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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.

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Introduction

Article V of the U.S. Constitution provides two methods by which the nation's founding charter may be amended. The first, Amendment by Congressional Proposal, requires the adoption of an amendment or amendments by a two-thirds vote in both houses of Congress; the second, generally referred to as the "Article V Convention" method, authorizes the states to apply to Congress for a convention for proposing an amendment or amendments. If the legislatures of two-thirds of the states, 34 at present, do, in fact, apply for a convention, Congress is obliged to convene one. Both methods then require the approval of three-fourths of the states, 38 at present, in order to become part of the Constitution.

While the Article V Convention option was largely dormant for more than two decades after the early 1980s, there is evidence of revived interest both in new constitutional amendment proposals and in the use of the Article V method as a grass-roots or state-driven alternative that could empower a convention to propose amendments without securing a two-thirds majority in both chambers of Congress. Indeed, the evidence of the founder's actions at the 1787 Constitutional Convention suggests that they intended the Article V Convention as a "way around" a Congress unwilling to consider an amendment or amendments that enjoyed broad support. Whether current efforts to promote an Article V Convention enjoy sufficiently broad support to make serious progress toward their goal remains to be seen.

In the past, the need to mobilize public support, coupled with the measured pace of state legislative action, guaranteed that an organized movement for an Article V Convention would take considerable time to develop public awareness and support and move the application process forward. Over the past 15 years, however, extraordinary advances in communications technology may have altered this calculation. The swift rise of Internet- and social media-driven policy campaigns suggests that the time-consuming organization and development once considered prerequisite to an effective Article V Convention advocacy movement could be greatly compressed in the contemporary context, and that much of the infrastructure previously thought necessary for such a campaign might be avoided altogether.

This report opens with a brief overview of the provisions of Article V of the U.S. Constitution, which established the alternative procedures for proposing amendments to the states. A companion report, CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, provides more comprehensive information on the Article V Convention mechanism, including a detailed examination of constitutional and statutory provisions, constitutional origins and original intent, case studies of major campaigns for an Article V Convention, and a review of the role of the states in the process.

Background: Article V of the U.S. Constitution in Brief

Article V of the U.S. Constitution provides two methods for amending the nation's fundamental charter. The first, or "Congressional" method, authorizes proposal of amendments by Congress:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, ... which ... shall be valid to all Intents and Purposes, as

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> Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress....[1]

The second, or "Article V Convention" method, requires Congress, "on the Application of the Legislatures of two thirds of the several States," 34 of 50 at present, to call "a Convention for proposing Amendments...."

Amendments ratified by the states under either procedure are indistinguishable and have equal force; they are both "valid to all Intents and Purposes, as Part of this Constitution ...."[2] Both modes of amendment share key constitutional requirements:

- Amendments proposed either by Congress or an Article V Convention must be ratified by three-fourths of the states, 38 at present.
- Congress is authorized to choose the method of ratification in the states. The options are ratification by ad hoc *conventions* called by the states for the specific purpose of considering the ratification, or ratification by the legislatures of the states. The three-fourths requirement applies in both instances.[3]

In addition, three elements not included in the Constitution have also become "standard procedure" when Congress proposes amendments. As precedents, they would also likely be followed for an amendment or amendments proposed by an Article V Convention.[4]

- First, amendments are not incorporated into the existing text of the Constitution as adopted in 1788, but rather, are included as supplementary articles.[5]
- Second, Congress may set a time limit on the ratification process. Beginning with the 18th Amendment, proposed in 1917, and continuing with the 20th through 26th Amendments,[6] Congress specified that amendments must be ratified within seven years after being proposed in order to become effective.[7]

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[1] U.S. Constitution, Article V.

[2] Ibid.

[3] To date, Congress has specified ratification by ad hoc state convention for only one amendment, the 21st, which repealed the 18th "prohibition" amendment. This is discussed at greater length later in this memorandum.

[4] A fourth element applies to amendments proposed by Congress: the congressional vote must be by *two-thirds vote of the Members present and voting, a quorum being present* in both the House and Senate, in order to propose an amendment. This practice was endorsed by the Supreme Court in the *National Prohibition Cases*, of 1920 (253 U.S. 350, 386 (1920)).

[5] James Madison, sponsor in the House of Representatives of the amendments now known as the Bill of Rights, suggested they should be incorporated in the body of the Constitution. The House decided instead to add them to the end of the Constitution as additional articles, a precedent followed for all subsequent amendments.

[6] The 27th Amendment, the most recently ratified, was proposed to the states in 1789 *without* a seven-year time limit on ratification. It requires that congressional salary increases can take effect only after an intervening election. Despite having been pending for 203 years, this amendment was revived, ratified by more states, and was ultimately declared to have been ratified in 1992.

[7] The seven-year requirement was incorporated in the body of the amendment in the 18th and 20th through 22nd Amendments. For subsequent amendments, Congress concluded that incorporating the time limit in the amendment itself "cluttered up" the amendment. Consequently, the 23rd through 26th Amendments placed the limit in the authorizing resolution, rather than in the body of the amendment. (See "Article V: Ratification" in U.S. Congress, Senate, *The Constitution of the United States, Analysis and Interpretation*, 108th Congress, Senate Document 108-17 (Washington: GPO, 2004), available at http://www.gpoaccess.gov/constitution/pdf2002/015.pdf.

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- Finally, the Constitution does not require approval of proposed amendments by the President, who has no official function in the process of proposing an amendment to the states. The chief executive's approval or signature has no bearing on the process, and he or she cannot veto or pocket veto a proposed amendment that has been approved by the requisite congressional majorities, or proposed by an Article V Convention.[8]

The first method has been used by Congress to submit 33 amendments to the states, beginning with the Bill of Rights in 1789. Of these, 27 amendments were approved by the states; 26 of them are currently in effect, while one, the 18th Amendment that prohibited the "manufacture, sale, or transportation of intoxicating liquor," was ultimately repealed by the 21st Amendment.

The Article V Convention option has yet to be successfully invoked, although not for lack of activity in the states. Three times in the 20th century, concerted efforts were undertaken by proponents of particular amendments to secure the number of applications necessary to summon an Article V Convention. These included conventions to consider amendments to (1) provide for popular election of U.S. Senators; (2) permit the states to include factors other than equality of population in drawing state legislative district boundaries; and (3) to propose an amendment requiring the U.S. budget to be balanced under most circumstances.[9] The campaign for a popularly elected Senate is frequently credited with "prodding" the Senate to join the House of Representatives in proposing what became the 17th Amendment to the states in 1912, while the latter two campaigns came very close to meeting the two-thirds for an Article V Convention in the 1960s and 1980s, respectively.[10]

Congress and the Article V Convention in the 21st Century

Three decades have passed since the high-water mark of the balanced budget amendment convention campaign in the 1980s. Few current Members of either chamber have experienced the prospect of an Article V Convention. After 30 years of relative inactivity, however, there is evidence of renewed public interest in the convention alternative.

Congress: Key Actor in the Article V Convention Process

What compelling interest, among the many competing demands for its time and energy, does Congress have in the Article V Convention mechanism? There is little to command its interest if the Article V Convention remains, as it has for the past three decades, a constitutional footnote. In the event of revived pubic interest in this issue, however, Congress might choose to reexamine its constitutional duties under Article V.

[8] This issue was determined as part of a 1798 Supreme Court decision, *Hollingsworth v. Virginia*, 3 Dall. (3 U.S.) 378 (1798).

[9] For more detailed information on the origins and history of the Article V Amendment process, please consult the companion report, CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, by Thomas H. Neale.

[10] By 1969, 33 states had applied for a convention to consider amendments related to state legislative reapportionment. Between 1975 and 1983, 32 petitioned for a convention to consider a balanced budget amendment.

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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...)

