

*see pages 27-37*

Report No. 81-135 GOV/A

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CONSTITUTIONAL CONVENTIONS: POLITICAL AND LEGAL ISSUES  
THE UNANSWERED QUESTIONS

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**CRS**

June 2, 1981

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#### ABSTRACT

This report provides a brief history of the section of Article V of the Constitution which provides for a convention to propose constitutional amendments, and analyzes some unanswered questions about this yet to be used part of the Constitution.

#### NOTE

Factual information about recent State applications for a convention, as well as current legislative proposals in the area, may be found in CRS issue brief number IB80062, entitled "Constitutional Conventions: Background and Policy Considerations." Copies of this issue brief and other CRS products may be obtained by requesting them through the CRS Inquiry Unit at 287-5700.

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CONSTITUTIONAL CONVENTION: POLITICAL AND LEGAL ISSUES--  
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INTRODUCTION

In the not too distant future the nation may face its first constitutional convention since 1787. By the end of 1980, applications for a convention had been passed by thirty of the necessary thirty-four State legislatures to convene a convention to propose an amendment limiting deficit spending, and by nineteen States for an amendment prohibiting abortion. Because this process for amending the Constitution has never been used, several unresolved legal and policy questions arise governing the convening and the authority of such a convention.

AMENDING THE CONSTITUTION

Article V of the U.S. Constitution establishes the procedures by which the Constitution may be amended. The process can be conveniently divided into two phases: the procedures relating to the proposal of constitutional amendments, and those pertaining to the ratification of proposed amendments.

The article provides two methods for proposing amendments. The first permits Congress to propose amendments "whenever two-thirds of both Houses shall deem it necessary." All the amendments now part of the Constitution originated in this manner. The second method is explained

in the language, "on the application of the legislatures of two-thirds [34] of the several States Congress shall call a convention for proposing amendments." This method has never been used.

Article V also specifies that, once proposed, amendments are to be ratified either by the legislatures or special conventions of three-fourths of the States before becoming part of the Constitution. Whether the amendment is proposed by Congress or a convention, Article V delegates to Congress the power to choose the method of ratification.

Thus, a convention called pursuant to Article V does not have the power to amend the Constitution but, rather, to propose amendments. Amendments proposed by such a convention still need to be ratified by three-fourths (38) of the States in the same manner as an amendment proposed by the Congress.

#### BRIEF HISTORY OF CONVENTION PROPOSALS

Controversy over the convention alternative for proposing amendments is not a new phenomenon. In the period since 1789, State legislatures have submitted more than 400 applications for a convention to consider amendments relating to a wide variety of subjects. In recent years, legislatures have applied to Congress for a convention more often than in the past. During the 174-year period from 1789 to 1963, Congress received approximately 250 applications requesting a convention. In the 17 year span from 1963 to 1980, more than 150 such applications have been received.

During the 94th and 95th Congresses, in addition to the subjects of the budget and abortion, the issue of compulsory school assignment

(busing) prompted thirteen States to apply, and a movement to allow prayer in the public schools brought five such applications.

The constitutional convention issue received considerable attention in the late 1960s and early 1970s, owing largely to the effort of Senator Everett Dirksen (R.-Ill.). He wanted to convene a convention in order to amend the Constitution to allow one house of a State legislature to be apportioned by a means other than population. As a result of this campaign, Senator Sam Ervin, Jr. (D.-N.C.), introduced in 1967 (the 90th Congress) a Constitutional Convention Procedures Act (S. 2307).<sup>1/</sup> The purpose of the bill was to establish the steps to be taken by the Congress in the event that applications were received from the necessary two-thirds of the States. This measure and a similar bill (S. 623) introduced in the 91st Congress were considered by the Senate Judiciary Committee, but were not reported to the floor.

Citing the need for "orderly procedures" to avoid the possibility of a "runaway convention and a constitutional crisis," Senator Ervin introduced S. 215 in 1971 (92d Congress).<sup>2/</sup> The bill passed the Senate by a vote of 84-0, but the House did not consider the measure on the floor. A similar bill, S. 1272, passed the Senate by a voice vote in 1973 during the 93rd Congress but, again, it was not considered on the House floor.<sup>3/</sup>

These 92d and 93d Congress bills, among other things: (1) specified the forms of State applications acceptable to Congress; (2) provided that

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<sup>1/</sup> See, Congressional Record. v. 113, August 17, 1967. p. 23004.

<sup>2/</sup> Ibid. v. 117, January 26, 1971. p. 543.

<sup>3/</sup> Ibid. v. 119, June 11, 1973. p. 18952-18953.

the applications would remain in effect for seven years; (3) allowed States to rescind applications; (4) limited the jurisdiction of any convention to the subject for which it was called; (5) set forth administrative procedures for convening a convention, such as the method of selecting delegates and the type of vote required to propose an amendment; and (6) permitted Congress to reject a disfavored convention proposal in lieu of submitting it to the States for ratification.

In the 94th, 95th, and 96th Congresses a number of bills were introduced seeking to set similar standards. Hearings were held on the 96th Congress Senate Bills, S. 3, S. 520 (Helms), and S. 1710 (Hatch) in 1979. No further action was taken.

All of the questions concerning a possible constitutional convention are now pertinent because thirty of the necessary thirty-four States have adopted resolutions calling for a constitutional convention to consider an amendment to require a balanced Federal budget.

#### THE BALANCED BUDGET CONVENTION DRIVE

In 1979, the National Taxpayers Union (NTU), a Washington-based lobby group claiming a membership of 100,000 was identified with a campaign that sparked considerable interest in State legislatures to adopt resolutions to Congress about a proposed amendment to limit the power of the Federal Government to incur budget deficits. In 1980 the NTU lobbied for the proposal in the State legislatures.

In March 1979, a coalition of labor, religious, business, and other interests met to organize a group called Citizens for the Constitution. This group, under the leadership of the Lieutenant Governor of Massachusetts,

Thomas P. O'Neill III, helped coordinate the efforts of those persons who opposed efforts to convene a constitutional convention during 1979.

The latter organization opened an office in Washington and actively lobbied in many of the States that were considering resolutions to apply to Congress under Article V for a convention to consider an amendment about Federal spending.

By December 1978, twenty-two States had adopted resolutions requesting a convention on the Federal budget while six other States had adopted resolutions favoring such an amendment, but not requesting a constitutional convention. In 1979, eight States--Arkansas, Idaho, Iowa, New Hampshire, Nevada, North Carolina, South Dakota, and Utah--approved similar convention resolutions. Four of the approvals came from among the six States that had previously endorsed the amendment in a resolution, but did not request a convention.

The thirty States that have passed resolutions requesting a constitutional convention about Federal spending are: Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Iowa, Indiana, Kansas, Louisiana, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. The legislatures of California, Illinois, and Kentucky have adopted resolutions requesting that Congress propose a deficit spending amendment, but not asking for a constitutional convention.

In three States, California, Massachusetts, and Montana, deficit



spending convention proposals have been defeated in floor votes in the legislatures.

#### THE RIGHT-TO-LIFE CONSTITUTIONAL DRIVE

There is another effort being made in the States to convene a constitutional convention. Nineteen States--Alabama, Arkansas, Delaware, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Utah--have asked for a convention to propose an amendment which would prohibit abortions.

