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

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Summary

Article V of the U.S. Constitution provides two methods of proposing amendments. First, Congress, with the approval of two-thirds of both houses, may propose amendments to the states for ratification, a procedure used for all 27 current amendments. Second, if the legislatures of two-thirds of the states apply, 34 at present, Congress “shall” call a convention for considering and proposing amendments. This alternative, known as an Article V Convention, has yet to be implemented. This report examines the Article V Convention, focusing on contemporary issues for Congress. CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, examines the procedure’s constitutional origins and history and provides an analysis of related state procedures.

Contemporary developments give evidence of renewed interest in the Article V Convention alternative as emerging Internet- and social media-driven public policy campaigns embrace the convention alternative as a vehicle to bypass perceived policy deadlock at the federal level. In 2011, individuals and advocacy groups ranging on the political spectrum from conservative libertarian to progressive joined in a 2011 conference, “ConConCon,” to discuss and promote an Article V Convention. In November 2013, the Ohio legislature applied for an Article V Convention to consider a balanced federal budget amendment, the first new state application received since 1982. On December 7, 2013, a group of 100 state legislators convened to promote an Article V “convention of states,” while a new policy advocacy group of the same name is promoting an Article V Convention to propose amendments that “impose fiscal restraints and limit the power of the federal government.” Earlier in 2013, the Compact for America, a group initially sponsored by the Goldwater Institute, proposed the “Compact for a Balanced Budget.” This initiative would involve an interstate compact that would provide a single package by which states would call for a convention, agree to convention format, membership and duration, agree to and propose to Congress a specific balanced budget amendment, and prospectively agree to ratify the said amendment.

The Constitution provides a brief description of the Article V Convention process, but leaves many questions unanswered. If an Article V Convention seemed imminent, Congress would face a range of issues and questions associated with a convention summons. These would include the following: Is Congress required to call a convention? What constitutes legitimate applications from the states, and what authority does Congress have to decide this question? What sort of convention would it be: “general,” open to consider any issue, or “limited,” confined to a specific issue? Could a “runaway” convention propose amendments outside its mandate? Is Congress required to submit to the states *any* amendment proposed by an Article V Convention? Does Congress establish the procedures for a convention, and has it addressed this issue in the past? How should Congress process state applications for a convention? How many delegates should a convention include? How should the states vote? How long should the convention last? Could Senators and Representatives serve in an Article V Convention? Would a simple majority suffice to propose amendments, or is a super-majority appropriate? Would the District of Columbia, U.S. territories, and other associated jurisdictions participate? What would the President’s role be?

If Congress were called on to summon a convention, it could consult a range of information resources in fashioning its response. These include the original intent of the founders, scholarly works cited in this report and elsewhere, historical examples and precedents, and the work of previous congressional examinations of the issue from the 1970s through the 1990s.

First, Article V delegates important and exclusive authority over the amendment process to Congress. As noted earlier in this report, first among these are the right to propose amendments directly to the states for their consideration on the vote of two-thirds of the Members of the House of Representatives and the Senate and the responsibility for summoning a convention for consideration of amendments on application of the legislatures of two-thirds of the states *and* submitting any amendments proposed by an Article V Convention to the states for their consideration.

Second, while the Constitution is silent on the mechanics of an Article V convention, Congress has traditionally laid claim to broad responsibilities in connection with a convention, including (1) receiving, judging, and recording state applications; (2) establishing procedures to summon a convention; (3) setting the amount of time allotted to its deliberations; (4) determining the number and selection process for its delegates; (5) setting internal convention procedures, including formulae for allocation of votes among the states; and (6) arranging for the formal transmission of any proposed amendments to the states.

Traditional Deterrents to an Article V Convention

It may be argued that there is no immediately pressing need for Congress to examine its Article V options and responsibilities. Historical precedent suggests that attaining petitions from two-thirds of the states in a timely manner is a difficult obstacle, as demonstrated by the several unsuccessful convention drives in the latter part of the 20th century. As noted earlier, these fell short of the two-thirds mark, despite the vigorous efforts of organized support groups over a period of several years, and until recently, there has been little apparent interest in the Article V Convention mechanism in the states since the 1980s. Judging by the historical record, the process might arguably be described as a footnote to constitutional history.

The obstacles to any campaign for an Article V Convention remain daunting even in the face of rapid change: the Constitution sets a considerable hurdle for the Article V Convention process by requiring that applications for a convention be made by the legislatures of at least two-thirds of the several states. Further, as this report demonstrates, there are competing schools of thought on how a convention should be called, what would be an appropriate mandate for the convention, the scope of any amendments it might propose, and, perhaps most important, the role of Congress in all these questions. Moreover, any amendments proposed would face the same task of securing approval of three-fourths of the states before they were ratified.