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flexibility of contemporary social media and communications technology, interested organizations could conceivably launch an Article V Convention campaign for a specific amendment or amendments, or perhaps for a general constitutional convention, within a shortened time frame. In the 1960s, 1970s, and 1980s, it took time for "grass roots" efforts to emerge, form organizations to promote their causes, communicate with like-minded groups, undertake campaigns in state legislatures, and generally to learn and perfect the ancillary skills necessary for nationwide issue advocacy. Today, in contrast, the greatly enhanced level of communications technology and widespread use of social media arguably provide a ready-made infrastructure for emerging advocacy campaigns.

Emergence of Technology-Driven Issue Advocacy—A Model for Contemporary Article V Convention Supporters?

Communications technology has greatly advanced in the three decades since the campaign for an Article V balanced budget convention gained its last state application in 1983. The development and subsequent ubiquity of e-mail and social media have already provided a new and compelling model for issue-driven mass policy advocacy campaigns. The emergence of social-media driven groups such as MoveOn.org, the Tea Party movement, and Occupy Wall Street serve as the most obvious examples. Their swift rise, combined with widespread publicity, and a certain degree of success, suggest the possibility that a contemporary campaign, using the communications strategies and tools of the age, could arguably move the issue of an Article V Convention to the forefront of public awareness on a shorter cycle than was possible for previous campaigns.

In an era of instant interpersonal electronic communication, e-mail and other social network media can facilitate remarkably rapid growth in awareness of a political phenomenon. For instance, MoveOn.org emerged in 1998 as an ad hoc online coalition opposed to the impeachment of President Bill Clinton; it has since grown to a membership of 5 million.[13] More recently, the Tea Party movement originated in late 2008 with online discussions on conservative-oriented social networking sites and frequent conference calls among organizers. On February 19, 2009, a cable network business commentator made an on-air call for rallies to oppose government spending; his emotionally charged remarks were picked up by various websites and went "viral." In just two months the newly named "Tea Party" movement was able to rally over 600,000 supporters in more than 600 demonstrations around the nation.[14] Occupy Wall Street was started by Canadian activists on July 13, 2011;[15] by September 17, it had begun its protests in New York

(...continued)

on their sessions, frequently limiting them to as little as 60 to 90 session days. Given the generally hectic pace and urgent demands faced by most state legislatures during their sessions, it seems unlikely that Article V convention proposals could make it through the legislatures of 34 states in one year. Judging from previous efforts, it appears more likely that even a well-publicized and popular Article V petition drive would require two to five years of state legislative action before it approached "critical mass." See *The Book of the States*, 2009 edition, volume 41 (Lexington, KY: Council of State Governments, 2009), pp. 83-85.

[13] Jonathan Rauch, "How Tea Party Organizes Without Leaders," *National Journal*, September 11, 2010, available at http://www.nationaljournal.com/njmagazine/cs_20100911_8855.php.

[14] Ibid.

[15] "Occupy Wall Street To Turn Manhattan Into 'Tahrir Square'" *New York Times*, September 17, 2011, available at http://newyork.ibtimes.com/articles/215511/20110917/occupy-wall-street-new-york-saturday-protest.htm.

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City, and within a month, it claimed to have mounted demonstrations or other protests in 70 major cities and more than 600 communities throughout the country.[16]

Advances in communications technology and the examples of such phenomena as the Tea Party and Occupy Wall Street movements could provide a model for present-day advocates of the Article V Convention alternative. Notwithstanding the deterrents to an Article V Convention cited earlier in this report, the methods and technologies identified above could arguably be harnessed to promote a credible campaign in a much shorter period of time than was the case with previous convention advocacy movements.

As the institution authorized by the Constitution to summon, and, arguably, to plan for and guide an Article V Convention, this prospect could present Congress with a range of consequential issues in a time frame that could require its urgent consideration. Under these circumstances, Congress might be called on to revisit the Article V Convention issue for the first time since the 1980s.

2011-2012: Revival of Interest in the Article V Convention Option

After more than 20 years of inactivity, there is evidence of renewed interest in the Article V Convention option among various policy advocacy groups. The convention method may be particularly attractive on several grounds: it springs unquestionably from the "original intent" of the founders; the need for state petitions suggests widespread popular grass-roots origins; and the prospect of proposing amendments directly to the states offers an alternative to what some have characterized as a legislative and policy deadlock at the federal level.

One organization, the Friends of the Article V Convention (FOAVC), a self-described non-partisan group, has been a persistent advocate of the convention option since at least 2007. Its website[17] includes lists of what the organization claims are over 700 state applications for a convention.

In a subsequent development, in September 2011, a diverse coalition, including Harvard Law School; the Tea Party Patriots; and Fix Congress First, a self-described "network of activists fighting the corrupting influence of money and politics,[18] sponsored a Conference on the Constitutional Convention—"ConConCon"—at Harvard.[19] This colloquium investigated constitutional and political questions associated with an Article V Convention, identified state and local grass-roots planning for a convention, and considered the question of proceeding with a convention campaign.[20]

Also in 2011, the Tax and Fiscal Policy Task Force of the American Legislative Exchange Council (ALEC) released *Proposing Constitutional Amendments by a Convention of the States, A Handbook for State Lawmakers*. This publication, which provides an overview of the Article V

[16] Joanna Walters, "Occupy America: Protests Against Wall Street and Inequality Hit 70 Cities," *The Guardian* (U.K.), October 8, 2011, available at http://www.guardian.co.uk/world/2011/oct/08/occupy-america-protests-financial-crisis.

[17] See Friends of the Article V Convention, available at http://www.foavc.org/.

[18] This group has renamed itself Rootstrikers, available at http://rootstrikers.org/.

[19] Conference on the Constitutional Convention, available at http://conconcon.org/.

[20] Ibid., available at http://conconcon.org/agenda.php.

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Convention question, includes such elements as an overview of the process; the question of judicial review; a step-by-step guide to the state application process; an examination of the "runaway convention" question; and "practical recommendations" for the states. ALEC describes itself as a non-profit organization that provides a forum for state legislators and private sector leaders to discuss and exchange information on state policy issues. It focuses on such issues as "free markets, limited government and constitutional division of powers between the federal and state governments."[21] Critics of ALEC and its programs, such as Bob Edgar, president of Common Cause, assert, however, that "its mission is to bring together corporations and state legislators to draft profit-driven, anti-public-interest legislation, and then help those elected officials pass the bills in statehouses from coast to coast."[22]

A further example of increasing interest in the Article V device was offered by a "ConConCon" participant, Harvard Professor Lawrence Lessig, collaborating with campaign management expert Mark McKinnon on "How to Sober Up Washington," a related article that appeared in *The Daily Beast* on April 6, 2012. The authors called for a convention to consider amendments that would eliminate what they describe as corruption in the federal government:

> There is something we can do. We, the People, can take back the power we gave to Congress. We can take it back through the states. The framers left open a path to amendment that doesn't require the approval of Congress: a convention. Article V of the Constitution requires Congress to call a convention to propose amendments if 34 state legislatures demand it.[23]

Moreover, they assert that an Article V Convention would be equally attractive to the political left and right, because, assuming that it would be an open convention,[24] the delegates could consider, and conceivably propose, amendments from the agendas of both ends of the political spectrum:

> The beauty of a convention is that it would provide a forum of possibility for conservative Tea Party types who might want an amendment calling for a balanced budget; or a line-item veto for the president as well as progressives who would like to amend the [C]onstitution to make it possible to enact meaningful campaign finance reform. The only requirement is that two-thirds of the states apply, and then begins the drama of an unscripted national convention to debate questions of fundamental law. It would be a grand circus of democracy at its best.[25]

One notable aspect of these proposals for an Article V Convention appears to be the political diversity of their proponents. As noted previously, "ConConCon" was partially sponsored by organizations that represent divergent parts of the political spectrum, while the conference itself was co-sponsored by Harvard Law School and held on the Harvard campus. These efforts may

[21] For additional information on ALEC, see http://www.alec.org/about-alec/frequently-asked-questions/.