The National Right-to-Life Committee, an interest group with affiliates nationwide, adopted a resolution in June 1978 encouraging and supporting all methods of obtaining a right-to-life constitutional amendment. Previously, the committee had not endorsed the convention method and a group called Americans for a Constitutional Convention, Inc. (now the Ad Hoc Committee in Defense of Life) had been the chief coordinator of the drive for the anti-abortion convention.

Organized opposition to the right-to-life constitutional amendment includes the National Abortion Rights Action League (NARAL), the Religious Coalition for Abortion Rights (RCAR), and Planned Parenthood.

The many unknowns raised by the prospect of a Federal constitutional convention are considered in the following pages in a question and answer format.

## POLITICAL AND LEGAL ISSUES--THE UNANSWERED QUESTIONS

The steps required to convene an Article V convention and the rules which would govern it are not set forth in the Constitution or in statutory or case law. The questions raised by these omissions are considered in the series of issues set forth below.

1. What is the role of Congress in calling a convention?
2. What constitutes a valid application for a convention?
3. What is the life-span of an application?
4. May a legislature withdraw its application for a convention?
5. The Constitution refers to the receipt of applications for a convention from two-thirds of the States. If more than four hundred applications have been received since 1789, why have we not had a convention?
6. May applications be conditional?
7. Must applications be identical?
8. What kind of scenario can be anticipated to show the likely steps that will be taken if applications are received from thirty-four States?
9. Does the Congress fulfill its constitutional duty under Article V, after receipt of valid applications from two-thirds of the States, by proposing its own substitute amendment?
10. Can a constitutional convention be limited to the consideration of a single issue?
11. If a convention is limitable, who may do the limiting? The Congress? The States? or both?
12. If the Congress can limit the subject of a convention, how strict may that limitation be?
13. If a convention should go beyond a limitation imposed by the Congress or the States, are there any remedies available?

14. Is the Supreme Court the ultimate arbiter of disputes over the proper implementation of Article V?
15. Who would have standing in a court of law to litigate any of these issues?
16. What method of representation to a convention should be adopted?
17. Can a Member of Congress be a delegate to a convention?
18. Can the Congress set the vote required by the convention to propose an amendment?
19. Is a convention the creature of the Congress, the States, or the "people?"

A summary of some of the possible approaches to answering these questions follows.

1. WHAT IS THE ROLE OF CONGRESS IN CALLING A CONVENTION?

Article V clearly charges Congress with the responsibility of calling a convention if two-thirds of the States have validly applied for one. Congress' precise role in this matter remains undetermined because the steps necessary for this action are not set forth in Article V.

Arguably, Congress may establish the standards for the content of the State applications to aid in judging when a convention must be called. In its report on S. 1272 (a constitutional convention procedures act which passed the Senate in the 93rd Congress) the Senate Judiciary Committee concluded, "Congress unquestionably has the authority to legislate about the process of amendment by convention, and to settle every point not actually settled by Article V of the Constitution itself."<sup>4/</sup> In addition, the

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<sup>4/</sup> U.S. Congress. Senate Judiciary Committee. Federal Constitutional Procedures Act; report to accompany S. 1272. Senate Report No. 93-293, 93d Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1971. p. 7.

American Bar Association Special Committee on Constitutional Conventions concluded in its 1974 report that "Article V explicitly gives Congress the power to call a convention upon receipt of applications from two-thirds of the State legislatures [34] and to choose the mode of ratification of a proposed amendment." The committee further concluded that "as necessary incident of the power to call, Congress has the power initially to determine whether the conditions which give rise to its duty have been satisfied."<sup>5/</sup>

On the other hand, it can also be argued that the authority of Congress in the convention process is limited only to the ministerial aspects of calling the convention and determining how amendments proposed by the convention are to be ratified by the states. For example, Senator Weldon Heyburn (R.-Id.) in a speech before the Senate said in 1911:

When the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution, and they can repeal the provision that limits the right of an amendment. They can repeal every section of it, because they are the peers of the people who made it. <sup>6/</sup>

## 2. WHAT CONSTITUTES A VALID APPLICATION FOR A CONVENTION?

At present, there are no precise standards for judging an application. Because Article V refers to applications of the legislatures of

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<sup>5/</sup> American Bar Association Special Constitutional Convention Study Committee. Amendment of the Constitution by the Convention method under Article V. Washington, American Bar Association, 1974. p. 17.

<sup>6/</sup> Heyburn, Weldon. Constitutional Convention. Remarks in Senate. Congressional Record. -- v. 46, Feb. 17, 1911. -- p. 1769. See also, Black, Charles L. The Proposed Amendment of Article V: A Threatened Disaster. Yale Law Journal, v. 72, April 1963. p. 957.

the States, most commentators have assumed that a valid application must be a measure that has been passed in identical form by both houses of the legislature (except in the case of Nebraska which has a unicameral legislature). At this point disagreements begin.

The manner and form of an application could be left entirely to the States to decide, or the Congress could make requirements for applications. Some of the controversy which has come from the lack of standards for applications can be illustrated from the balanced budget convention drive. Issues such as the vote required in legislatures to make an application, the role of the governor, what constitutes a "legislature," and whether an application must be sent to Congress have been raised.

To be Valid Must An Application be Passed by a "Super Majority" Vote in the State Legislature?

This issue was raised in 1978 by the Legislative Council of the State of Indiana. That legislature had passed an application for a convention about Federal spending in 1957. The Indiana constitution requires that all measures which will have the force of law must be passed by a majority of the membership of the legislature, rather than a majority of those voting, provided a quorum is present, as in congressional practice. Setting aside the question of whether the Congress would be obligated to count a State application which had passed more than twenty years ago, the Indiana Legislative Council suggested it had not been passed by a majority of the membership of the legislature--a "constitutional majority." This concept of a "constitutional majority" exists in many States. Apart from requirements for a constitutional majority, some State constitutions have been interpreted to require that

applications for a convention must be passed by the same margin as a proposed amendment to their constitutions--a two-thirds or three-quarters vote. For example, in Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975), a federal district court upheld an Illinois supermajority requirement for ratification of a proposed amendment to the U.S. Constitution. The court explained that Congress may not regulate the procedure by which each State convention or legislature ratifies amendments.

Most of the proposed constitutional convention procedures bills require State applications to be adopted in the same manner as a law of the State, absent the consent of the governor.<sup>7/</sup> Thus in States with the requirement of a "constitutional majority" for enacting laws, constitutional convention applications might be subject to these requirements for more than a simple majority vote.

#### Does a Governor Have a Role in the Application Process?

Questions about whether a governor may veto or must sign an application of a State legislature have been asked during the present budget convention drive, as well as during previous convention drives. Prior to passing a resolution in 1979 (which was approved by the governor), the Nevada legislature passed a resolution calling for a convention that was vetoed by the governor. Based on the assumption that the governor has no role in the application process because the Constitution specifies "legislatures" rather than "States" as the bodies necessary for requesting

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<sup>7/</sup> See section 3(a) of S. 600 (Helms), S. 817 (Hatch), and H.R. 353 (Hyde), introduced in the 97th Congress, 1st Session.

a convention, the National Taxpayers Union counted the vetoed Nevada application as valid. Officials of the Nevada legislature, however, concluded that the governor had the power to veto the application. Thus, the Nevada legislature in 1978 did not count itself as having applied under Article V for a convention. Had the legislature not re-passed the resolution, and had the governor not signed it, there still might be a controversy about Nevada's application.

