

Article V Convention

INTRODUCTION

Article V of the U.S. Constitution provides two paths for proposing amendments to the U.S. Constitution. A Convention – referred to hereafter as an Article V Convention -- is one path. Article V requires the U.S. Congress to call for a convention when two-thirds (34) of the state legislatures petition Congress for one. To date, however, all amendments occurred through the second path: proposals passed by two-thirds majorities in both chambers of Congress. Regardless of how an amendment is proposed, under Article V it only becomes part of the Constitution if ratified by three-quarters (38) of the states, either by majority votes of the state legislatures or by majority votes in state conventions, whichever method is prescribed by the U.S. Congress.

One reason that an Article V convention has never been called is that when close to two-thirds of the states have petitioned Congress, Congress has itself taken action. In some cases it has proposed an amendment on the relevant issue and in others it has passed legislation. For example, Congress proposed the XVII Amendment, providing for direct election of Senators, only when it became clear that at least two-thirds of the states were likely to petition for this change (Weber and Perry).

Fears that an Article V convention cannot be limited in scope have also played a role in preventing sufficient petitions from states. For example, once 33 states had submitted applications for a convention to address apportionment, between 1963 and 1969, several states rescinded their petitions. A similar scenario played out in the case of calling for a balanced budget amendment, starting in the early 1990s and continuing up through 2011. One reason for this dynamic seems to have been fear that the convention could not be limited to a single issue (Rogers).

Finally, Congress may have played a role in forestalling use of an Article V convention. It lacks both a process for calling for a convention and rules for counting and determining the validity of petitions. Rules governing processes that involve both chambers of Congress are enacted via concurrent resolution, which does not require the President's signature. No such bill has ever passed both chambers, nor has one been introduced in either chamber in the current session of Congress.

Since an Article V convention has never been held, many questions remain about its logistics: how will delegates be selected; how will it be financed; where would it be held? However, the issue that commands most attention is whether or not an Article V

convention can be limited in scope, e.g., to a single issue. In spite of the controversy surrounding this question, an overwhelming majority of legal experts (see ABA, Natelson, Stern, US Dept. of Justice) have provided convincing arguments demonstrating that an Article V Convention can and would be limited to the specific issue(s) described in the requisite number of state applications.

The existence of sound arguments notwithstanding, fear and other forms of opposition may be generated by those opposed to a Convention in principle, as is the case with the John Birch Society, or due to the issue(s) under consideration. For example, the 1787 Convention which drafted the Constitution is sometimes put forth as an example of a “runaway” convention – a convention in which delegates vastly exceeded their authority (See e.g.,: Goldberg). However, Natelson provides substantial evidence that the vast majority of the delegates did not exceed their authority as given to them by the states, as distinct from the directive given by the Congress.

In addition to contemporary legal opinion, there is historical support for use of conventions. During the Founding Era conventions were a favored method of solving political problems. There were at least ten interstate conventions between the Declaration of Independence and the 1787 Constitutional Convention (Natelson). Furthermore, states regularly use conventions to craft and alter their constitutions, with over 200 such state conventions held.

“...conventions have been the preferred instrument for major revision of state constitutions...The convention is purely American, widely tested and used.” (ABA)

Attempts to call an Article V convention have become increasingly common, with over half of the more than 400 applications that have been submitted occurring since 1960 (Weber). As a result, Congress has begun to attempt to pass legislation to clarify the procedures for calling an Article V convention. Such legislation has passed the Senate. For example, in the 93rd Congress a Federal Constitutional Convention Procedures (S. 1272), including a “same subject” test for applications from the States passed the Senate. It did not, however pass the House. (ABA, U.S. Dept. of Justice).

TOPICS for Consideration

I. **Can, will, should or must its subject matter be limited?**

1. No:

a. Michael Stokes Paulsen’s position is that “...neither Congress nor the States constitutionally may limit the substantive proposals of any Article V convention that is called...”

However, Paulsen does not believe there is reason to fear a “runaway” convention. He holds that the need for ratification by three-quarters of the states is a sufficient brake on this possibility. Lawrence Tribe, among others, suggests that a convention could establish its own ratification rules, despite the language of Article V, just as the Philadelphia convention did in defiance of both the Articles of Confederation and the mandate from Congress. (Tribe: <https://vimeo.com/30446278>)

b. Sandy Levinson: A wide-open convention is desirable.
<https://vimeo.com/30446278>)

c. Barbara Perry: A wide-open convention is necessary to bring the Constitution into line with the greater democracy, greater media and the global nature of the 21st century.
<https://vimeo.com/30446278>)

2. Yes:

a. In General. Both the US Department of Justice and the American Bar Association have determined that Article V permits states to apply for Conventions for limited purposes. One argument is that Congress clearly has the authority to propose single amendments on a specific issue. Since the state route is intended to be a parallel, alternative procedure for amending the Constitution, applications of the states for a constitutional convention can also be limited to a specific issue.

b. By the States

i. Through their delegates:

States can limit the scope of a convention in the manner used originally in conventions. Delegates would be serving as agents of their respective state legislatures. They would in effect have a commission and can be bound, under an oath of office, to abide by the commission’s terms, including limiting deliberations to the specified issue(s) (Natelson, Stern, U.S. Dept of Justice).

ii. Through their calls.