[22] Mike McIntyre, "Conservative Non-Profit Acts as a Stealth Business Lobbyist, *New York Times*, April 21, 2012, available at http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?pagewanted=1&_r=1.

[23] Mark McKinnon and Lawrence Lessig, "How to Sober Up Washington," *The Daily Beast*, April 6, 2012, available at http://www.thedailybeast.com/articles/2010/04/06/how-to-tell-dc-politicians-to-go-to-hell.html.

[24] The question of whether an Article V Convention has the authority to propose an amendment or amendments on any issue (open), or is restricted to the single issue for which it is convened (closed) is examined in detail later in this report.

[25] McKinnon and Lessig, "How to Sober Up Washington."

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reflect a deliberate choice to target "grass roots" populist and libertarian reformist elements on both the political left and right.

2013-2014: Most Recent Article V Convention Developments

Since the "ConConCon" of 2011, a number of new developments indicate continued growing interest in an Article V Convention, particularly an amendment or amendments requiring a balanced federal budget and/or limits on the federal debt.

Ohio Legislature Applies for an Article V Convention, November 2013

On November 20, 2013, the Ohio legislature approved an application for an Article V Convention to consider an amendment requiring a balanced federal budget except in wartime or instances of declared national emergency.[26] This action came after three decades of comparative inactivity in the states and was the first fresh-start application filed by a state since that of the Missouri legislature in 1982.

Ohio's action brings the number of states that have applied for a convention for this specific purpose to 33, one short of the two-thirds threshold set in the Constitution. Between 1975 and 1983, the legislatures of 32 states submitted applications for an Article V Convention to consider an amendment requiring a balanced federal budget except in times of national emergency.[27] Some observers maintain that state applications remain valid indefinitely, while others claim that state applications expire after some length of time, so that Ohio's application brings the total to 33, one short of the constitutional requirement. Other observers disagree, however, claiming that state applications have only a limited lifespan; by this reasoning, most or all the previous applications have expired and are invalid, so the Ohio application should not be aggregated with the earlier ones, but must be considered as first of a new series. [28]

A further complicating factor centers on state actions rescinding their previous applications for a balanced budget amendment convention. In the years following the convention movement's high water mark in 1982, nine states rescinded their applications for an Article V Convention; subsequently, however, three of the states that rescinded have since filed fresh applications.[29] This issue turns on the question of whether states have the right to rescind their applications for an

[26] S.J. Res. 5, 130th Ohio General Assembly, at http://www.legislature.state.oh.us/res.cfm?ID=130_SJR_5. The resolution also called on Congress to propose a balanced budget amendment to the states, a format previously employed widely in other past state applications.

[27] For additional information consult CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, by Thomas H. Neale, pp. 12-14.

[28] A shelf life of two, four, or seven years has been suggested, but other observers claim that state applications have no expiration date. For additional information on this question, consult CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, by Thomas H. Neale, p. 18.

[29] According to the Friends of the Article V Convention's website, between 1988 and 2010, Alabama, Arizona, Florida, Georgia, Idaho, Louisiana, Montana, New Hampshire, Nevada, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, and Wyoming rescinded Article V applications. In recent years, however, Alabama, Florida, and New Hampshire have submitted fresh applications for a convention to consider a balanced budget amendment. The author gratefully credits Gregory Watson, Legislative Assistant with the Texas Legislature for his assistance in verifying this list.

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Article V Convention. Here again, proponents of the convention device deny their ability to do so, while others argue to the contrary.[30]

Depending on the observer's position on the questions of timeliness and rescission, Ohio could be the 33rd state to apply for an Article V Convention to propose a balanced budget amendment, or it could be the 27th, or the fourth, or conceivably only the first.

"Mount Vernon Conference," December 2013

In a related development, a group of 100 state legislators met on December 7, 2013, at the National Library for the Study of George Washington on the grounds of the Mount Vernon estate in Virginia, to discuss organizing for a projected Article V Convention. It is unclear whether the conference organizers intended a comparison to the Mount Vernon Conference of 1785, a meeting of Maryland and Virginia delegates that was a precursor to the Philadelphia Constitutional Convention.[31]

According to one press account, "The purpose of the meeting is to discuss and draft an agenda for a 'Convention of the States' for the sole purpose of writing the rules that would govern any Article V Conventions for proposing amendments, a so-called constitutional convention."[32] Another report identified Convention of States (COS) as the primary stimulus for the meeting. Convention of States is a project of Citizens for Self Governance, an advocacy group whose self-described goal is "to take power away from big government and the big money that influences it… and return the power to its rightful owners, the people..." and "enable the conservative grassroots to restore our country to a republic with effective self-governance."[33] According to COS, the movement's ultimate objective is to call an Article V Convention that would address a particular subject, rather than a specific amendment, in this case, issues related to "limit[ing] the power and jurisdiction of the federal government." According to their argument, this would then allow a convention to consider amendments in other related issues (e.g., term limits and tax reform).[34]

[30] Dwight Connely, "Amending the Constitution: Is This any Way to Call for a Constitutional Convention?" Arizona Law Review, volume 22, issue 4, 1980, pp. 1033-1034.

[31] The organizers may have intended to draw a connection with the original Mount Vernon Conference of 1785, at which representatives from Maryland and Virginia negotiated an agreement settling outstanding issues concerning fisheries, commerce, and navigation in the Potomac River and Chesapeake Bay. George Washington presided. In addition to negotiating a compact settling these issues, other states were invited to attend a conference on commercial issues at Annapolis the following year. The Annapolis Convention of 1786, attended by representatives of six states, in turn issued the call for the Philadelphia Constitutional Convention of 1787.

[32] Nikki Kelly, "Long Pushes Mount Vernon Assembly," *Journalgazette.net* (Fort Wayne, IN), November 145, 2013, at http://www.journalgazette.net/article/20131114/LOCAL0202/131119679.

[33] Citizens for Self Governance, "About Citizens for Self Governance/Mission" at http://selfgovern.com/about/.

[34] Convention of States, "News," Citizen's Toolkit, Frequently Asked Questions, at http://www.conventionofstates.com/news/looking-back-moving-forward.

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Compact for America's Compact for a Balanced Budget Amendment: A "Turn-Key" Plan for an Article V Convention[35]

A different approach to the Article V Convention question was advanced in 2013 by the Compact for America, CFA. The Compact for America is an advocacy group initially launched by the Goldwater Institute, [36] a public policy organization which identifies its focus as research oriented to individual rights, the free market economy, and limited constitutional government;[37] CFA currently identifies itself as a domestic non-profit "501(c)4" corporation registered in Texas.[38] The organization's program is comprised of the Compact for a Balanced Budget Amendment ("the Compact"), a proposed interstate compact, which, in the institute's words, would transform "the otherwise cumbersome state-initiated amendment process under Article V into a 'turn-key' operation."[39] The Compact includes a comprehensive program that, in the opinion of its advocates, meets all the requirements necessary to

- apply for and convene a convention;
- provide rules and operating procedures for the convention;
- convene the convention;
- present, approve, and propose a pre-drafted amendment for transmission to the states; and
- provide for prospective state ratification of the amendment.

The single action of the requisite number of states in agreeing to the Compact would, its proponents argue, set in motion the convention process and carry it through to successful ratification and incorporation as part of the Constitution. Proponents of the Compact maintain that the interstate compact device would speed up the Article V Convention process, so that a convention could be called, convened, and adjourned and an amendment proposed and ratified within 12 months.[40]

The Compact seeks to anticipate and prescribe procedures for various elements in the Article V Convention process. States that agree to the Compact would simultaneously agree to its various requirements. A state's act of agreement to the Compact would constitute its application for an Article V Convention, the sole purpose of which would be to propose an amendment whose text is prescribed in the Compact. Participating states also agree to observe the Compact's provisions governing the convention's composition and rules of procedure. Finally, by agreeing to the

[35] The author extends grateful thanks and credit to CRS Legislative Attorney Kathleen S. Swendiman, kswendiman@crs.loc.gov, 7-9105, who prepared much of the section dealing with interstate compacts.