Most constitutional convention procedures bills exclude State governors from the process. Arguably, it is within Congress' power to exclude the Governor of the applying State from participation in the process, since the exclusion would not affect the legislature's own power over its own rules of operation, and such exclusion would be consistent with the theory that the executive at both the State and Federal levels should not be part of the amending process.<sup>8/</sup>

What is a "Legislature" in a Constitutional Sense?

The argument that the term "legislature" as specified by the Constitution precludes participation by the State executive in the amendment process finds support in a case decided in 1798 called Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). In this case the Supreme Court established that the President has no role in Article V in proposing amendments. Here, the issue was whether the 11th amendment, after two-thirds passage in the House and Senate, had to be presented to the President for approval prior to submission to the States for ratification. The Supreme Court said that the "negative" of the President applies only to

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<sup>8/</sup> See, discussion of Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798), *infra*.

ordinary cases of legislation, the rationale being that the two-thirds vote necessary to pass an amendment is enough to overcome a veto, so that submission to the President is unnecessary.

Thus, by analogy, presenting an application to a State executive, or governor, for approval is also unnecessary, since the States are performing a Federal function when they initiate or participate in the amending process. Applications for a convention or a ratification of proposed amendments are not acts of legislation in the ordinary sense of the word.

This analogy may be challenged in that the precedential value of Hollingsworth v. Virginia has been called into question because the Court failed to give the reasons for its decision. Thus, the case introduced by fiat a clear exception to the Article I, Section 7 command that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall before it becomes a law, be presented to the President of the United States." Although Hollingsworth has been confirmed by historical practice regarding the actual proposing of amendments, it is not clear that the principle to be derived from Hollingsworth can be applied to all amendment - related congressional activities, and by analogy, extended to State legislative activities.

#### To be Valid Must a State Application be Sent to Congress?

Another potential controversy over what constitutes a valid "application" relates to the steps a State must take to send an application to the Congress. From a State's perspective, one might contend that the



States need only pass a resolution making application for a convention for it to be valid. No further State action would be necessary. It would be Congress' duty to be aware of State actions in this area and to keep accurate records. Another view, from the vantage point of a Congress that must track these applications, is that an "application" implies formal communication of the State's action to the Congress.

This issue assumed great importance in early 1979 when it was learned that before 1978, a quarter of the States that had passed applications relating to the budget apparently never sent them to the Congress. After learning this, most of the affected States soon sent their applications to Congress.

The important question here is at what point must Congress take note and acknowledge the validity of the applications? When applications pass the State legislatures, or when they are actually received by the Congress? Does the Congress have a duty to maintain records of State applications, acting as a "trustee" for the States, and hold the applications until the requisite number have been sent? Or does the Congress' duty arise to call a convention "on the application of the Legislatures of two-thirds of the several States," merely if the States assert the claim that, together, they have met the Article V requirement for applications and now Congress must respond and heed their call for a convention even if they have not sent them to Congress?

With regard to the foregoing, it should be noted that most of the legislation on convention procedures specifies the steps which States must follow to ensure their applications will be received and properly noted by the Congress. Although the procedures vary, most bills provide

that applications must pass the legislature by the same procedure as a law in the State (without, however, the consent of the governor); direct the States to send their applications to the Clerk or Speaker of the House, and the Secretary or President of the Senate; and set a time limit on the life-span of an application.<sup>9/</sup>

### 3. WHAT IS THE LIFE-SPAN OF AN APPLICATION?

Proposals have been made to limit the life of a State's application for a convention for periods ranging from one to twenty-five years. The proposals introduced in the Congress have ranged from two to seven years. Those who favor a period as short as two years have suggested that a short life-span for an application is necessary to make sure the application accurately reflect the current consensus of a legislature. Proponents of the seven-year limitation argue that for consistency's sake the seven year ratification period for constitutional amendments, which has been the practice in the Congress since the 1920s, ought to be followed in the case of applications for conventions.<sup>10/</sup>

Although there is no mention in Article V about the effect of the lapse of time on the validity of an application, the Article implies that all State actions in the amendment process must be contemporaneous. This was asserted in the Supreme Court decision of Dillon v. Gloss, 256 U.S. 368, 375 (1921), which concerned the pendency of an amendment proposed by the Congress to the States for ratification. The Supreme Court upheld the

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<sup>9/</sup> Sections 4 and 5 of S. 600 (Helms), S. 817 (Hatch) and H.R. 353 (Hyde), introduced early in the 97th Congress, set out requirements in this area.

<sup>10/</sup> For example, see U.S. Congress. House. Committee on the Judiciary State Applications asking Congress to call a Federal Constitutional Convention. Committee Print, 86th Cong., 1st Sess. Washington, U.S. Govt. Print. Off. p. 4 See also, the ABA study previously cited at p. 32.

right of Congress to set a time limit for ratification saying that (1) Congress could fix a reasonable time within which proposed amendments had to be ratified, and (2) seven years was a reasonable time. In dicta the Court also noted that "proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time." Id. at 374. Thus, it is arguable that applications, which are part of the proposal aspect of the amending process, cannot be widely separated in years and still be effective. Moreover, by analogy, Congress may set a reasonable time for the efficacy of an application. On what constitutes "reasonable time" there is some disagreement.<sup>11/</sup>

#### 4. MAY A LEGISLATURE WITHDRAW ITS APPLICATION FOR A CONVENTION?

In the late 1960s, Senator Everett Dirksen (R., Ill.) led a nearly successful campaign to convene a convention to allow one house of a State legislature to be apportioned by a means other than population. At one point thirty-two of the necessary thirty-four States had applications pending. Opponents of the convention subsequently succeeded in convincing a number of States to reconsider their actions and pass resolutions seeking to withdraw their applications.

The question about whether these withdrawals were permissible, as well as other instances when States have sought to withdraw applications for a convention have not been answered. Since there never have been applications pending before Congress from two-thirds of the States on the same subject,

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<sup>11/</sup> The 97th Congress bills, S. 600 (Helms), S. 817 (Hatch), and H.R. 353 (Hyde), have seven year limits, but S. 817 allows the States to set a shorter period.

the issue of whether to count a "withdrawn" application has never been "ripe" for decision.

Most of the bills seeking to establish constitutional convention procedures in advance of the receipt of applications from two-thirds of the States provide for the withdrawal of applications. Some of these bills also would allow States to rescind their ratification of proposed amendments. In both cases, withdrawal and rescission, the States would be free to have a change of mind so long as their action is taken before the requisite number of States have been reached. Some of the proponents of these measures believe that if Congress allows States to withdraw applications for a convention, then the Congress must also allow States to rescind ratifications of amendments as a matter of consistency.<sup>12/</sup>

On the other hand, the distinction between withdrawal of an application and rescission of a ratification vote lies in the timing of the two legislative products. An application for a convention is merely a request of Congress by a particular State. It is the first step of an amendment process which ultimately has many other steps before an amendment becomes part of the Constitution. Applications are often phrased in general terms so that a State only will have a vague idea what an final product of the proposed convention will be.

Ratification, however, is part of the final stage of the amendment process and comes after lengthy discussion of the issues both before and after Congress or a convention proposes the amendment. Thus, one

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<sup>12/</sup> Section 5(b) of the 97th Congress bills S. 600 (Helms), S 817 (Hatch), and H.R. 353 (Hyde) allow States to withdraw applications under certain conditions. Section 13(a) of these bills allow States to rescind their ratification of proposed amendment prior to receipt by the Congress of valid ratifications by the necessary three-fourths of the States.

could say that a ratification constitutes a far more certain act in that the stakes are set; the last State to ratify is fully aware of the consequences of its vote. The last State to apply to Congress for a convention may be aware of the general nature of the amendments which may be proposed by a convention, but it cannot know precisely what a convention will propose.

