which state convention applications would expire.

### **Application, Receipt, and Processing by Congress; Call of the Convention**

These measures generally authorized the Secretary of the Senate and the Clerk of the House of Representatives to receive and retain applications, declare when applications were received, and report to their respective chambers when and if the constitutional requirement had been met.<sup>77</sup> Most bills required a declaration by Congress in the form of a concurrent resolution that valid applications had been submitted by the legislatures of two-thirds of the states, and that the constitutional prerequisite for an Article V Convention had been met. Convention procedures bills generally set a time limit ranging from 45 days to two years for Congress to call a convention once the constitutional requirement was attained. An additional concurrent resolution would then call for a convention, designating the place and time of the meeting, usually not more than one year after the adoption of the resolution, and the nature of the amendment or amendments to be considered.

### **Convention Delegates: Selection, Number and Apportionment**

Most bills used the formula for apportionment of electoral votes for President and Vice President to determine the size of the convention and apportionment of delegates among the states. Early proposals assigned each state the same number of delegates as it had Members in the House of Representatives, on the grounds that this apportionment would most closely approximate the goal of "one person, one vote."<sup>78</sup> Later proposals tended to assign each state a number of delegates equal to the combined total of its Representatives and Senators, for a total of 535 delegates. In this case, the additional members reflect the "senatorial" electors, and were intended "to afford smaller states a weighted influence in proposing amendments, as they have in Congress."<sup>79</sup> Some bills also provided a three-member delegation for the District of Columbia, although the nation's capital does not participate as a political jurisdiction at any other stage of the amendment process. Most bills also provided that voting in the convention would be individual members per capita, rather than by state. This was a departure from the precedent set by the Philadelphia Constitutional Convention of 1787, in which each state cast a single vote, and from Article V's

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<sup>76</sup> *Ibid.*, p. 16.

<sup>77</sup> In 2015, the House of Representatives directed the Clerk of House to begin the systematic retention and public availability of all state applications concerning an Article V Convention. For additional information, please consult CRS Report R000000, *The Article V Convention to Propose Constitutional Amendments: Current Developments*, by Thomas H. Neale.

<sup>78</sup> American Bar Association, *Amendment of the Constitution by the Convention Method under Article V*, pp. 36-37.

<sup>79</sup> Caplan, *Constitutional Brinkmanship*, p. 119.

application and ratification processes, under which each state's application or instrument of ratification is equally weighted.<sup>80</sup> Most bills provided for popular election of delegates governed by existing state procedures. Although widespread agreement that delegates should be popularly elected might be assumed,<sup>81</sup> some contemporary convention advocates assert the states have complete discretion in choosing how delegates will be chosen.<sup>82</sup>

## **Convention Funding and Support**

Most convention procedures bills provided that delegates and convention staff would be compensated from, and miscellaneous convention expenses covered by, appropriated funds. Delegates would be provided with immunity from arrest in most instances during the convention. Various federal agencies were authorized to provide a reasonable level of material and staff support for the convention as requested.

## **Convention Procedures**

Convention planning proposals generally included the following provisions governing procedures.

- The Vice President was designated in most proposed convention procedures bills to preside over the inaugural convention session, primarily for the purpose of election and installation of the convention officers, as chosen by the delegates. After this initial session, the permanent officers would oversee the adoption of convention rules and procedures and preside over subsequent sessions.
- While earlier legislation would have provided for approval of proposed amendments by a simple majority of convention delegates, later versions generally substituted a two-thirds majority of delegates, voting per capita, for approval.
- Amendments were required to address the issue for which the convention was summoned. In most versions, as noted earlier in this report, Congress reserved the right to reject a proposed amendment that failed to meet this standard.
- Unless the House and Senate passed a concurrent resolution of disapproval, the President pro tempore of the Senate and the Speaker of the House of Representatives were required to refer approved proposed amendments to the Administrator of General Services<sup>83</sup> for circulation to the states for ratification.
- Valid grounds for congressional disapproval of a proposed amendment included not only a departure from the policy issue for which the convention had been called, but also failure to follow procedures prescribed in the authorizing legislation.
- Amendments proposed by a convention would be subject to ratification by state legislatures or ad hoc conventions at the discretion of Congress.