[36] The institute is named for the late Barry M. Goldwater, Arizona Senator from 1953-1965 and 1968-1987, and Republican nominee for President in 1964.

[37] "Liberty and Justice for All," Goldwater Institute, at http://goldwaterinstitute.org/institute.

[38] CompactforAmerica.org, "About," at http://www.compactforamerica.org/about-2/.

[39] The Compact for America was endorsed by the American Legislative Exchange Council's Board of Directors on January 28, 2013. See http://www.alec.org/model-legislation/resolution-to-effectuate-the-compact-for-america/.

[40] Goldwater Institute, Compact for America, Statement of Nick Dranias, November 20, 2013, at http://goldwaterinstitute.org/article/compact-america.

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Compact, states also commit themselves to "prospective" ratification of the proposed amendment.[41]

The keystone element of the Compact is the "Balanced Budget Amendment" that would be proposed by the convention. Among its major elements, the amendment would

- provide for a balanced federal budget at all times, unless any deficit is financed by debt issued in conformity with the amendment's requirements;
- set a ceiling for federal debt equal to 105% of the outstanding debt at the time the amendment takes effect;
- require that any increase in the federal debt ceiling proposed by Congress must be submitted to the states and approved by a simple majority (26, assuming the District of Columbia and the territories are excluded) of state legislatures within 60 days before taking effect;
- require the President to ensure that the debt ceiling is not exceeded by proposing the impoundment of specific expenditures sufficient to prevent the breach. The President's impoundments would become effective in 30 days unless Congress proposed alternatives of the same or greater amount;
- specify that the President's failure to designate or enforce such impoundments would be an impeachable misdemeanor; and
- require that any new or increased tax revenue tax legislation be approved by two-thirds of the full membership of the Senate and House of Representatives on a roll call vote.

The Compact includes other noteworthy provisions. It would establish an ongoing Compact Commission which would promote the convention, encourage states to join, and "coordinate the performance of obligations (presumably of signatory states) under the Compact," among other things. It would set the size of convention delegations as one delegate per member state, and specifies that the governor of each member state would serve as the state's delegate, contingent on the governor's taking a leave of absence from state duties. The convention would last one day, and its sole duty would be to introduce, debate, vote upon, and reject or propose for ratification the specific text of the Balanced Budget Amendment described above.[42]

As part of the compact initiative, the CFA has also drafted model legislation for a concurrent resolution that could be used by Congress to call the convention. Title I of the model resolution also includes the text of the proposed amendment and would establish procedures governing the form of the convention, delegate appointment, convention rules of procedure, and provisions governing congressional referral of the proposed amendment to the states. Title II of the resolution would refer the Balanced Budget Amendment proposed by the convention to the state legislatures for ratification.[43]

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[41] Ibid., "Compact for State Legislators," at http://goldwaterinstitute.org/article/compact-america.

[42] Goldwater Institute website, "Compact for a Balanced Budget," at http://goldwaterinstitute.org/sites/default/files/CFA-Text-Compact%20for%20a%20Balanced%20Budget%20Final%20%282%29.pdf.

[43] Goldwater Institute website, "Omnibus Concurrent Resolution," at http://www.compactforamerica.org/wp-content/uploads/CFA-Text-Congressional-Omnibus-Resolution.pdf.

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Compact for a Balanced Budget Amendment: An Interstate Compact under the Constitution

The Compact for a Balanced Budget Amendment is self-identified as an interstate compact. As such, it falls under the authority of Article I, Section 10, clause 3 of the Constitution, which states that, "No State shall, without the Consent of the Congress ... enter into any Agreement or compact with another State...." This provision is known as the "Compact Clause," and it is the only section of the United States Constitution that deals with formal agreements between and among the states. The Compact Clause reflects the view of the Framers that states should be able to work cooperatively together, as well as the concern that unchecked interstate alliances might threaten the harmony of the Union or the authority vested by the Constitution in the federal government.[44] The compact clause was originally included in the Constitution primarily to govern boundary agreements between states, but it has subsequently evolved "as an instrument for state cooperation in carrying out affirmative programs for common problems."[45]

The Constitution places no limits on what might be done through an interstate compact other than the requirement of congressional consent. In the early years of government under the Constitution, they were used almost exclusively to settle boundary disputes. Beginning with the establishment of the Port of New York Authority[46] in 1921, however, compacts began to be used to address more complex, regional issues requiring intergovernmental cooperation. Some compacts are merely advisory in form, but others may be regulatory, with significant powers granted to multi-state commissions.[47] More recently, compacts have addressed such wide-ranging concerns as mental health treatment, law enforcement and crime control, education, driver licensing and enforcement, environmental conservation, energy, nuclear waste control, facilities operations, transportation, economic development, insurance regulation, placement of children and juveniles, disaster assistance, and pollution control. There are approximately 200 interstate compacts in effect today. [48]

Even though the Compact Clause specifically provides for congressional consent, the United States Supreme Court declined, in 1893, in *Virginia v. Tennessee,*[49] to read the consent requirement literally, so as to apply to each and every agreement between states. "There are many matters upon which different States may agree that can in no respect concern the United States," such as joint actions between states to fight disease.[50] Thus the Court held that the Framers

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[44] Michael L. Buenger and Richard L. Masters, "The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems," *Roger Williams Law Review*, v. 9, issue 1, fall 2003, pp.71, 85.

[45] U.S. Constitution Annotated, Article I, Section 10, clause 3 at http://www.crs.gov/conan/default.aspx?mode=topic&doc=Article01.xml&t=3|2&s=10&c=3.

[46] 1921 N.Y. Laws Ch. 154; N.J. Laws Ch. 151; 42 Stat 174 (1921).

[47] Administrators under compacts with congressional compacts with congressional consent may have the power to promulgate rules and regulations, and may also review federal agency action under certain circumstances. See *Seattle Master Builders Assn. v. Pacific Northwest Elec. Power*, 786 F.2d 1359, 1362 (9th Cir. 1986).

[48] The Council of State Governments, National Center for Interstate Compacts (NCIC), at http://www.csg.org/programs/ncic/default.aspx. The NCIC website includes a database of current interstate compacts searchable by state, name of compact, and subject.

[49] 148 U.S. 503 (1893). It may also be noted that this case involved a boundary agreement between Virginia and Tennessee early in the 19th century that had never obtained formal congressional consent. The court held that, over the years, Congress had relied upon the terms of the compact for judicial and revenue purposes and thus had impliedly consented to the interstate compact.

[50] Ibid., 518. For an analysis of whether congressional consent may or may not be required for the proposed National (continued...)

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intended this requirement to apply only to compacts "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[51] States may enter into agreements among themselves, and congressional consent will not be required, so long as the agreements do not infringe on federal interests or shift the balance of power within the federal system of government.[52] It should, however, be noted that the consent power of Congress is absolute. Congress can require consent to any interstate compact, and can deny consent to any interstate compact if it so chooses.[53]

Usually congressional consent to an interstate compact takes the form of a joint resolution or act of Congress specifying its approval of the text of the compact, adding any conditions or provisions it deems necessary, and often embodying the compact document. As with any congressional enactment, it must be signed by the President before it becomes law.[54] Very rarely has the President vetoed or threatened to veto consent legislation by Congress.[55] While congressional consent to an interstate compact is most often explicit, consent by Congress may also be implied by subsequent acts of Congress: "An inference clear and satisfactory that Congress ... intended to consent" to a compact may be sufficient.[56] Congress may also delegate its power to approve a compact to a federal official so long as an "intelligible principle" against which approval can be measured is apparent.[57]

In addition, Congress can condition its consent to require that the proposed interstate compact be changed to meet congressional criteria, or contain specific provisions.[58] The Supreme Court, in

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Popular Vote Compact, see Heather Green, "The National Popular Vote Compact: Horizontal Federalism and the Proper Role of Congress Under the Compact Clause," *Chapman Law Review*, vol. 16, spring 2012, p.16.

