General Discussion
HOLLINGSWORTH v. STATE OF VIRGINIA, 3 U.S. 378 (1798)

Hollingsworth v State of Virginia, 3 U.S. 378 (1798) (hereafter Hollingsworth) is a landmark decision of the Supreme Court of the United States. The specific question put before the Court in 1798 was "whether the Amendment [the Eleventh Amendment] did, or did not, supersede all suits depending, as well as prevent the institution of news, suits, against any one of the United States, by citizens of another State." The Eleventh Amendments states,

> "The Judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

The Court was asked to decide whether any amendment had effect on already commenced proceedings (in this case already begun legal proceedings). Arguments that the amendment did not prohibit such actions already commenced or that would be commenced were (1) "The amendment has not be proposed in the form prescribed by the Constitution, and, therefore, it is void" and (2) the language of the amendment had grammatical errors within it making the words "commenced or prosecuted" "ambiguous and obscure."

Chase

Samuel Chase, (Associate Justice 1796-1811, Signer of the Declaration of Independence 1776), dispensed with the second argument with a single footnote notation, "The words 'commenced and prosecute,' standing alone, would embrace cases both past and future."

For the purposes of examination of Article V no further time need be spent on this portion of the ruling. This then leaves the first objection, that "upon an inspection of the original roll, it appears that the amendment was never submitted to the President for his approbation. The Constitution declares that 'every order, resolution, or vote, to which the concurrence of the senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, etc.' Art 1.s.7. … The Constitution, likewise declares, that the concurrence of both Houses shall be necessary to a proposition for amendments. Art. 5. … The concurrence of the President is required in matters of infinitely less importance; and whether on subjects of ordinary legislation, or of constitutional amendments, the expression is the same, and equally applies to the act of both Houses of Congress."

Again Justice Chase dispensed the argument with a single footnote, "There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution."

Lee

Chase's determination was clearly based on the argument of U.S. Attorney General Charles Lee (1785-1801) who argued in part:

> "An amendment of the constitution, and the repeal of a law, are not manifestly, on the same footing. … The amendment, in the present instance, is merely explanatory, in substance, as well as language. From the moment those who gave the power to sue a state, revoked and annulled it, the power ceased to be part of the constitution; and if it does not exist there, it cannot in any degree be found, or exercised else where. The policy and rules, which in relation to ordinary acts of legislation, declare that no ex post facto law shall be passed, don not apply to the formation, or amendment, of a constitution. The people limit and restrain the power of the legislature, acting under a delegated authority; but they impose no restraint on themselves. They could have said by an amendment to the constitution, that no judicial authority should be exercised, and any case, under the United States; and, if they had said so, could a court be held, or a judge proceed, on any judicial business, past or future, from the moment of adopting the amendment? On general ground, then, it was in the power of the people to annihilate the whole, and the question is, whether they have annihilated a part, of the judicial authority of the United States? Two objections are made: 1st, That the amendment has not been proposed in due form. But has not the same course been pursued relative to all the other amendments that have been adopted? And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms, of investing the President with a qualified negative on the actions and resolutions of Congress."

The similarity between Lee's statement and Marshall's statement in Marbury cannot be disregarded. Both men based their propositions on the principle that *the people* have the right to alter or abolish not any other political body. While the people may operate through representative bodies in order to execute their desire, nevertheless *the history of this nation demonstrates irrefutably the people have the inherent right to choose who shall represent them in this endeavor and through that act therefore determine what changes in their form of government shall occur.*

Before addressing the obvious question of the Hollingsworth and its apparent conclusive resolution regarding presidential involvement in the amendatory process one other relevant piece of information must be considered.

Buchanan

In 1861, President James Buchanan, 15th President of the United States, (1857-61), submitted an application for an Article V Convention from the state of Kentucky to Congress (pages 174-75). The Senate ordered the resolution to "lie on the table" as prescribed by Madison in 1789. The House also took note of the application ordering it to be published in the Congressional Globe. At this time, public record shows there were insufficient applications to cause a convention call. Therefore President Buchanan, unlike today, could take no further action regarding any application.

The significance of this presidential action and subsequent acceptance of it by both houses of Congress cannot be overlooked. Congress accepted a president may bring to its attention applications submitted by the states for a convention call. Thus Congress permitted the President of the United States to insert himself in the convention process. But to what extent is the president permitted to do this and under what basis of law may he interpose himself?