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<sup>80</sup> This question is addressed at greater length later in this report.

<sup>81</sup> *Is There a Constitutional Convention in America's Future?* pp. 18-19.

<sup>82</sup> Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, pp. 22-23.

<sup>83</sup> This referral is explained by the fact that between 1949 and 1985, the National Archives was a unit of the General Services Administration. Since the latter year, it has been an independent agency, the National Archives and Records Administration.

## **A Limited Term for the Convention**

Most planning bills provided a term of six months or one year for an Article V Convention.

## **State Authority to Rescind Ratification of Proposed Amendments**

In general, state legislatures would have been authorized to rescind ratification of a proposed amendment any time during the process, but not after the constitutionally-mandated threshold of three-fourths of the states was reached.

## **Judicial Review**

Most versions of convention planning legislation introduced later in the period would have established procedures for challenges to, and judicial review of, congressional rejection of a convention-approved amendment.

## **Additional Issues for Consideration**

Beyond the fundamental questions examined above, the Article V Convention process presents a range of ancillary issues for the consideration of Congress.

## **The President's Role: Policy Questions**

One question concerning the Article V Convention process concerns the President: what role does he have, if any? The Constitution arguably designates Congress as the exclusive agent in federal aspects of the process—in contrast, the President, the executive branch, and the federal judiciary are not mentioned in Article V. In this absence, certain precedents have emerged over time. For instance, *Hollingsworth v. Virginia*,<sup>84</sup> a 1798 Supreme Court decision, held that the President's signature is not required on amendments proposed by Congress, and many sources accept this as settled fact. As an example, the National Archives website states that “[s]ince the President does not have a constitutional role in the amendment process, the joint resolution [proposing an amendment] does not go to the White House for signature or approval.”<sup>85</sup>

On the other hand, some argue that the Constitution's presentment clause, contained in Article I, Section 7, clause 3,<sup>86</sup> requires that all constitutional amendments must be presented to the President. Whether this holding would apply to amendments proposed by an Article V Convention remains the subject of legal analysis beyond the scope of this report. Nevertheless, the President's role under an Article V Convention has been the subject of a range of policy questions and proposals over the years.

Advocates of a presidential role in the Article V Convention process have argued their point with considerable energy in the past. Constitutional scholar Charles Black emphatically asserted that the call for a convention was too important *not* to come under the President's purview:

... a convention call would have the force of law—significant, vital law, comparable to a law establishing any other body with power to act.... Can it be thought that Article I, Section

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<sup>84</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

<sup>85</sup> “The Constitutional Amendment Process,” National Archives website, at <https://www.archives.gov/federal-register/constitution/>.

<sup>86</sup> “Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary ... shall be presented to the President...”

7, can be evaded by mere *nomenclature* [emphasis in the original]—by merely calling something a “Concurrent” rather than a “Joint” Resolution?<sup>87</sup>

Supporters of a presidential role in the Article V Convention process also note that the legislative models offered in proposed convention procedures bills in the past were more than simple “calls” for a convention. They prescribed forms and procedures for a convention, authorized use of federal resources and facilities, and covered their expenses through public funding. As commentator Arthur Bonfield noted,

Congress must necessarily make more than a mere call for a convention. Such a call would be meaningless without the inclusion of the specific terms upon which such a body is to be constituted, organized, and conducted. These terms to be spelled out by Congress would appear to be similar to the general kinds of legislation with which Congress normally deals. Consequently, no reason of logic dictates its different treatment in respect to the need for Presidential approval.<sup>88</sup>

From the standpoint of the broader national interest, the same author noted that as the President is the only federal official elected (albeit indirectly) by and responsible to all voters, “[h]is participation in this process that would intimately affect all Americans and our nation as a whole seems, therefore, especially proper and natural.”<sup>89</sup>