[51] Ibid., 519.

[52] See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), where the Court stated that if an agreement is not "directed to the formation of any combination tending to increase the political power of the States, which may encroach upon or interfere with the just supremacy of the United States," it does not require congressional consent to be valid.

[53] This may be true even where affirmative consent is not necessary. *St. Louis & San Francisco Ry. Co. v. James*, 161 U.S. 545 (1896); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). See also *Cuyler v. Adams*, 449 U.S. 433 (1981), where the Court deferred to Congress's political judgment that the Interstate Agreement on Detainers was to be treated as a compact pursuant to the Compact Clause even if the Constitution did not require such treatment. Justice White noted that the "requirement that Congress approve a compact is to obtain its political judgment." *Cuyler*, at 441, n. 8 (White, J., joined by Blackmun, J., dissenting).

[54] See *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276 & n.21 (1991). "If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." See, also, footnote 21 of that decision, wherein Justice Stevens, concurring in the judgment, cites several provisions in the Constitution which permit Congress or a part of Congress to take some actions without complying with the bicameral and presentment requirements of Art. I, § 7. While the Justice's list may not be all inclusive, it is noted that the Compact Clause is not included.

[55] In 1942, President Roosevelt vetoed the Republican River Compact, stating that it "seeks to withdraw the jurisdiction of the United States over the waters of the Republican Basin for purposes of navigation." *Congressional Record*, v. 87, pt. 3, April 2, 1941, pp. 3285-86. He did, however, sign a later, modified version of the compact. See 57 Stat. 86. Joseph F. Zimmerman, *Interstate Cooperation: Compacts & Administrative Agreements*, 2nd ed. (Albany, NY: State University of New York Press, 2012), p. 56.

[56] *Virginia v. West Virginia*, 78 U.S. 39, 60 (1870). Congressional consent "is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them . . ." *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

[57] *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1471 (D.C. Cir. 1998).

[58] Chief Justice Charles Evans Hughes wrote in *James v. Dravo Contracting Company*, 302 U.S. 134, 138 (1937): "It (continued...)

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Cuyler v. Adams, stated that, "(b)y vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority."[59]

The Interstate Compact for a Balance Budget Amendment would require congressional approval under the Compact Clause because it proposes actions that would redefine, via a constitutional amendment, Congress's taxing and spending authority, arguably shifting the balance of power within the federal system of government. CFA's available promotional literature does not appear to acknowledge explicitly the need for congressional approval, but Nick Dranias, the Goldwater Institute's Constitutional Policy Director, and perhaps the best-known advocate of the Compact for America and its Compact for a Balanced Budget Amendment, has suggested as much. In one account he writes, "[t]he agreement (Compact for America) is designed to be 'blessed' by a counterpart congressional resolution, *which consents to the compact* (emphasis added) and completely fulfills Congress' role in the state-initiated Article V process—from the call for the convention, to the ultimate ratification referral of the proposed amendment."[60] In one of its supporting documents, CFA makes another indirect reference to the congressional approval requirement:

> Moreover, because no member state may attend the convention until Congress adopts the counterpart omnibus concurrent resolution, which calls the convention in accordance with the CFA, the CFA's safeguards will also have the status of the "Law of the United States" under current precedent interpreting the effect of Congressional approval of interstate compacts.[61]

If the Interstate Compact for a Balanced Budget Amendment were to be approved by Congress via a concurrent resolution without presentment to the President, it would likely be challenged as unconstitutional. As noted above, congressional approval of interstate compacts, along with any conditions attached to such approval, generally takes the form of a legislative bill, usually a joint resolution, which becomes law when signed by the President. A concurrent resolution which does not include presentment may be found by the courts to fall short of the requirement of congressional approval under the Compact Clause.[62]

Reaction to the Compact for a Balanced Budget

In its early announcements, Compact for America, the Compact's sponsoring organization, initially suggested that quick approval by the 38 state legislatures required by the plan could lead to a convention and subsequent ratification of the amendment as early as July 4, 2013, due to the

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can hardly be doubted that in giving consent Congress may impose conditions."

[59] *Cuyler v. Adams*, 449 U.S. 433, 439-440 (1981).

[60] *Constitution Daily*, "Fulfilling the Promise of Article V with an Interstate Compact," December 6, 2013, at http://blog.constitutioncenter.org/2013/12/fulfilling-the-promise-of-article-v-with-an-interstate-compact/.

[61] Nick Dranias, "Legal Brief: The Compact for America's Laser-Focused Article V Convention is Clearly Constitutional," Compact for America, February 22, 2013, at http://www.compactforamerica.org/legal-brief-the-compact-for-americas-laser-focused-article-v-convention-is-clearly-constitutional/.

[62] *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276 (1991). See also Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

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"prospective" ratification process embedded in the compact. The only identifiable state legislative action to date, however, appears to have been by the Rules Committee of the Arizona House of Representatives, which rejected a bill incorporating the Compact in February 2013.[63]

Although the Compact does not appear to have generated widespread coverage in major national newspapers, broadcast or cable media, or in academic journals, it has attracted considerable reaction, largely posted on the Internet.

Among its supporters, as noted earlier, is the Goldwater Institute, which sponsored CFA, the organization that developed the Compact. In addition, the Board of Directors of the American Legislative Exchange Council, ALEC, approved a resolution offering the Compact as model legislation in January 2013.[64] Cato Institute[65] senior fellow in constitutional studies Ilya Shapiro also declared his support in a Cato blog posting in which the author asserted that "the Compact for America would powerfully check and balance Washington's debt addicts."[66] In its literature, Compact for America also lists a number of Members of Congress and other public figures who support the Compact for a Balanced Budget Amendment.[67]

Other organizations have criticized the Compact, however. The conservative John Birch Society, which opposes an Article V Convention on the grounds that a runaway convention could damage the Constitution, also opposes the Compact for a Balanced Budget Amendment on the same grounds. In addition, the society's journal, *The New American*, asserted the CFA's balanced budget amendment would "grant the President new, sweeping authority over the budget-making process. Furthermore, giving the President the right to 'designate' any spending request is tantamount to giving him the power to rewrite laws passed by Congress, which would amount to rewriting both Articles I and II of the Constitution."[68] Bill Walker, co-founder of Friends of the Article V Convention, and one of the earliest contemporary supporters of the convention concept, strongly opposed CFA on several grounds in a monograph posted on the FOAVC website. He claimed that CFA would be an improper use of the interstate compact device, since it seeks effectively to circumvent the amendment process as established in Article V and would adversely impact the balance of power among the various branches built into the Constitution. He further criticized the proposal on the grounds that by reducing the convention to a "turn-key" process, it would reduce what the founders envisioned as a deliberative effort to a clockwork series of events with pre-ordained outcomes. In his critique, he asserted that the Compact would ignore the founders' vision of the Article V Convention as a deliberative assembly, that debate and amendment in the convention would be prohibited, that Congress would be deprived of any

[63] "Compact for America Dies, Legality Questioned," *Arizona Daily Independent*, February 20, 2013, at http://www.arizonadailyindependent.com/2013/02/20/compact-for-america-dies-legality-questioned/.

[64] http://www.alec.org/model-legislation/resolution-to-effectuate-the-compact-for-america/.

[65] The Cato Institute, based in Washington, describes itself as a "public policy research organization—a think tank—dedicated to the principles of individual liberty, limited government, free markets and peace." See http://www.cato.org/about.