The Supreme Court ruled emphatically in Hollingsworth that the president shall have no part "in the proposition or adaptation of amendments." However Congress has not fulfilled its required duty and called an Article V Convention as mandated. The Constitution mandates Congress commence a process of amendment procedure Congress refuses to comply with. In doing this Congress violates other constitutional provisions—the oath of office and supremacy clauses.

The Constitution explicitly states the president shall "take care that the laws be faithfully executed." His oath of office demands he "…preserve, protect and defend the Constitution of the United States." Between these two textual clauses there is no doubt the duty of the president is not only to preserve statutory but constitutional law as well. Hence if law exists within the Constitution that mandates an action by the government the president is authorized (indeed mandated) to take care to preserve the Constitution. Any other interpretation of presidential duty permits the destruction of the Constitution. As Chief Justice Marshall stated, "This is too extravagant to be maintained."

In preserving the integrity of the Constitution, when the president uses a power expressly assigned him by the Constitution how can it be argued he cannot use this power to carry out his assigned duty of constitutional preservation? How can it be reasonably proposed that in faithfully preserving the constitutional *process of amendment* while not being involved in any specific amendment

proposal, the president has violated the terms of Article V which, while not assigning a specific role in the process, *are based on the presumption all parties who are involved will obey the process as described and will not violate the process described either by overt act or omission*. In the circumstance of Congress refusal to obey the Constitution, the act of disobedience is not directed against any one amendment proposal such that president intervention would aid in the proposition or adoption of that amendment but instead is directed at the entire amendment process. The fact of the obstruction is what mandates presidential intervention, not the promotion of a particular amendment proposal. The president is therefore dealing with the *process* rather than a *proposal*. The issue in Hollingsworth concerned a specific amendment *proposal*. The Court did not say the president cannot preserve the Constitution when it comes to the amendment *process* only that he may not be involved in the *proposition* of a specific amendment in that his consent is not required for that specific amendment to be proposed.

Surely the president, particularly when he has expressed powers to resolve this constitutional violation, cannot be restrained by the assumption his action violates Hollingsworth in that the president shall have no role in the proposition or adoption of amendments meaning he has no veto power over an amendment proposal (which was specifically the question the Court addressed in its response) when in fact he is dealing with an assumed veto power by Congress *not prescribed or contemplated by the people who created the Constitution*. The president's job simply put is to preserve the Constitution "as is" not as others in power would like it to be.

Moreover, the applications are intended for the *convention* not Congress to resolve. By its act of refusal to call when mandated to act, Congress has unconstitutionally inserted a new provision into the Article V process such that applications intended by the states for a convention to address are instead resolved by Congress by its assumption of a veto of the entire convention process. The convention cannot carry out its function to *propose* amendments until it exists to do so. Article V is explicit: Congress must take the necessary step of call in order to begin the convention and cannot abort the process by any means whatsoever.

Thus, causing Congress to convene in order to count state applications for an Article V Convention cannot be considered involving the president in an amendment proposal as the convention still retains all aspects of consideration related to proposal and it will be the *convention*, not the president, that will propose the amendments and *exclusively holds the right of veto over any amendment proposal*. Rather the president is preserving the constitutional *process* described in Article V by compelling Congress to be bound by that process as the Constitution mandates *without effecting or affecting any conclusions regarding amendment proposals a convention will determine*. The

president is simply ensuring the law of the Constitution is faithfully executed as you are required to do for any law.

Moreover, the Constitution affords the president the means to avoid any question of constitutional impropriety. The Constitution requires the president call Congress into special session. No other officer is so authorized. The Constitution does not require the president attend or actively participate in the special session. Therefore the president may avoid any question of constitutional impropriety by sending in his place the only person in government who simultaneously holds office in two branches of government—the vice president. Hollingsworth does not prohibit the vice president from being involved in the "proposition or adaptation of proposed amendments" because the vice president, an officer of the executive branch, also is President of the Senate, an officer of the legislative branch. The vice president has every right to participate in the "proposition and adaptation of proposed amendments" to the extent provided in the Constitution. In this latter capacity the vice president can preside over the special session of Congress and present each application to Congress until 34 applications from 34 states are presented and verbally counted by Congress. At which point the Constitution demands Congress issue a convention call which, if Congress is still recalcitrant, the president can compel Congress do under his "preserve" power without being in violation as the president is still dealing with the *process* of an Article V Convention rather than the *proposal* of a specific amendment.

In sum, Hollingsworth does not restrict the president from using designated constitutional powers assigned the president by the Constitution with the specific intent of preserving the constitutional processes within the Constitution where Congress, wholly without constitutional support, has violated that process.