The measured pace of the legislative process in the states has also traditionally served as a check to haste in calling such a convention.¹¹ For instance, in the case of the balanced budget amendment convention drive, it took seven years for an organized campaign to gain convention applications from 32 of the necessary 34 states.¹² Nevertheless, given the extraordinary speed and

¹¹ As Supreme Court Justice and constitutional commentator Joseph Story noted, "The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory." See Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co., 1833), §1821. Available in *The Founders Constitution*, a joint venture of the University of Chicago Press and the Liberty Fund, Web edition, at <http://press-pubs.uchicago.edu/founders/documents/a5s12.html>.

¹² See under "The Balanced Budget Amendment: 1975-1983" in CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, by Thomas H. Neale. While most state legislatures convene annually, their sessions are frequently limited by law; 32 states place some form of time constraint (continued...)

states. The House and Senate, by concurrent resolution, would then call for a convention, designating the place and time of the meeting, which would be not less than one year after the adoption of the resolution, and the nature of the amendment or amendments to be considered.

Number and Apportionment of Delegates

Apportionment of convention delegates among the states was generally set at the formula provided for the electoral college, with each state assigned a number equal to its combined Senate and House delegations. Some bills included the District of Columbia, assigning it three delegates, but others did not include the federal district. When combined with the per capita voting which most bills provided, this formula gave greater weight to differences in state population; as with the electoral college, it also recognized the federal system's position on constitutional equality of the states by providing each with an extra two delegates and votes, regardless of population.

Funding

Most bills provided that delegates and convention staff were to be compensated from federal funds, and delegates received immunity from arrest in most instances during the convention. Various federal agencies were authorized to provide support for the convention as requested, and convention expenses were to be covered by appropriated funds.

Convention Procedures

The Vice President was authorized in most versions to preside over the inaugural session and swear in the convention officers, after which time the permanent officers would preside over later sessions and the delegates would adopt their rules and procedures.

Most bills required that amendments were to be approved by two-thirds of the whole number of delegates, and that amendments were required to be consistent with the issue which the convention had been summoned to address. In most versions, as noted earlier, Congress reserved to itself the right to decide whether proposed amendments met this criterion.

The President pro tempore of the Senate and the Speaker of the House were required to transmit proposed amendments to the Administrator of General Services for circulation to the states unless both chambers passed a concurrent resolution of disapproval. Valid grounds for disapproval included departure from the policy issue for which the convention was called or failure to follow procedures prescribed in the authorizing legislation. Amendments proposed by a convention would be subject to standard constitutional requirements, that is, ratification by three-fourths of the states, either in their legislatures, or by ad hoc ratification conventions, as determined by Congress.

A Defined Term for the Convention

The convention was given a limited term, generally either six months or one year.

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 encreased [sic] 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.¹⁵⁹

The report also cites assertions that Members serving as delegates would constitute “great potential for conflict of interest because Members would be viewed as acting both as regulators and as persons regulated.”¹⁶⁰ Finally, it notes arguments also cited elsewhere in this report that the founders intended the Article V mechanism to be a way around congressional unwillingness to propose amendments.

At the same time, other observers have suggested that there is no constitutional prohibition against Senators and Representatives serving as delegates to an Article V Convention. In a 1974 study, the American Bar Association determined that the constitutional mandate prohibits Members from holding any additional office in one of the three branches of the U.S. government, but concluded that service as a “state-elected delegate to a national constitutional convention does not meet this standard.”¹⁶¹ Another commentator agreed, suggesting that Members of Congress could make a substantial addition to a convention: “in light of the delegates’ function and possible impact on the constitutional scheme, it seems desirable that interested members of Congress be allowed to participate.”¹⁶² Finally, both the aforementioned sources cite as precedent the fact that several incumbent Delegates to Congress under the Articles of Confederation, “the United States in Congress Assembled,” served with distinction as delegates to the Philadelphia Convention of 1787.

Convention Procedures: Ancillary Issues for Congress

The Article V Convention carries with it a range of ancillary questions, several of which are addressed in this section.

Would State Representation and Voting in the Convention be Equal? Proportional to Population? Or Both?

One issue would likely arise over the state representation formula at an Article V Convention. As noted earlier, the most widely discussed model would establish a convention including 535 (or 538, depending on whether the District of Columbia is included) delegates, allocated to each state according to the size of its electoral college delegation, that is, the combined total of each state’s House of Representatives and Senate delegations.

A related question concerns vote allocation in an Article V Convention. Would delegates vote per capita, or would each state cast a single vote, during the convention’s deliberations, and on the final question of proposing amendments? Here again, contemporary democratic practice might

¹⁵⁹ U.S. Constitution, Article I, Section 6, clause 2.

¹⁶⁰ *Is There a Constitutional Convention in America’s Future?*, p. 20.

¹⁶¹ American Bar Association, *Amendment of the Constitution by the Convention Method Under Article V*, p. 37.

¹⁶² Forkosch, “The Alternative Amending Clause in Article V: Reflections and Suggestions,” p. 1073. Professor Forkosch further suggested that federal judges would be able to serve as delegates to an Article V Convention, although he advised Congress to exclude them.