Opponents of a presidential role reject this assertion. They maintain that the language of Article V is specific, providing no part for the chief executive. The Senate Judiciary Committee’s 1971 report on the proposed Federal Constitutional Convention Procedures Act (S. 215, 92<sup>nd</sup> Congress) noted that, “[i]nasmuch as the function of Congress is simply to operate the machinery to effectuate the actions of the States and the convention, there is no proper place for a Presidential role.”<sup>90</sup> Moreover, the committee went on to assert that the appropriate device for proposing an Article V Convention amendment to the states was a concurrent resolution, a legislative vehicle that, by tradition, is not sent to the President.<sup>91</sup>

In its 1974 study, the American Bar Association also cast doubt on the President’s role in an Article V Convention. The study argued that the need for presidential approval of any action connected with a convention would impose an additional requirement on the process not contemplated by the framers. The report concluded that, under these circumstances, “the parallelism between the two initiating methods would be altered, in a manner that could only thwart the intended purpose of the convention process as an ‘equal’ method of initiating amendments.”<sup>92</sup>

As the House Judiciary Committee’s 1993 study noted, proponents of a role for the President might cite the presentment clause as justifying the chief executive’s involvement, and that amendments proposed by Congress have traditionally been contained in joint resolutions, which are presented to the President, although not subject to his veto.<sup>93</sup> The report concludes, however,

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<sup>87</sup> Black, “A Letter to a Congressman,” p. 208. The author refers to the Constitution’s presentment clause, contained in Article I, Section 7, clause 3.

<sup>88</sup> Bonfield, “Proposing Constitutional Amendments by Convention: Some Problems,” p. 675.

<sup>89</sup> Arthur Earl Bonfield, “The Dirksen Amendment and the Article V Convention Process,” *Michigan Law Review*, volume 66, number 5, 1967-1968, p. 986

<sup>90</sup> U.S. Congress, Senate, Committee on the Judiciary, *Federal Constitutional Convention Procedures Act*, report to accompany S. 215, Report No. 92-336, 92<sup>nd</sup> Congress, 1<sup>st</sup> session (Washington, GPO: 1971), p. 12.

<sup>91</sup> *Ibid.*

<sup>92</sup> American Bar Association, *Amendment of the Constitution by the Convention Method under Article V*, p. 27.

<sup>93</sup> “The Constitutional Amendment Process,” National Archives website, at <https://www.archives.gov/federal-register/>



that, “[t]he purpose of the Convention alternative was to free the states [from] control of the Federal government in amending the Constitution. Presumably this includes the Nation’s Chief Executive, as well as the National Legislature.”<sup>94</sup>

The Senate Judiciary Committee’s 1984 report on proposed convention planning legislation<sup>95</sup> made a strong claim for congressional primacy in the proposal process, apparently rejecting a role for the President:

Although there is no explicit statement to this effect in Article V, 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.” 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 power[s] invested in Congress ... are entirely a function of this responsibility, authorized under the “necessary and proper” clause of Article I, section 8, clause 18.<sup>96</sup>

Other sources, however, suggest that the convention planning bills of the 1960s through 1990s fell into the category of regular legislation, and if passed by Congress, would require presentment to the President for approval. The House Judiciary Committee’s 1993 report argued that these are constitutionally distinct from the convention call, since they would appropriate federal funds and allocate staff, facilities, and other federal resources to support a convention. As such, it concluded these bills would require submission to the President for his approval.<sup>97</sup> This judgment implies a two-step process, in which Congress might pass a concurrent resolution summoning a convention, which would not be presented to the President, while the additional arrangements to implement the call could be contained in a law-making measure subject to presidential presentment and approval.<sup>98</sup>

A final issue of presidential involvement concerns the ratification process. The explicit constitutional language granting Congress authority over the mode of ratification “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* [emphasis added]” arguably precludes any involvement by the President.

### **“Checks and Balances” in the Article V Convention Process**

With their usual attention to constitutional equity, the framers incorporated various checks and balances in the amendment process, to which Congress has added an additional requirement since the early 20<sup>th</sup> century.

#### ***Ratification by Legislatures or Conventions***

Article V provides Congress with two alternative ratification referral procedures for proposed amendments, stating explicitly that they “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

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<sup>94</sup> *Is There a Constitutional Convention in America’s Future?* p. 14.

<sup>95</sup> S. 119, 98<sup>th</sup> Congress, Constitutional Convention Implementation Act of 1984.