This uncertainty of final outcome underlies the view that Congress need not give States the authority to rescind ratifications at the same time that they are granted the authority to withdraw applications. The applying State legislature may be a different legislature entirely from a ratifying State legislature, and each may have distinctive interests in the issue. Arguably, the States ought to be able to change their minds in the application process.

5. THE CONSTITUTION REFERS TO THE RECEIPT OF APPLICATIONS FOR A CONVENTION FROM TWO-THIRDS OF THE STATES. IF MORE THAN FOUR HUNDRED APPLICATIONS HAVE BEEN RECEIVED SINCE 1789, WHY HAVE WE NOT HAD A CONVENTION?

Historically, the unwritten congressional policy regarding applications has been that they must relate to the same subject if they are to be counted together for the purposes of convening a convention. There have been additional suggested refinements to this policy. For example, some writers have said that applications must be substantially similar in language and format.<sup>13/</sup>

Although there have been numerous occasions when applications from more than two-thirds of the States have been pending before the Congress on

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<sup>13/</sup> For example, see, a memorandum from Philip B. Kurland to Senator Sam G. Ervin, Jr. in U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. Federal Constitutional Convention. Hearings on S. 2307, 90th Cong., 1st Sess., Oct. 30, 31, 1967. Washington, U.S. Govt. Print. Off., 1967. p. 233. For a differing view see, Black, Charles L. Amendment by National Constitutional Convention: A Letter to a Senator. Oklahoma Law Review, v. 32, Summer 1979.

differing subjects, there never has been a time when the required number of applications pending before the Congress addressed the same subject area. Congress, having been delegated the exclusive authority under Article V to call a convention, would seem to have the power to require that the nature of a particular problem be stated in the State applications before issuing such a call.

It has been said that valid applications for a convention to provide for direct election of Senators were received from two-thirds of the States in 1912. It has also been said that Congress, in order to avoid a convention, reported a direct election amendment to the States in lieu of calling a convention. However, recent research suggests that applications from two-thirds of the States had not been received because one resolution counted by these observers requested only a constitutional amendment rather than a constitutional convention.

#### 6. MAY APPLICATIONS BE CONDITIONAL?

Many applications are conditional because the State legislatures first ask Congress to propose its own amendment. If Congress fails to do so, the legislatures' request will then become an application for a convention. Arguably, applications may not be conditional in nature, and any such applications ought to be considered invalid. The language of Article V that requires the Congress to convene a convention on the "application of the legislatures of two thirds of the several States," may be interpreted to require such applications to be unequivocal because amendments to the Constitution are matters of national concern and any steps taken to achieve such an important action should be of unquestionable legal sufficiency.

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<sup>14/</sup> See, e.g., *Hawke v. Smith*, 253 U.S. 221 (1920), that holds a State may not validly condition ratification of a proposed constitutional amendment on its approval by a popular referendum.

On the other hand, it can be argued that the legislative intent of a conditional application is clear, because the legislatures are seeking an opportunity to consider an amendment proposal on a certain subject, regardless of the method of proposal. The conditional resolutions serve as both a memorial to Congress requesting Congress to propose an amendment, and an application under Article V if Congress fails to agree to propose the amendment requested.

7. MUST APPLICATIONS BE IDENTICAL?

A Special Constitutional Convention Study Committee of the American Bar Association addressed this issue in its report to the ABA House of Delegates in 1974. The committee stated that it agreed "with the suggestion that it should not be necessary that each application be identical or propose similar changes in the same subject matter" to be countable.<sup>15/</sup> It can be argued however, that applications must be identical to be countable. On the other hand, if the Framers intended to require applications to be identical, then the convention could have been omitted as unnecessary. Article V might have been drafted so that if two-thirds of the States proposed an identical amendment, it then would be sent directly to the States for ratification. No deliberation by a convention would be necessary.

Most of the proposed bills establishing constitutional convention procedures provide that the applications must refer to the same "general subject," "general subject matter," or the same "general nature" of the amendments to be proposed in order to be counted. This structure permits Congress to call a convention that is reasonably limited by the same

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<sup>15/</sup> American Bar Association, Special Constitutional Study Committee, p. 31.

group of applications. It also allows the convention to make any necessary further refinements in the language of any amendment that is proposed.<sup>16/</sup>

Other questions relating to the content of applications include:

Are applications which specify the exact text of an amendment countable inasmuch as they seek to limit the deliberative function of a convention?

If all applications are not identical, how much variation is acceptable?

The balanced budget convention drive provides an example of the problem of how much variance may be acceptable in the applications. The budget applications can be divided into four categories--those which request a convention to consider an amendment to require that appropriations not exceed estimated revenues, those which merely specify that there shall be a balanced budget, those which say that expenditures or obligations may not exceed income or receipts, and those which say that deficit spending will be prohibited. All these applications relate to federal spending, but some may argue that they are not specifically on the same subject, and therefore ought not be counted together.

The issue of abortion could hypothetically cause further confusion in counting. All the applications received by the Congress on abortion have sought to add an amendment to the Constitution prohibiting abortion. It is possible that a State could apply to Congress for a convention to propose an amendment guaranteeing a right to abortion. Clearly the State would be asking for a convention to consider different things. Would it

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<sup>16/</sup> S. 600 (Helms) and H.R. 353 (Hyde) require the States to state "the nature of the amendment or amendments to be proposed," (Section 2). Section 3(b) of these bills gives Congress the ultimate authority to determine the validity of the adoption of State applications for a convention.

S. 817 (Hatch), Section 2(a) requires the States to give the "general subject of the amendment or amendments to be proposed." Section 3(b) provides that "questions concerning compliance with the rules governing the adoption or withdrawal of a State resolution cognizable under this Act are determinable by the State legislature."



be appropriate to count such applications together to convene a convention?

8. WHAT KIND OF SCENARIO CAN BE ANTICIPATED TO SHOW THE LIKELY STEPS THAT WILL BE TAKEN IF APPLICATIONS ARE RECEIVED FROM THIRTY-FOUR STATES?

Because Congress has never been required to call a convention, the following procedure is only one of several possible routes that a convention call might take through the congressional process.

If the thirty-fourth State legislature has voted to convene a convention, and all the applications have been received by the Congress, it may take months for a convention to be called. It is likely that the first step in the procedure would be the introduction of concurrent resolutions stating that the requirements for a constitutional convention have been met. These resolutions would probably be referred to the respective Judiciary Committees. Such resolutions which have been introduced in the past (based on the theory that a convention must be called if applications are received from two-thirds of the States on any subject) have been in this form, and have been referred to the Judiciary Committees.

The Committees would probably examine the applications to ensure that they had been properly submitted. This "validation process" might be carried out in committee hearings where State legislative and executive officials could be called to testify about the authenticity of the applications. (Some applications have been erroneously sent to Congress in the past.)

Questions about the content and, possibly, the timeliness of the applications could be raised at the hearings. Also questions as to the status of conditional applications and the likely lack of identical phrasing as discussed in (6) could be raised at this time.

After considering the applications, the Judiciary Committees would probably issue reports on whether the requisite number of applications had been received. Other matters such as convention procedures might be addressed at this point or later in the process.