Almost all calls for a convention by states have identified a specific area (John Baker in: <https://vimeo.com/30446278>). Congress has never objected to applications requesting an amendment on a specific topic. (Rogers, p. 1017)

iii. Through their ratification power: “...the states can be expected to be most intolerant of any proposals from a convention that violated the terms of its convening...It is unlikely that the states would accept amendments other than on the topic they had petitioned for. (Weber, The Constitutional Convention: A Safe Political Option, cited in US Dept. of Justice)

c. By Congress

i. In 1987 there were thirty-nine (more than the 34 required) convention applications. No convention was called because it was understood that there needed to be consensus regarding the topic of the convention. If there needs to be consensus on topic to trigger a call for a convention, it follows that the convention is limited to that topic. (U.S. Dept. of Justice)

ii. By 1993 there were 45 state applications for a general convention (Paulson). If Congress did not have the authority to call a convention on a limited topic, they would have had to call a convention at least as of 1993.

iii. If states can apply for a convention on a specific topic (see 2.b.ii above), then Congress has the power to call a limited convention, since that would be the only way to implement the states' wishes. (U.S. Dept. of Justice)

d. Other methods

i. Media attention. The media can be relied on to point out discrepancies between delegates' commissions and their words and actions. (Weber/Perry)

ii. Number of delegates. The number and divisions among delegates render it unlikely that they could come to agreement on issues beyond the one(s) specified by the states. (Weber/Perry)

iii. Supreme Court. If delegates went beyond the issues for which the convention was called, the Supreme Court could declare their actions beyond the constitutional powers of the convention. (Weber/Perry)

II. Can Congress impede an Article V convention?

1. Through time limits on reaching the requisite applications

a. No: There is no Constitutional authority which gives Congress the authority to set time limits on reaching the requisite number of applications. If Congress were allowed to set time limits on applications it would defeat the purpose of the Article V as Congress could set very short time limits on issues they were opposed to (Natelson).

b. Yes. There is Supreme Court precedent (Dillon v. Gloss) finding that Congress can set reasonable time limits on the ratification process. The same consideration, i.e., that "the will of the people at relatively the same period" is a determinative fact in ratification could also apply to the application process (ABA).

2. Through how it counts (or fails to count) state applications

There is no established mechanism in Congress to count (cumulate) state applications, decide on their validity, or to decide whether applications are on “the same topic”. Thus Congress, by failing to count applications as valid, either by reason of content or elapsed time since passage, or placing very narrow limits on what qualifies as “same topic,” can thwart a call.

3. Through general recalcitrance.

In 1967 the realization that almost 2/3rds of the states had applied for an amendment led some to claim that “Congress would be under no duty to call a convention even if applications were received from the legislatures of two-thirds of the states.” Furthermore ... “if one more state had requested a convention, a major struggle would have ensued on the adequacy of the requests...” (ABA)

III. How will or should delegates be selected (and how many)

1. Congress will establish the rules (ABA)

2. Each state would determine how to select its delegates (Natelson).

- i. Election. State-wide vote or vote by districts
- ii. Appointment by legislature.

3. National Lottery:

The Supreme Court’s “one-person, one-vote” decision (Reynolds v. Sims) does not necessarily apply to a constitutional convention. (ABA). Therefore it is possible that delegates could be chosen through a nation-wide lottery.

- i. Pro: avoids political process, including being subject to “money in politics” determining who gets selected.
- ii. Con: may be more difficult to limit authority.

IV. What role can the Court play?

1. Based on Powell v. McCormack, the Court could act “...if two-thirds of the state legislatures apply, for example, for a convention to consider the apportionment of state legislatures, and Congress refuses to call the convention...” (ABA)

2. Courts might also address questions such as whether the state legislatures can bind a convention by the limitations in their applications (ABA)

3. The Supreme Court is just as likely to avoid intervention in Article V disputes, citing lack of jurisdiction or separation of powers. (Tribe: <https://vimeo.com/30446278>)

V. Fears and Other Factors Thwarting an Article V convention

1. What are the fears?
 - a. We seem to be afraid of “We the People” (Levinson: <https://vimeo.com/30446278>)
 - b. Left and Right fear each other
 - i. Left fears Right will introduce, e.g, rights of unborn, single-sex marriage, prayer in school, balanced budget amendments
 - ii. Right fears Left will introduce amendments to create new rights in areas like health care, housing, income or wealth distribution, and more government powers in areas like environmental protection, religious freedom and gun ownership.
2. How might the fears be addressed?
 - a. By method of selection of delegates
 - b. By recognition that convention can be limited to single topic
 - c. Other?
3. How can Congressional obstruction be addressed?
 - a. Direct pressure by citizens and citizen groups. Millions of citizens petitioning for redress of grievances. (Levinson: <https://vimeo.com/30446278>)
 - b. Supreme Court
 - c. Appeal to party committees
 - d. Other?

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