<sup>96</sup> *Constitutional Convention Implementation Act of 1984*, 98<sup>th</sup> Congress, 2<sup>nd</sup> session, S.Rept. 98-594, p. 21.

<sup>97</sup> *Is There a Constitutional Convention in America’s Future?* p. 15.

<sup>98</sup> *Ibid.*, p. 14.

Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.”<sup>99</sup>

The language authorizing Congress to choose ratification by legislatures or conventions was introduced at the Philadelphia Convention by James Madison, during consideration of the amendment process in general. Although there had been considerable discussion of the need to provide for an alternative to congressional proposal of amendments, the records of the convention and available contemporary documents reveal little debate over the two modes of ratification, arguably suggesting that the duality met with general approval.<sup>100</sup> Earlier in the convention, however, the delegates strongly favored, and ultimately approved, ratification of the Constitution by ad hoc state conventions, which they presumed would be more democratic and reflective of public opinion. State legislatures, it was assumed, would be less open to change and more wedded to the status quo.<sup>101</sup>

Although the choice remains with Congress, observers have made competing policy arguments respectively, for ratification of proposed amendments both by conventions and state legislatures over the years. One commentator observed that “the convention is the only mechanism of ratification which assures the expression of the people.... It seems apparent, however, that the convention mode will be used only when there is powerful public opinion in its favor.”<sup>102</sup> A contrary view was expressed by another scholar, who suggested that since amendments proposed under the Article V alternative will have been proposed by a convention, Congress should choose ratification by the state legislatures, on the grounds that

... there should be two different bodies, one to check on the other; the different sets of delegates to the Convention and to the states’ legislatures may and should produce different reasons for so amending the Constitution.<sup>103</sup>

Thus the Constitution, in this seemingly uncontroversial delegation of authority, arguably endows Congress with a potential check to the work of an Article V Convention.

### ***Approval by Three-Fourths of the States Required for Ratification***

A second constitutional check to the Article V Convention alternative is that any amendments proposed by a convention must be ratified by a supermajority of three-fourths of the states. The

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<sup>99</sup> “Congress has *complete freedom of choice* [emphasis added] between the two methods of ratification recognized by Article V—by the legislatures of the States, or by conventions in the States.” U.S. Congress, *The Constitution of the United States of America, Analysis and Interpretation* (Washington: GPO, 2004), p. 952, at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-8-6.pdf>.

<sup>100</sup> U.S. Constitutional Convention, 1787, *Records of the Federal Convention*, 2:629, 15 September, in *The Founders’ Constitution*, web edition, at <http://press-pubs.uchicago.edu/founders/documents/a5s2.html>. It is worth noting that Madison’s original draft did not require that a *convention* be called on application of two-thirds of the states, but rather, that *Congress should propose amendments* on application of two-thirds of the states. Madison, however, accepted an amendment offered by Gouverneur Morris and Elbridge Gerry that provided for a convention.

<sup>101</sup> Philip L. Martin, “Convention Ratification of Federal Constitutional Amendments,” *Political Science Quarterly*, volume LXXXII, number 1, March, 1967, pp. 61-71.

<sup>102</sup> *Ibid.*, p. 71. It is worth noting that Congress designated ratification by conventions only for the 21<sup>st</sup> Amendment, which repealed the 18<sup>th</sup> (Prohibition) Amendment. According to one source, pro-repeal Members of Congress “favored this mode of ratification because they believed that they clearly had popular sentiment on their side, and furthermore, they distrusted the response to the issue of the rural-dominated state legislatures.” Alan P. Grimes, *Democracy and the Amendments to the Constitution*, (Lexington, MA: Lexington Books, D.C. Heath and Co., 1978), p. 110.

<sup>103</sup> Forkosch, “The Alternative Amending Clause in Article V: Reflections and Suggestions,” pp. 1079-1080.

framers' intentions in setting this threshold for both amendments proposed by Congress or a convention were clear. As James Madison wrote in *The Federalist*:

That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.<sup>104</sup>

The framers intended that successful amendments to the Constitution, whether proposed by Congress or an Article V Convention, would reflect the measured and deliberate opinion of the nation, expressed through their elected representatives.