[66] Ilya Shapiro, "A Compact for America to Reign in Government," Cato Institute, *At Liberty*, January 4, 2103, at http://www.cato.org/blog/compact-america-rein-government.

[67] "Compact for America's 'Article V 2.0' Turn-Key Approach is Our Best Shot," Compact for America website, at http://goldwaterinstitute.org/sites/default/files/CFA-Fact%20Sheet%20Turn%20Key%20Article%20V%20Approach%20to%20Reforming%20Washington.pdf.

[68] Joe Wolverton, II, "How the Compact for America Threatens the Constitution," *The New American*, January 10, 2013, at http://www.thenewamerican.com/usnews/constitution/item/14109-how-the-compact-for-america-threatens-the-constitution.

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discretion with respect to proposing the amendment, and the states would be locked in to a prospective ratification without the chance for debate or reconsideration.[69]

From the standpoint of Congress and its role in the Article V Convention process, the Compact presents certain issues for consideration. First, its literature appears to presume congressional approval of the interstate compact providing for a Balanced Budget Amendment via a concurrent resolution. As noted previously, however, a concurrent resolution which does not include presentment to the President may be found by the courts to fall short of the congressional approval requirement of Article I, Section 10, clause 1 of the Constitution. Second, by approving the resolution, Congress would presumably agree to its "turn-key" design, effectively waiving any claim to further authority for setting the convention's mandate, form, or procedures; determining whether the amendment should be proposed to the states; and selecting the ratification process, that is, whether by the state legislatures or ad hoc convention, as explicitly provided in Article V. The role and responsibilities of Congress in the Article V Convention process are examined at greater length in the next section of this report.

The Role of Congress in the Article V Convention Process

The state legislatures are indispensable actors in the process of proposing an Article V Convention—nothing can happen unless 34 or more apply, but Congress is equally indispensable in the process of summoning, convening, and by its own assertion, defining, one. The Constitution, with characteristic economy of phrase, simply directs that "Congress ... on the application of the Legislatures of two thirds of the several States, shall call a Convention for the proposing of Amendments...." Beyond the language of Article V, however, observers have identified subsidiary issues for consideration by Congress, of which three may arguably be most important:

- Is Congress obligated to call an Article V Convention on the receipt of sufficient state applications?
- What sort of convention does Article V authorize?
- If an Article V Convention proposes amendments, does Congress have any discretion as to whether they must be submitted to the states for consideration?

Is Congress Required to Call a Convention?

The language of the Constitution is notably straightforward on Congress's duty to call an Article V Convention: "... on the Application of the Legislatures of two thirds of the several States, [Congress] *shall* call a Convention for proposing Amendments.... (emphasis added)" The founders' intentions seem unmistakable, and no less an authority than Alexander Hamilton wrote emphatically that, once the two-thirds threshold is met, "the Congress will be obliged ... to call a convention for proposing amendments.... The words of this article are peremptory. The Congress

[69] Bill Walker, "The Diabolical Plot of 'Compact for America' A Blueprint for Disaster," undated, FOAVC website at http://www.foavc.org/reference/file48.pdf.

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'shall call a convention.' *Nothing in this particular is left to the discretion of that body* (emphasis added). And of consequence, all the declamation of disinclination to a change vanishes in air."[70] One scholar, Russell L. Caplan, noted that, "[t]he founding generation spoke with one voice on this duty," going on to quote the writings of John Marshall, James Iredell, John Dickinson, and James Madison in which they all asserted the obligation of Congress to call a convention once the two-thirds threshold has been passed.[71]

Given the founders' stern injunctions, on what grounds could Congress decline to call a convention? Several factors concerning state applications might be used to represent state applications as defective, and therefore not valid. For instance, most constitutional scholars hold that applications proposing a specifically worded amendment are invalid. As one observer noted, "these resolutions seek to make the 'Convention' part of the *ratifying* (emphasis in the original) process, rather than part of the deliberative process for "proposing" constitutional amendments.... they are applications for a convention empowered solely to approve or disapprove the submission to the states of particular amendments 'proposed' elsewhere."[72] Another reason for hesitation in calling an Article V Convention centers on the great issue of its scope — general versus limited. A further potential impediment is lack of contemporaneity, in other words, an application or applications have expired and no longer have any force. It should be noted, however, that the advocacy group, Friends of the Article V Convention, holds that state applications never expire.[73] Similarly, a 2010 study by the Goldwater Institute on the Article V Convention asserts that Congress's role in the convention process is purely ministerial, or clerical:

> Congress acts primarily as the legislatures' agent. From the nature of that role it follows that Congress may not impose rules of its own on the states or on the convention. For example, it may not limit the period within which states must apply. Time limits are for principals, not agents to impose: if a state legislature believes its application to be stale, that legislature may rescind it.[74]

Cyril Brickfield, reporting to the House Judiciary Committee in 1957, suggested that Congress was, arguably, *not* required to summon an Article V Convention on the presentation of the requisite number of state applications: "[i]t is doubtful, however, that there is any process or machinery by which the [C]ongress could be *compelled* (emphasis added) to perform this duty."[75] In support of this assertion, he cited as precedent the failure of Congress in 1920 to carry out its constitutionally mandated duty to reapportion the House of Representatives.[76] Congress, he noted,

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[70] Alexander Hamilton, in *The Federalist*, Number 85, "Conclusion," (Cambridge, MA: the Belknap Press of Harvard University Press, 1961), p. 546.

[71] Russell L. Caplan, *Constitutional Brinksmanship, Amending the Constitution by National Convention* (New York: Oxford University Press, 1988) pp. 115-117.

[72] Arthur Earl Bonfield, "Proposing Constitutional Amendments by Convention: Some Problems," *Notre Dame Law Review*, volume, 39, 1963-1964, pp.662-663.

[73] Friends of the Article V Convention, "What Does Contemporaneous Mean as It Relates to Counting Applications," available at http://www.foavc.org/mod/resource/view.php?id=2.

[74] Robert G. Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Goldwater Institute, Policy Report Number 241, September 16, 2010. p. 21. The Goldwater Institute is a public policy research institute, the self-identified focus of which is policy research oriented to individual rights, the free market economy and limited constitutional government.

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

[76] See U.S. Constitution, Article I, Section 2, clause 3, and Amendment 14, Section 2.

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had the mandate to perform, but "its failure of refusal to do so apparently gives rise to no enforcible (sic) cause of action."[77]

Still another option potentially available is preemption of the call for a convention. Supporters of this tactic maintain that Congress can legally respond to the applications of the states by proposing its own relevant amendment. During the 1980s campaign for a balanced budget amendment convention, the National Taxpayers' Union asserted that the call for a convention was, "just a way of getting attention — something akin to batting a mule with a board."[78] In defense of this argument, the House Judiciary Committee's 1993 print, *Is There a Constitutional Convention in America's Future?*, noted that during the 1980s, a number of states had forwarded conditional applications that specifically stated their applications would be canceled in the event Congress proposed a balanced budget amendment incorporating the general principles included therein.[79]

Ultimately, it is difficult to conceive that Congress would fail to heed the deliberate call of a substantial majority of the nation's citizens, acting through the agency of their state legislatures, and meeting the clearly stated requirements of Article V. As Cyril Brickfield noted, in the final analysis, "[p]ublic opinion and, ultimately, the ballot box are the only realistic means by which the Congress can be persuaded to act."[80] The House Judiciary Committee speculated that congressional failure to call a convention might trigger court challenges that could lead to a constitutional crisis,[81] but another legal scholar wrote that, "[e]ven conceding the reach of the judicial power as exercised these days, I find it difficult to believe that the Supreme Court would issue an order compelling Congress to carry out a duty which can hardly be called a simple ministerial duty, or would, in the alternative, take it upon itself to prescribe the procedures for a convention. I much prefer to rely on the integrity of Congress in carrying out a constitutional duty."[82]

What Sort of Convention Does Article V Authorize?