During floor consideration of the concurrent resolutions, the issues addressed during the committee hearings would probably be raised again. There is a possibility that one House might decide that a convention has been properly requested, and the other might disagree. There is also a possibility that faced with an apparently valid call, the Congress might decide to propose an amendment similar to the one suggested by the States. One State's application for a budget convention specifically provides this option saying that, if Congress proposes an amendment within sixty days after the receipt of applications from two-thirds of the States, the State's application will become null and void. Again, there are unanswered political and constitutional questions regarding the nature of the duty Congress owes to the States.

In addition to the mechanics of calling the convention, the Congress would need to address such matters as the time and place for holding the convention, and methods for financing, staffing, and selecting delegates to the convention (if the matter had not been previously settled with the enactment of one of the convention procedures bills discussed above).

9. DOES CONGRESS FULFILL ITS CONSTITUTIONAL DUTY UNDER ARTICLE V, AFTER THE RECEIPT OF VALID APPLICATIONS FROM TWO-THIRDS OF THE STATES, BY PROPOSING ITS OWN SUBSTITUTE AMENDMENT?

It is arguable that Congress could satisfy its constitutional duty under Article V to respond to the call of the States for a convention by proposing its own amendment. According to this view a request to Congress

to call a convention on a particular subject is in essence a request to the National Legislature to respond to a specific directive as expressed in the applications. But is this constitutional duty met by a legislative response to applications for a convention? That is, does Congress have a choice of responses once the requisite number of applications have been submitted?

Although some State's applications seek to give Congress this option, it is clear from the language of Article V ("Congress shall call...") that once the determination has been made that the requisite number of valid applications have been received, Congress has a constitutional duty to call a convention. However, Article V does not appear to preclude Congress from proposing its own amendment and submitting it to the States subsequent to the call and pending the actual start of the convention.

10. CAN A CONSTITUTIONAL CONVENTION BE LIMITED TO THE CONSIDERATION OF A SINGLE ISSUE?

This pivotal issue in the debate about the scope of congressional power under Article V, has spawned several theories on the constitutionality of limitations imposed by Congress or the States on a convention's authority. According to one view, the use of the plural "amendments" in Article V requires a convention to be called by the Congress only if the States request a general convention. This view is espoused by Charles Black, a constitutional scholar at Yale University who holds that the Congress may ignore applications requesting a single-issue convention because they do not ask what he believes the Constitution provides--a general convention.

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<sup>17/</sup> "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." Hamilton, Alexander. The Federalist No. 85. May 28, 1788.

Black wrote in a 1972 Yale Law Journal article when the concern was the possibility of a reapportionment convention, 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>18/</sup> Arguing further that the Constitution only provides for a general convention, he said, "if thirty-four states may put Congress under a certain obligation by, and only by, requesting X, and thirty-four States request Y instead, then no congressional obligation arises."

#### The Limited Constitutional Convention

There is also support for the proposition that a convention may be called for a single issue and limited to that purpose.<sup>19/</sup> This proposition is buttressed by the introduction in Congress of various Constitutional Convention Procedures Acts<sup>20/</sup> and by the committee reports issued by the Senate Judiciary Committee on such bills in the 92nd and 93rd Congresses. Support is also found in the reports of a special study committee of the American Bar Association issued in 1973 and 1974.

The record left by the Framers is inconclusive on this point, although statements in The Federalist and The Records of the Federal Con-

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<sup>18/</sup> Black, Charles, Amending the Constitution: A Letter to a Congressman. Yale Law Journal, Vol. 82, Dec. 1972. p. 199. See also, Dellinger, Walter. The Recurring Question of the Limited Constitutional Convention. Yale Law Journal, v. 88, July, 1979. p. 1623.

<sup>19/</sup> See, William W. Van Alstyne -- Does Article V Restrict the States to Calling Unlimited Conventions Only? -- A Letter to a Colleague -- Duke Law Journal, v. 1978, January 1978. p. 1295.

<sup>20/</sup> S. 600, S. 817, and H.R. 853 are all designed to implement the call for a limited convention, but they do not preclude a general convention, which might require different legislation.

vention of 1787 evidence that the Framers intended the Congress and the States to be equals in the amendment process. Because the Congress can propose amendments which relate to single issues, it is arguable that the equality of power to propose amendments is severely diminished if the States may only convene a general convention. For example, Madison's observation that Article V "equally enables the general and State governments to originate the amendment of errors as they may be pointed out by the experience of one side or the other" (The Federalist No. 43) may be viewed as support for the proposition that not only are the States and Federal Government equal in the amending process, but the phrase "amendment of errors" shows that at least Madison contemplated the possibility of a single issue convention. There is little other evidence in either the Records of the Federal Convention, The Federalist, or records from State ratifying conventions that the issue of the nature and scope of a Convention's authority was much discussed.

Arguably, the role of Congress and of the States in the proposing aspect of the amending process was not intended to be equal. The reason is that under Article V Congress has the authority to propose amendments directly, but the States through their legislatures have authority only to make application for a convention. In addition, Congress presumably <sup>21/</sup> decides when the requirements for a convention are met. With regard to the ratifying process, Article V gives to the Congress the authority to set the mode of ratification whether a convention proposes an amendment or the Congress. Amendments are then ratified either by state

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<sup>21/</sup> Section 3 (b) of S. 600 (Helms), and H.R. 353 (Hyde) introduced in the 97th Congress state that questions about the validity of applications "congnizable under this Act shall be determinable by the Congress of the United States and its decision thereon shall be binding on all others, including State and Federal courts."

legislatures or conventions called in the States "as one or the other mode of ratification may be proposed by the Congress."

The Precedent of the Convention of 1787

The concept of a limited convention is not a new one, but it remains a controversial issue. Scholars are in disagreement among themselves because there is so little historical information, precedents, or case law to guide today's interpreter of the Constitution. This results in contrasting views not only on what constitutes the true intent of the Framers but also on the most advisable application of that intent to the contemporary political scene. Variance in interpretation occurs because scholars differ about the precedential role of the original Constitutional Convention and the records therefrom; and the precedential role of the existing case law on the amending process. For example, if the original Constitutional Convention is viewed as a strong precedent, then one might argue that only an unlimited convention is possible. It is true that the first convention went beyond its original purpose because it devised an entirely new scheme of government rather than merely amending the Articles of Confederation. It is also true that one of the major defects in the Articles of Confederation was the lack of a workable method of amendment. Thus, Article V of the Constitution was devised as a means of remedying that very flaw: the inability of the government to respond to the need for change.<sup>22/</sup> But the original Constitutional Convention, because it was not sanctioned by the Articles, was not provided for by the fundamental

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<sup>22/</sup> See Farrand, Max. The Framing of the Constitution of the United States. New Haven, Yale University Press, 1913. p. 51.

law of the land. Unlike the first convention, any convention called now would be spawned directly from the fundamental law of the land, and thus, presumably, governed by that law.<sup>23/</sup>

Examination of the issues of the scope, authority, and limitability of a convention leaves unanswered questions about the relative powers of Congress, the States, and the convention.