### ***Ratification Within Seven Years of Proposal***

Article V does not contain language requiring that proposed amendments be ratified within a specific length of time. Moreover, no deadline for ratification was set by Congress for any amendment referred to the states between 1789 and 1918. Since proposal of the 18<sup>th</sup> Amendment, however, and continuing with the 20<sup>th</sup> and all subsequent proposed amendments,<sup>105</sup> Congress has set a deadline of seven years for ratification of these proposals. This standard is not found in the Constitution, but “[i]t has been accepted that Congress may, in proposing an amendment, set a reasonable time limit for its ratification.”<sup>106</sup>

Would Congress have the authority to attach a ratification deadline to any amendment or amendments proposed by a convention, as opposed to one proposed by Congress? Proponents might argue that historic precedent suggests Congress does have this power, based on the generally accepted reasoning that amendments should be ratified within a reasonable length of time. To this they might add that this practice has continued for nearly a century, and has arguably been sanctioned by the Supreme Court.<sup>107</sup> Nothing in Article V, they might conclude, prohibits attachment of a deadline, asserting that since Article V makes no distinction between amendments proposed by Congress and those proposed by a convention, there is no constitutional barrier to the inclusion of a deadline for ratification.

Critics could point to the founders' original intent in establishing an alternative amendment process placed beyond the reach and influence of Congress. They could note that a congressionally imposed time limit for an Article V Convention's amendments would add an additional hurdle to the process of ratification, and that this would violate the spirit of the original text by making the ratification process more stringent, a requirement never contemplated by the founders.

A more problematic issue concerns *where* in the concurrent resolution proposing an Article V Convention amendment a ratification deadline could be placed. Two alternatives are available: for the 18<sup>th</sup> and 20<sup>th</sup> through 22<sup>nd</sup> Amendments, Congress placed the deadline within the body of the amendment as proposed by the resolution. For the 23<sup>rd</sup> through the 26<sup>th</sup> Amendments, and for the proposed Equal Rights Amendment, the time limit was incorporated in the proposing clause, rather than in the body of the amendment itself. While it is arguable that Congress could attach a

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<sup>104</sup> James Madison, in *The Federalist*, Number 43, “Powers Delegated to the General Government: III,” p. 315.

<sup>105</sup> This includes the 20<sup>th</sup> through 26<sup>th</sup> Amendments and the proposed Equal Rights Amendment and District of Columbia Congressional Representation Amendments, neither of which was ratified within the specified time limit.

<sup>106</sup> *U.S. Constitution Annotated*, “Article V, Mode of Amendment, Ratification,” at <https://www.congress.gov/content/conan/pdf/GPO-CONAN-REV-2014-9-6.pdf>.

<sup>107</sup> *Dillon v. Gloss*: 256 U.S. 368 (1921).

deadline to the proposing clause of an amendment generated by an Article V Convention, placing it *within* the body of the amendment could be subject to criticism as congressional interference in the process established by Article V.

## Should Senators and Representatives Serve as Delegates to an Article V Convention?

This question has been the subject of legal discussion that is beyond the scope of this report, but various policy-related issues have been part of the Article V Convention debate since at least the 1960s. At first reading, the Constitution would appear to bar Members of either house of Congress from serving as committee delegates. Article I, Section 6, clause 2 states that, “[n]o Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office under the Authority of the United States....” This point was acknowledged by the House Judiciary Committee’s 1993 report, which noted the presumed constitutional prohibition, and that Members’ service might present “great potential for conflict of interest because Members would be viewed as acting both as regulators and as persons regulated.”<sup>108</sup>

Other commentators, however, have suggested that there is no apparent constitutional prohibition of Senators and Representatives serving in an Article V Convention. The American Bar Association’s 1974 study determined that the constitutional prohibition bans Members of Congress from serving in one of the branches of the U.S. government, but concluded that service as a “state-elected delegate to a national constitutional convention does not meet this standard.”<sup>109</sup> One scholar suggests that Members could make a substantial contribution to a convention: “in light of the delegates’ function and possible impact on the constitutional scheme, it seems desirable that interested members of Congress be allowed to participate.”<sup>110</sup> It could also be noted in defense of congressional participation that 41 of the 55 delegates to the Philadelphia Constitutional Convention of 1787 had served in Congress, and that during the convention, 10 delegates were simultaneously serving as incumbent Members of Congress.<sup>111</sup>