One of the weightiest issues Congress would face when considering an Article V Convention turns on the question of what sort of convention is contemplated by the Constitution. What did the founders envision when they drafted this clause of the Constitution? Commentators have generally suggested three alternative models for the Article V Convention: the general convention; the limited convention; and the runaway convention, actually a subset of the limited convention. A general convention would be free to consider any and all additions to the Constitution, as well as alterations to existing constitutional provisions. A limited convention would be restricted in its "call" or authorizing legislation to consideration of a single issue, or group of issues, as specified by the states in their applications. The third model is a much-cited subset of the limited convention, the runaway convention, an assembly that departs from its

[77] Brickfield, *Problems Relating to a Federal Constitutional Convention*, p. 27.

[78] *Baltimore Evening Sun*, March 11, 1983; quoted in *Is There a Constitutional Convention in America's Future?*, p. 13.

[79] Ibid. For additional information on conditional state applications, see CRS Report R2592*, The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, by Thomas H. Neale, pp. 17-18.

[80] Brickfield, *Problems Relating to a Federal Constitutional Convention*, p. 28.

[81] *Is There a Constitutional Convention in America's Future?*, p. 14.

[82] Paul G Kaupfer, "The Alternative Amendment Process: Some Observations," *Michigan Law Review*, volume 66, issue 5, March 1967-1968 (sic), pp. 905-906.

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mandate to address a wide range of issues that had supposedly been beyond its purview. Each of these alternative models has had its proponents and detractors over the years.

The General Convention

Supporters of a general convention note that the language of Article V is broadly inclusive: "... on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing *Amendments* (emphasis added)...." They assert that the article places no limitation on the number or scope of amendments that would be within a convention's purview. Constitutional scholar Charles Black offered emphatic support of this viewpoint: "I believe that, in Article V, the words 'a Convention for proposing such amendments' mean 'a convention for proposing such amendments as that convention decides to propose.'"[83] In fact, he went on to assert that limited conventions would be constitutionally impermissible for the reason that no language is found in Article V that authorizes them:

> It (Article V) does *not* (emphasis in the original) imply that a convention summoned for the purpose of dealing with electoral malapportionment[84] may kick over the traces and emit proposals dealing with other subjects. It implies something much more fundamental than that; it implies that Congress cannot be obligated, no matter how many States ask for it, to summon a convention for the limited purposed of dealing with electoral apportionment alone, and that such a convention would have no constitutional standing at all.[85]

Consequently, by this reasoning, the many hundreds of state applications for a convention to consider amendments on a particular subject are null and void. Moreover, Professor Black noted that state applications demanding a convention on a single issue were almost unknown in the 19th century; he described the phenomenon as " ... a child of the *twentieth century* (emphasis in the original).... The twentieth century petitions, embodying this theory, are on the point of law implicitly resolved by them, nothing but self-serving declarations, assertions of their own power by the state legislatures."[86]

Writing at the height of debate over the 1980s campaign for an Article V Convention to consider a balanced budget amendment, former Solicitor General Walter Dellinger asserted that the Framers deliberately sought to provide a means of amending the Constitution that is insulated from excessive influence by either the state legislatures, or by Congress.[87] His view of the convention's authority is among the most expansive advanced by commentators on the Article V Convention:

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[83] Charles Black, "Amending the Constitution: A Letter to a Congressman," *Yale Law Journal*, volume 82, number 2, December 1972, p. 199.

[84] Professor Black was writing in the context of the Article V Convention campaign to overturn the Supreme Court decision in *Reynolds v. Simms*, 377 U.S. 553 (1964) and *Wesberry V. Sanders*, 376 U.S. 1 (1964), which extended the "one-person, one vote" requirement respectively to state legislative districts and congressional districts, ruling that the population of both jurisdictions must be substantively equal.

[85] Black, "Amending the Constitution: A Letter to a Congressman," p. 199.

[86] Ibid., p. 203.

[87] See Walter E. Dellinger, "The Recurring Question of the 'Limited' Constitutional Convention," *Yale Law Journal*, volume 88, issue 8, July 1979, pp. 1623-1640.

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> ... any new constitutional convention must have the authority to study, debate, and submit to the states for ratification *whatever amendments it considers appropriate* (emphasis added).[88]

According to his judgment, an Article V Convention must be free to pursue any issue it pleases, notwithstanding the limitations included in either state applications or the congressional summons by which it was called:

> If the legislatures of thirty-four states request Congress to call a general constitutional convention, Congress has a constitutional duty to summon such a convention. If those thirty-four states recommend in their applications that the convention consider only a particular subject, Congress still must call a convention and leave to the convention the ultimate determination of the agenda and the nature of the amendments it may choose to propose.[89]

More recently, Michael Stokes Paulsen invoked original intent and the founders' understanding of such a gathering. Asserting that they would have considered a "convention" to be a body that enjoyed broad powers, similar to the Constitutional Convention itself, he suggests:

> "Convention" had a familiar ... public meaning in 1787. It referred to a deliberative political body representing the people, as it were, "out of doors." Representatives or delegates to such a convention might well operate to some extent pursuant to "instructions" of the people thus represented, but a convention was not a pass-through or a cipher, but rather an agency — a deliberative political body."[90]

Perhaps the most assertive expression of the open or general convention argument centers on the doctrine of "conventional sovereignty:"

> According to this theory, a convention is, in effect, a premier assembly of the people, a representative body charged by the people with the duty of framing the basic law of the land, for which purpose there devolves upon it all the power which the people themselves possess. In short, that for the particular business of amending and revising our Constitution, the convention is possessed of sovereign powers and therefore is supreme to all other Government branches or agencies."[91]

Another school of thought, cited by the House Judiciary Committee in a 1957 study, rejects the conventional sovereignty argument, primarily on the grounds that an Article V Convention can only be summoned subject to the conditions of the Constitution:

> ... those who assert the right of the Congress to bind a convention contend that the convention is, in no proper sense of the term, a sovereign. It is, they argue, but an agency employed by the people to institute or revise fundamental law. While there may be a special dignity attaching to a convention by reason of its framing fundamental law, no such dignity or power should attach which would invest it with a primacy over other branches of government having equally responsible functions.[92]

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[88] Ibid., p. 1624.

[89] Ibid., p. 1640.

[90] Michael Stokes Paulsen, "How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention," *Harvard Journal of Law and Public Policy*, volume 34, issue 3, 2011, p. 842.

[91] Brickfield, *Problems Relating to a Federal Constitutional Convention*, 16.

[92] Ibid.

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Writing in *Constitutional Brinksmanship*, Russell Caplan further noted the example that contemporary state conventions called to propose constitutional amendments tended to exceed their mandates unless they had been strictly limited:

> The trend toward aggrandizement of power at a convention is supported by modern experience in the states. When delegates are presented with the choice of writing a new constitution or submitting a number of amendments to the existing document, they have exhibited a desire to become part of history by framing a new constitution.[93]

Defenders of the general convention counter opponents by asserting that the founders included ample checks on the work of a general or unlimited convention: first, any proposed amendment or amendments would face the same requirement of approval by three-fourths of the states, and second, Congress is empowered to choose whether such amendments will be considered by the state legislatures or special-purpose ratification conventions. In the final analysis, they assert, "a convention can only *propose* (emphasis in the original) amendments, not ratify them."[94] An additional check not cited in the Constitution centers on the question of whether Congress is required to propose to the states any or all amendments offered by an Article V Convention. This issue is examined at greater length later in this report.