11. IF A CONVENTION IS LIMITABLE, WHO MAY DO THE LIMITING?  
THE CONGRESS? THE STATES? OR BOTH?

The fear of a "runaway convention," proposing amendments not related to the subject matter of the States' applications, appears to have been a strong deterrent to calling a convention. This is true even though all the applications for a convention sent to the Congress in the last twenty years have included language that specifically seeks to limit the jurisdiction of a convention to the issue which is the subject of a State's application. Some States have included statements in their applications which proclaim that the authority to limit the subject area of the convention is matter of States' rights which cannot be contravened by congressional action. Some legislatures have included such language because they believe that the Congress might call a convention without strictly limiting the convention's jurisdiction.

If Congress has the power to limit, then that power is derived from several sources. One source is the "necessary and proper" clause of Article I, Section 8 of the Constitution which confers upon Congress the power:

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<sup>23/</sup> Jameson, John A., A Treatise on Constitutional Conventions--Their History Powers and Modes of Proceeding, 4th ed. Chicago, Callaghan and Company; 1887.

To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of office thereof.

Because the Constitution does not answer many of the questions about a convention, it is argued, this section gives Congress the authority to legislate in this matter. Chief Justice John Marshall's opinion in McCulloch v. Maryland 4 Wheat. (17 U.S.) 316 (1819) is said to have established the scope of the power of Congress granted by this section. In that opinion, Marshall wrote, "let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with letter and spirit of the Constitution, are constitutional." It may be inferred from this decision that since the means of implementing Article V, i.e. congressional legislation establishing convention procedures, are not directly prohibited by the relevant clause, and since the end, i.e. structuring the call of the convention according to the wishes of the States, appears to be legitimate, then the authority to legislate for a limited convention is within the scope of the Constitution.<sup>24/</sup>

The argument that Congress may limit a convention finds potential support in another source of congressional power: the principle of federalism. By virtue of Congress's position as the National Legislature, and the need for uniformity on national issues, there is no other body capable of, if not directly overseeing then at least being responsible for, the practical aspect of setting up a constitutional convention. Article V

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<sup>24/</sup> Dillon v. Gloss, 256 U.S. 368 (1921).



spells out only the barest minimum of requirements, but the details need to be filled in by a body naturally attuned to the need for procedural uniformity in a national, representative, and deliberative organization. From a practical standpoint, fifty State legislatures could not meet together to make the procedural decisions to convene a convention.

A third source of congressional power over a convention stems from Article V itself. Since the Congress is given the duty to call the convention, the power to supervise the launching may be viewed as a natural derivative of the power to call, given the practical considerations discussed above. The question then becomes what is minimal supervision and what is direct intervention? A balance between the power of congress and the independence of a convention may be achieved by Congress limiting the subject matter of a convention but not interfering in a convention's internal procedures.

12. IF CONGRESS CAN LIMIT THE SUBJECT OF A CONVENTION,  
HOW STRICT MAY THAT LIMITATION BE?

If Congress attempts to specify the text of the amendment that a convention may consider, the delegates to a convention might challenge this section as restricting their deliberative function. The balanced budget proposals provide a good illustration of this point. If the concurrent resolution calling such a convention were to be worded only to allow the convention to consider an "amendment relating to Federal spending," a convention might feel free to limit specific categories of Federal spending. For example, the convention might propose to limit Federal court jurisdiction over issues (such as busing) by prohibiting the use of Federal funds for courts to hear cases on the subject. Any number of issues might come

up under such circumstances and in this manner a convention could circumvent restrictions imposed in its charter. Thus a convention might incorporate the purposes of several amendments into one.

13. IF A CONVENTION SHOULD GO BEYOND A LIMITATION IMPOSED BY THE CONGRESS OR THE STATES, ARE THERE ANY REMEDIES AVAILABLE?

Although the fear of a "runaway" convention remains high, the amendment process does have an important safeguard, the ratification requirement.

First, as discussed in (10) above, Article V gives to the Congress the power to choose the method of ratification. There is a presumption that a convention would have to transmit its proposal to the Congress, after which the Congress would choose the method of ratification and send the proposal to the States for their consideration. What is not known is whether Congress could reject and refuse to transmit an amendment proposal because the convention had exceeded the authority granted to it by the resolution of call. If the Congress refused to send a proposal of a convention to the States for consideration, could a convention bypass the Congress and send out a proposed amendment on its own? If a convention did so, and Congress refused to designate the method of ratification (by State legislatures, or State conventions), would a "ratification" of a convention's proposal by a State legislature be valid?<sup>25/</sup>

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<sup>25/</sup> The Constitutional convention procedures bills introduced early in the 97th Congress address the issue of the duty of the Congress to transmit any amendment proposed by a convention in the following manner. S. 600 (Helms) in Section 11, directs the President of the Senate and the Speaker of the House, acting jointly, to transmit the amendment to the Administrator of General Services to be sent to the States for ratification purposes 90 days after receiving the proposed amendment from the convention. This must be done unless the Congress agrees to send the resolution at an earlier date, or the Congress agrees to a resolution disapproving submission of the proposed amendment to the States because it "relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution of the Congress by which the convention was called, or because the procedures followed by the convention in proposing the amendments were not in substantial conformity with the provisions of this Act."

Article V is silent on such matters, but some scholars argue that Congress' power to choose the method of ratification is merely a ministerial function, involving no discretion other than the choice of ratification mode.<sup>26/</sup> According to this view, Congress would be obliged to make such a choice if a convention were to propose an amendment, just as the Congress is obliged to call a convention under Article V if two-thirds of the States request one.

Another argument concerns the legal status of a convention once it has proposed an amendment. Having once proposed an amendment, it is argued, a convention would no longer have a constitutional justification for its existence and therefore would be powerless to act further if Congress failed to transmit its proposed amendment to the States.

As a practical matter, a convention might adjourn subject to recall by its officers. Although the legal status of the body might be challenged, the convention could argue that it never had ceased to exist.

It is the State legislatures, however, who have the final say. They are free to accept or reject any proposed amendment, and each need answer for its action only to itself and its constituents.

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"continued" S. 817 (Hatch) in Section 11 is worded slightly differently, but follows procedures similar to those in S. 600.

H.R. 353 (Hyde) contains similar language in Section 11, except the order is reversed. First the presiding officer of the convention is directed to send any proposed amendment to the Congress "for approval" (a). The Congress then must set the mode of ratification and send the amendment to the States unless it has disapproved the amendment within 3 months (b). If the Congress fails to act within three months, the Speaker and President of the Senate must send the amendment to the Administrator of GSA, who will in turn send it to the State legislatures for ratification purposes.

<sup>26/</sup> For example, see the discussion of the nature of a convention in the American Enterprise Institute, *Proposals for a Constitutional Convention to Require a Balanced Federal Budget*. Legislative Analyses, No. 3, Washington, American Enterprise Institute, May 1979. p. 14.

The prospect of a convention running amok and of Congress remaining obdurate, coupled with the vast array of unknowns and, possibly, unanswerables in this area has led many scholars to ask whether or not any or all of the parties could take their grievances to court.<sup>27/</sup>

14. IS THE SUPREME COURT THE ULTIMATE ARBITER OF DISPUTES OVER THE PROPER IMPLEMENTATION OF ARTICLE V?

The question of judicial review of issues surrounding the use of Article V encompasses the question of enforceability should the Congress or a convention balk at the performance of a duty, either constitutionally or statutorily mandated. The issue of judicial authority over a constitutional convention is unresolved for two reasons: (1) there has never been an Article V constitutional convention, so the Supreme Court has never had reason to focus its attention directly upon the subject: and (2) through the years the Court has sometimes imposed upon itself certain restrictions in the area of constitutional law. The relevant restriction applied to the amending process is based upon the doctrine of separation of powers and involves judicial restraint.