## State Representation and Voting at a Convention: Equal or Proportional to Population?

As noted earlier in this report, convention planning bills introduced in Congress from the 1960s through the 1990s generally proposed that delegates be apportioned to states according to population, following a congressional model. Included in the various bills were the following figures: 435 delegates, assigned to each state according to its House of Representatives delegation; 535, which added two “senatorial” delegates to provide less populous states with a “weighted influence;” and 538 delegates, which included three delegates for the District of Columbia. It may be noted, however, that some commentators assert that Congress has no authority to set the number of delegates, and that the states can send however many they choose.<sup>112</sup>

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<sup>108</sup> *Is There a Constitutional Convention in America’s Future?* p. 20.

<sup>109</sup> American Bar Association, *Amendment of the Constitution by the Convention Method under Article V*, p. 20.

<sup>110</sup> Forkosch, “The Alternative Amending Clause in Article V: Reflections and Suggestions,” p.1073.

<sup>111</sup> More accurately, they were incumbent delegates to “the United States in Congress Assembled,” which was the official style of Congress under the Articles of Confederation. Caplan, *Constitutional Brinkmanship*, p. 121.

<sup>112</sup> Natelson, *Amending the Constitution by Convention: A Complete View of the Founders’ Plan*, pp. 22-23.

While the size of a potential Article V Convention has aroused only modest controversy, debate has centered more closely on how the states would vote during proceedings, and on the crucial decision to propose an amendment or amendments: would delegates vote per capita, or would each state cast a single vote? Some advocates for an Article V Convention claim that a convention can only vote by state, not by delegates. The “Convention of States,” for instance, asserts that

The universal precedent for voting at an interstate convention is on a one-state, one-vote basis. It is not a convention of delegates but a convention of states. This is the reason Article V did not need to specify the number of delegates to be sent by each state. The states can send as many delegates as they like, but each state only gets one vote.<sup>113</sup>

According to this argument, an Article V Convention would be following the precedent established in 1787 by the Philadelphia Convention if each state cast a single vote; moreover, supporters could also note that Article V provides further justification by assigning equal weight to the several states in both the application and ratification processes, notwithstanding differences in population. A subsidiary question concerns voting within delegations at a convention under this rubric: assuming each state casts a single vote, what form would internal balloting take in multi-member delegations? How many votes would be needed to cast a state’s single vote—a majority? a plurality? What would happen should the vote be split equally?

Others make the argument that contemporary democratic practice demands that convention voting power should reflect at some level the great differences in population among the several states. The American Bar Association declared in its 1974 study that “a system of voting by states at a convention, while patterned after the original Constitutional Convention, would be unconstitutional as well as undemocratic and archaic. While it was appropriate before the adoption of the Constitution, at a time when the states were essentially independent, there can be no justification for such a system today.”<sup>114</sup>

## **The Role of the District of Columbia and U.S. Territories**

Article V is silent on membership of an Article V Convention, so it is arguable that Congress might choose to include the District of Columbia or U.S. territories if it summoned a convention, either as full members, or, alternatively, as observers.

As noted earlier, some versions of convention planning legislation did provide for District of Columbia delegates, but not U.S. territories. Although the federal district would not have a role in the ratification process, which the Constitution specifically limits to states, there is no apparent impediment to participation by its representatives in a convention’s deliberations. The argument for participation by the District of Columbia can be made on the grounds that it has been part of the territory of the United States since independence, and that its residents have always been U.S. citizens. Within this larger question, Congress might consider whether representatives of the nation’s capital could be accorded full membership in an Article V Convention, admitted as observers or non-voting delegates, as is the case with its representation in Congress, or not be included. Advocates might assert that what the Constitution does not deny, it permits, and that fairness and contemporary democratic values argue in favor of convention participation by the District of Columbia. Alternatively, it could be noted that Article V vests authority over the amending process exclusively in Congress and the states, and that inclusion of a non-state jurisdiction like the federal district was never contemplated by the founders. Some advocates

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<sup>113</sup> Convention of States website, at [http://www.conventionofstates.com/real\\_answers\\_to\\_article\\_v\\_questions](http://www.conventionofstates.com/real_answers_to_article_v_questions).