Early in its exercise of its power of judicial review the Supreme Court set out the principle that certain powers may be exercised in a discretionary manner by the legislative and executive branches. The judicial self-restraint whereby the courts refuse to find an issue justiciable because it is appropriately resolved by the "political" branches of government is called the "political question" doctrine. It was invoked with respect to Article V in Coleman v. Miller, 397 U.S. 433 (1939).

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<sup>27/</sup> See, e.g. Note, The Process of Constitutional Amendment. Columbia La Review. v. 79, Jan. 1979. p. 138-172.

Coleman v. Miller involved the validity of Kansas' ratification of the proposed Child Labor Amendment and held that the validity of a State's ratification of a proposed amendment nearly thirteen years after it had been proposed was non-justiciable. In a concurring opinion, four Justices expressed their findings of non-justiciability in strong terms, stating that "Congress has sole and complete control over the amending process, subject to no judicial review". Id. at 459. Although a majority of the Justices held that the issues presented were non-justiciable, the Court split on another issue, which was the Lieutenant Governor's participation in casting a deciding vote. No clear standards for defining the concept of a "political question" emerged from Coleman v. Miller.

The case most often turned to for an explanation of judicial abstention under the political question doctrine is Baker v. Carr, 369 U.S. 186 (1962). Baker postulates the various considerations, such as a lack of judicially manageable standards, or the commitment of the jurisdiction of the matter to another branch, which must be weighed in any decision of questionable justiciability. Baker upheld Coleman, and observed that Coleman "held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." (369 U.S. at 214.) Both characteristics were features that the court in Baker, supra, 217, had identified as elements of political questions. Baker, however, gives little guidance as to the weight to be given to any of these considerations.

In adhering to the guidelines established by Baker, the Court might take any one of a number of approaches to the question of whether a convention issue warrants judicial review.

It is likely that the Supreme Court would pay substantial deference to congressional action under Article V unless it is clear that there is no constitutional authority for a particular act. Moreover, the Court may find that Congress not only has the power to regulate under Article V, but that it also has the power to interpret, i.e. Congress not only acts but also determines the scope of its authority to act. Such a finding would be consistent with the holding in Coleman v. Miller, supra.

On the other hand, some questions arising under the context of Federal-State relations might require judicial review, particularly if a State was a party to a suit. The Court may then determine that Congress had overstepped its constitutionally mandated boundaries not just under Article V, but also the inherent limitations on Congress established by the Constitution as a whole. Of course, if there was a perceived need for a Federal solution, the court may uphold congressional action in a particular area. For example, congressional standards for delegate selection might be upheld because fifty different delegate selection systems might be considered unwieldy and divergent.

15. WHO WOULD HAVE STANDING IN A COURT OF LAW IF ANY OF THESE QUESTIONS BECAME THE SUBJECT OF LITIGATION?

The rule of standing allows courts to refrain from deciding issues unless those issues are raised by the proper parties. The rule operates as a restriction on Federal court jurisdiction stemming from the Article III "case or controversy" requirement. The Supreme Court requires that the plaintiff suffer direct injury from the activity of which he complains. <sup>28/</sup>

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<sup>28/</sup> See, Warth v. Seldin, 422 U.S. 490, 498-99, 501 (1975).

In the amending process the number of parties is actually limited, since the constitutionally intended participants include Members of Congress, State legislatures, State legislators, and, possibly, the States themselves. If State ratifying conventions are chosen to consider proposed amendments, both delegates to these conventions and the conventions themselves might have standing. Delegates to a Federal convention as well as the convention as a body might have standing in addition to the parties listed above. These are the parties who could be injured directly by any procedural irregularity impairing their ability to participate; whereas, private parties would be less likely to suffer direct injury, and therefore would only have a generalized grievance based upon public interest in the smooth functioning of the amendment process.

Although all these parties may be able to claim standing at some point in the amending process, the Article V role assigned by the Constitution to the party, the timing of the suit, and the nature of the alleged injury, may be the issues of greatest interest to the courts. For example, Congressmen, like State legislators, may have standing if they can show that the effectiveness of their vote has been diluted.<sup>29/</sup> However, this rationale may be inapplicable where a Congressman asserts that the action exceeded the constitutional authority of Congress (rather than diluting

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<sup>29/</sup> See, e.g. Note, Standing to Sue For Members of Congress, 83 Yale Law Journal. v. 83, July 1974. p. 1632; and, Note, Congressional Access to the Federal Courts. Vol. 90, June 1977. p. 1632. A Member's vote could possibly be "diluted" in the following manner. On Aug. 15, 1978, the House voted to extend the deadline for ratification of the proposed Equal Rights Amendment by a simple majority of those voting. A Member who voted against extension might have standing to assert that a two-thirds vote was required, since the Member's opposing vote had less force in relation to the affirmative votes than it would have had if a two-thirds majority were required.

his vote), because the injury to the Congressmen would be no greater than that suffered by any other citizen.

A private party may have standing to raise procedural issues at the completion of the ratification process, but would probably not have standing to complain at the time that irregularities occur because of the concept of "ripeness" and "completion" of the process. Under this theory a private party, not being directly involved in the amendment process, would not have a legal interest until the end of the amendment process.

However, the concept of "completion" may require definition, because in many instances the controversy will revolve around the timing aspect of the issue. Have two-thirds of the States properly applied for a convention? Have three-fourths of the States properly ratified? These are questions of timing which may often arise in the process of amending the Constitution.

What remains very speculative is the position of lobbying and political groups that, because of their ideological interest and their expenditure of time and funds on behalf of large numbers of people, may suffer greater injury from an uncorrected procedural irregularity than the citizen standing alone.

A summary of the rule of standing is found in Flast v. Cohen, 405 U.S. 727 (1972), in which the Supreme Court, quoting Baker v. Carr, 397 U.S. 186, 204 (1962), stated, "[t]he 'gist of the question of standing' is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."



16. WHAT METHOD OF REPRESENTATION TO A CONVENTION SHOULD BE ADOPTED?

The Constitutional Convention of 1787 is our only Federal guide. There, each State was free to send as many delegates as it chose, but each State had only one vote.

A second method is found in the various constitutional convention procedures acts, which permit representation based upon the number of congressional seats in each State: one delegate to be elected from each congressional district, and two delegates to be elected at-large from each State, with each delegate casting one vote. The theory is that some recognition of the Federal nature of our constitutional scheme of government and the role the States play ought to be included in any delegate selection procedure. Thus a provision for at-large delegates appointed equally among the States is seen as meeting this need.<sup>30/</sup>

On the other hand, providing for two at-large delegates may be considered to be contrary to the contemporary concept of representation, i.e. "one person, one vote." Accordingly, a selection method based strictly on population would be in order.<sup>31/</sup>

Arguably, implementation of either the first or third methods would result in too great an imbalance of power in favor of or against, respectively, the less populous States, and that the congressional model provides a compromise between the two.

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<sup>30/</sup> The 97th Congress bills S. 600 (Helms) and H.R. 353 (Hyde) follow this model (Section 7). S. 817 (Hatch) gives as many delegates to each State as it has Representatives and Senators, but provides that "each State shall appoint, in such manner as the legislature thereof may direct" delegates to the convention.