<sup>114</sup> American Bar Association, *Amendment of the Constitution by the Convention Method under Article V*, p. 35.

might argue further that only states are authorized to participate in an Article V Convention, and that Congress lacks the authority to provide membership for any other jurisdiction.

The question of territorial representation at an Article V Convention seems more problematic. None of the convention planning bills introduced in the late 20<sup>th</sup> century provided for participation by the U.S. territories. A case could be made that these jurisdictions are controlled by the United States, their inhabitants are American citizens or nationals, they enjoy the privileges and protections of the Constitution, and that they deserve at least a place at the table, as observers or delegates, if not voting members. Here again, the counter-argument is that Article V vests authority over the amending process exclusively in Congress and the states.

## Proposing an Amendment

The Constitution is silent on the vote required in an Article V Convention to propose amendments. As noted earlier in this report, convention planning legislation of the 1960s-1990s set varying standards: some bills required a simple majority vote of convention delegates, while others set a higher bar with a two-thirds vote requirement. Supporters of a simple majority could note that Article V sets two very specific super-majority requirements for constitutional amendments—the two-thirds vote for amendments proposed by Congress, and the three-fourths requirement for ratification by the states. They might argue that if the framers wanted a higher threshold for amendments proposed by a convention, they would have established it in the amendment. Other commentators argue a two-thirds convention vote is consistent with the requirement for amendments proposed by Congress, and that a super-majority would ensure that only amendments enjoying widespread support would be proposed to the states:

Congress should also provide that an affirmative vote of two-thirds of the delegates would be required to propose any given amendments to the states. In this way, it would assure a symmetry of concurrence in the bodies empowered to propose constitutional amendments—whether the body was Congress or a convention.... A two-thirds requirement in such a convention would also guarantee that no amendment, regardless of its means of proposal, is ever submitted to the states before an overwhelming consensus as to its desirability is evidenced in a nationally oriented body.<sup>115</sup>

Here again, however, the question of congressional authority arises. Writing in *Constitutional Brinkmanship*, Russell Caplan rejects Congress's authority to set standards for an amendment produced by an Article V Convention and embraces the simple majority requirement:

... where the Constitution does not specify a vote ... a simple majority is sufficient to decide the issue, and Congress may not raise the figure. Since the convention decides its own approving vote, it could, by a simple majority, determine that proposing an amendment requires a supermajority, for example, two thirds or three fifths. But this hurdle can be imposed only by the convention itself, not from without by Congress.<sup>116</sup>

## Concluding Observations

The Article V Convention alternative for proposing constitutional amendments was the subject of considerable debate and forethought at the Philadelphia Convention of 1787. Clearly intended by the framers as a balance to proposal of amendments by Congress, it was included to provide the people, through applications by their state legislatures, with the means to call a convention having the authority to consider and propose changes to the Constitution, particularly if Congress proved

<sup>115</sup> Bonfield, "Proposing Constitutional Amendments by Convention: Some Problems," p. 676.

<sup>116</sup> Caplan, *Constitutional Brinkmanship*, p. 121.



incapable of, or unwilling to, initiate amendments on its own. It also has the distinction of being one of the few provisions of the Constitution that has never been implemented. As such, the convention alternative would present a wide range of policy and procedural questions should Congress ever be called on to consider or convene an Article V assembly. If this were to occur, Congress would not be without resources. This report has sought to identify and provide analysis of key issues for its consideration. In addition, other guideposts, if not simple answers, exist in the broad range of sources identified and cited in this report. These include the original intent of the founders, as preserved in the record; historical examples and precedents, particularly from the last decades of the 20<sup>th</sup> century; and the large volume of scholarly writing on the subject. Not least, Congress could also avail itself of the considerable body of study and debate developed by its own Members and staff during the more than two decades it gave serious consideration to the question of the Article V Convention alternative.

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