<sup>31/</sup> The equal protection clause of the Fourteenth Amendment, for example, requires that both houses of a State legislature be apportioned on a population basis in accordance with the "one-man-one vote" principle. *Reynolds v. Sims*, 377 U.S. 533, 561-568 (1964).

17. CAN A MEMBER OF CONGRESS BE A DELEGATE TO A CONVENTION?

Article I, Section 6, Clause 1 of the Constitution provides that "no 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, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office." This section may be interpreted as prohibiting Members of Congress from being delegates to a convention. Since a convention would be federal in nature, delegates would be "holding office under the United States."<sup>32/</sup>

The potential for conflicts of interest is very great, because Congress is the regulator for Article V. Members of Congress attending the convention as delegates might be viewed as acting both as regulators and persons regulated. Moreover, the Framers provided for the convention alternative for proposing amendments as means of circumventing a recalcitrant Congress.<sup>33/</sup>

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<sup>32/</sup> But see, American Bar Association, Special Constitutional Convention Study Committee, p. 37 which states:

"we do not believe that the provisions of Article I, Section 6 prohibiting congressmen from holding offices under the United States would be held applicable to service as a convention delegate. The available precedents suggest that an 'office of the United States' must be created under the appointive provisions of Article II or involve duties and functions in one of the three executive branches of government.... It is hard to see how a State-elected delegate to a national constitutional convention is within the contemplation of this provision. It is noteworthy in this regard that several delegates to the Constitutional Convention of 1787 were members of the Continental Congress and that the Articles of Confederation contained a clause similar to Article I, Section 6."

<sup>33/</sup> One of the bills introduced early in the 97th Congress, S. 817 (Hatch) says that "no Senator or Representative or person holding an office of trust or profit under the United States, shall be appointed as a delegate" (Section 7a). S. 600 (Helms), and H.R. 353 (Hyde) contain no such prohibition. See also, Madison, J. The Federalist No. 43 1788.

18. CAN THE CONGRESS SET THE VOTE REQUIRED FOR  
THE CONVENTION TO PROPOSE AN AMENDMENT?

In passing convention procedures bills during the 92nd and 93rd Congresses the Senate adopted language that would require a convention to approve any proposed amendment by a two-thirds vote of the delegates to a convention, similar to the vote required for congressional approval of proposed constitutional amendments.<sup>34/</sup>

However, under Article V, Congress may not have such authority, so that a matter such as the vote for approving an amendment may be left for the convention to decide. Arguably, Congress' function under Article V is limited to functions' such as providing the date and place of the convention. If Congress does have the authority to set the vote, Congress potentially has the power to prevent adoption of an amendment by setting the required vote so high as to preclude the likelihood of any amendment being approved by the convention and thus thwart the purpose of the amendment process by convention.

Delegates to the Constitutional Convention of 1787 caucused on measures by State. A simple majority vote of the States was all that was required to approve measures in the Constitutional Convention of 1787. The Constitution in final form was approved by a unanimous vote of the States, although not all the delegates favored the document.

However, if Congress sets the vote at two-thirds of the delegates to the convention in order to propose amendments it will be setting a

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<sup>34/</sup> Three approaches are provided by bills introduced early in the 97th Congress. Section 10 (a) of S. 600 (Helms) sets the required vote as a majority of the delegates to the convention. Section 10 (a) of H.R. 353 (Hyde) requires approval by two-thirds of the delegates. S. 817 (Hatch) does not specify a vote required in the convention to propose an amendment.

higher voting requirement than it requires of itself. It is now established practice that amendments may be proposed by vote of two-thirds of those Members present and voting so long as a quorum is present. Since Article V requires a three-fourths vote by the States for ratification, and two-thirds of the legislatures of the States to request a convention, it can be said that any need for parallelism to the congressional method of proposing amendments is met by the two-thirds requirement to call a convention.

State practice in ratifying proposed Federal constitutional amendments is not uniform and therefore does not serve well as an example for a convention to follow. Some States require more than a simple majority for ratifying constitutional amendments (such as a two-thirds vote), but many do not.

19. IS A CONVENTION A CREATURE OF THE CONGRESS, THE STATES, OR THE "PEOPLE?"

This question is addressed last because it serves as a reminder that discussions of the amendment process begin and end at the same point: the genesis of Article V. In many respects the legislative history of the convention alternative in Article V at the Philadelphia Convention of 1787 is a reflection of the legislative history of the entire document. The legislative history may give some insight into the answer to the above question.

We know that the final result was a compromise, or rather a series of compromises, between those people favoring a strong central government and those fearful of just such a possibility. We also know that the convention method of proposing amendments as viewed as an alternative in order not to place sole reliance upon Congress as a source of amendments, even though

Congress was considered the most likely body to perceive national needs. The convention method was viewed as a safeguard against congressional abuses.

Perhaps most importantly, Article V was a remedy for one of the major defects of the Articles of Confederation.

The first plan for the new Constitution was presented by Edmund Randolph on May 29, 1787, at the Constitutional Convention. The Virginia Plan, as it was called, contained a provision for amendment "whenever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."<sup>35/</sup> After some debate, further consideration on this provision was postponed until June 11, when George Mason urged its adoption arguing that "[i]t would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their consent on that very account."<sup>36/</sup>

In August 1787, the Committee on Detail, a drafting committee, presented the Convention a new proposal, Article XIX, which was subsequently adopted. This proposal read as follows:

On application of the legislatures of two-thirds of the States in the Union, for an amendment of this constitution, the legislature of the United States shall call a convention for that purpose. <sup>37/</sup>

It is easy to see that this proposal contemplated participation by both the States and Congress. On August 30, when this proposal was adopted, Gouverneur Morris suggested that Congress ought to be permitted to call a convention whenever it chose, but the proposal was agreed to as reported.

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<sup>35/</sup> Farrand, Max, Ed. The Records of the Federal Convention of 1787, New Haven, Yale University Press, 1911, v. I. p. 22.

<sup>36/</sup> The Records of the Federal Convention of 1787, Revised Edition, New Haven, Yale University Press, 1937, v. I. p. 203.

<sup>37/</sup> Farrand, Max, 1911, ed., v. II. p. 97.

In September, reconsideration and debate began. Elbridge Gerry moved to reconsider because he was concerned with the possibility that "two-thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State constitutions altogether."<sup>38/</sup> Alexander Hamilton seconded the motion because he thought the purpose of Article XIX was to provide an easier mode of amending than had been produced by the Articles of Confederation.

After more debate the motion for reconsideration was passed. James Madison, seconded by Hamilton, introduced a proposal worded much like the present Article V, providing for the congressional method of proposing and two methods of ratification.

Close to the conclusion of the convention, the Committee on Style reported out the Madison proposal as Article V. In response to grumblings about the possibility of oppressive government, Gerry and Gouverneur Morris moved to amend Article V to require a convention upon application of two-thirds of the States. The motion was unanimously adopted.

This abbreviated recapitulation of the genesis of Article V demonstrates that Article V was adopted in the spirit of compromise and should be interpreted in this light. There are a number of comments in the Records expressing fear of erosion of the power of the States; fear of the larger States overriding the smaller ones; and even fear of difficulties by a convention.

These same doubts and uncertainties of the Framers are shared by many contemporary observers. The spirit of compromise that guided the Framers in 1787, may be the model followed in the 1980's, if the Congress is confronted with an Article V constitutional convention.

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<sup>38/</sup> Ibid., p. 557-58.