The Limited Convention

While the concept of the general convention enjoys considerable support, there are those who maintain opposing views. A broad range of constitutional scholars holds that a convention may, in fact, be limited to a specific area or areas contained in state applications, or indeed, that it *must* be so limited. A fundamental assumption of this viewpoint is that the Framers did not contemplate a wholesale or large-scale revision of the Constitution when they drafted Article V. Senator Sam Ervin, a champion of advance congressional planning for a convention, wrote that, "... there is strong evidence that what the members of the convention were concerned with ... was the power to make specific amendments.... [The] [p]rovision in article V for two exceptions to the amendment power[95] underlines the notion that the convention anticipated a specific amendment or amendments rather than general revision."[96]

One commentator, championing the states' authority in this question, noted that the founders' intention in establishing the state petition device was to provide a check against a Congress that had declined to propose an amendment or amendments that commanded widespread support, suggesting that a convention limited by the subject area of state applications was constitutional, but that a convention could not be limited by Congress:

[93] Caplan, *Constitutional Brinksmanship, Amending the constitution by National Convention*, p. 147.

[94] Michael A. Almond, "Amendment by Convention: Our Next Constitutional Crisis?" *North Carolina Law Review*, volume. 53, issue 3, February 1975, p. 507.

[95] These were the prohibitions against amendments restricting the slave trade before 1808, imposing a capitation tax outside the census formula previously agreed to, or depriving states of equal suffrage in the Senate.

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

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> ... Congress may not impose its will on the convention.... the purpose of the Convention Clause is to allow the States to circumvent a recalcitrant Congress. The convention Clause, therefore, must allow the States to limit a convention in order to accomplish this purpose.[97]

According to this view, the states should decide whether a convention would be open and general, or limited, depending on the actions of the several legislatures.

Congress, however, has historically sought to provide for limited conventions when it has considered this question. Once valid applications have been received from 34 states, it has maintained, the call for an Article V Convention must come from Congress, and Congress has the authority to limit the subject of amendments to be considered. It is at this step that Congress has asserted in the past, but not provided in legislation, its power to set limits as to the convention's agenda. This suggests a delicate balance of authority: the states are authorized to apply for a limited convention, but only Congress can guarantee, by law, that a convention so summoned will confine its recommendations to the issues within its mandate. For instance, the Senate Judiciary Committee in 1984 claimed for Congress the power both to set and enforce limits on the subject or subjects considered by a convention summoned in response to state petitions that specified the consideration of amendments in particular areas. This was stated in the committee's report on S. 119 in the 98th Congress, the "Constitutional Convention Implementation Act of 1984":

> Under this legislation, it is the States themselves, operating through the Congress, which are ultimately responsible for imposing subject-matter limitations upon the Article V Convention.... the States are authorized to apply for a convention "for the purpose of proposing one or more specific amendments." Indeed, that is the only kind of convention within the scope of the present legislation, although there is no intention to preclude a call for a "general" or "unlimited" convention.[98]

The Goldwater Institute's 2010 study[99] reached similar conclusions. Examining the contemporary record at the time of the Constitutional Convention, the author asserted the founders anticipated that the Article V Convention would serve chiefly as an agent of the states. Consequently, the states could set the convention's agenda by specifying the questions it would address, and that the convention would be bound to respect the limits of its mandate.[100] Congress, in this viewpoint, acts to facilitate the will of the people acting through their state legislatures: if they call for a convention to consider one or more specific policy proposals, then Congress should call for an appropriately limited convention. If, however, the states petition for a general convention,[101] then the argument can also be made in favor of the broader-based assembly.

Assuming that Congress does possess a constitutional mandate to limit the issue or issues a convention might consider, what sort of instruction would be appropriate to this task? Past legislative proposals offer a view of the most widely favored mechanism. First, Section 6(a) of S.

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[97] James Kenneth Rogers, "The Other Way to Amend the Constitution: The Article V Amendment Process," *Harvard Journal of Law and Public Policy*, volume 30, issue 3, summer 2007, p. 1018.

[98] *Constitutional Convention Implementation Act of 1984*, 98th Cong., 2nd sess., S.Rept. 98-594, p. 25.

[99] Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Goldwater Institute, Policy Report Number 241, September 16, 2010.

[100] Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, pp. 15-18. Available online at http://www.goldwaterinstitute.org/article/5005.

[101] Presumably, language that asked only for a "Convention for Proposing Amendments," would be interpreted as calling for a general convention.

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119 (98th Congress), cited earlier, required the concurrent resolution summoning an Article V Convention to "set forth the nature of the amendment or amendments for the consideration of which the convention is called." Section 10(b) further required that

> No convention called under this Act may propose any amendment or amendments of a nature different from that stated in the concurrent resolution calling the convention. Questions arising under this subsection shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.[102]

Alternatively, a number of scholars suggest that while state applications are not prescriptive with respect to the issue areas a convention may address, state intentions must be given "great weight" by Congress when it calls a convention under Article V procedures. William Van Alstyne, writing in the Duke Law Journal in 1978 went so far as to assert that,

> ... [i]f two thirds of the state legislatures ... agree on the exact wording of an amendment ... this would seem to me to state the paradigm case in which Congress should proceed with the call — and limit the agenda exactly in accordance with the unequivocal expressions of those solely responsible for the event.[103]

The Runaway Convention

Fear of a runaway Article V Convention has been a recurring theme over many decades. What, in fact, is a "runaway convention?" It is generally defined as one that was summoned to consider a limited agenda, but moved beyond its original mandate to consider policy questions and potential amendments not contemplated in the applications of the state legislatures or in the congressional summons. In 1967 hearings held on the convention issue, Theodore Sorenson, one of President John Kennedy's principal domestic policy counselors, cautioned that, "[n]o matter how many and how sincere are the assurances from the backers of a new Convention that their sole concern is reapportionment, no one can safely assume that delegates to such a Convention, once safely seated and in action, would wish to go home without trying their hand at improving many parts of this delicately balanced document."[104] It is, as another scholar noted, the subject of "age old fear."[105] "Opponents suggest that a runaway convention, driven by 'political fringe groups' might revisit a wide range of constitutional provisions."[106] Proposals to alter parts of the Bill of Rights, in particular, seem to be singled out as being the most serious challenge to the Constitution by a runaway convention.[107]

These concerns, have, however, been characterized as overstated and alarmist. Critics note that the viewpoint elaborated above assumes an Article V Convention would be ideologically monolithic and dominated by a disciplined coalition dedicated to the imposition of an ideologically focused agenda. The breadth of opinion and viewpoints in a nation as populous and

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[102] S. 119, 98th Congress, "The Constitutional Convention Implementation Act of 1984," Section 10(b).

[103] See William W. Van Alstyne, "Does Article V Restrict the States to Calling Unlimited Conventions Only? — A Letter to a Colleague," *Duke Law Journal*, volume 1978 (sic), issue 6, pp. 1295-1306.

[104] Quoted in Caplan, *Constitutional Brinksmanship*, pp. 146, 146.

[105] Almond, "Amendment by Convention: Our Next Constitutional Crisis?" p. 504.

[106] James M. LeMunyon, "A Constitutional Convention Can Rein in Washington," *Wall Street Journal*, March 31, 2010, available at http://online.wsj.com/article/SB10001424052702304370304575152231710551888.html.

[107] U.S. Congress, Senate, Committee on the Judiciary, *Constitutional Convention Implementation Act of 1984*, 98th Cong., 2nd sess., S.Rept. 98-594 (Washington: GPO, 1984), p. 29.

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diverse as the United States arguably makes this prospect questionable, however, not to mention the element of time that would inevitably pass during and between the various stages of the Article V Convention process. Justice Joseph Story cast doubt on the runaway convention theory on these grounds as early as 1833:

> Time is thus allowed, and ample time, for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action.[108]

In its 1984 report on S. 119 (98th Congress), the "Constitutional Convention Implementation Act," the Senate Judiciary Committee argued that any Article V Convention would be more like Congress: broad, inclusive, and essentially moderate. Here, the report echoed Madison's assurance that the "size and variety" of the nation serve as a deterrent to "faction."[109] Finally, the report noted that the founders did not provide unchecked power to the Article V Convention: every amendment proposed would be subject to the same stringent conditions faced by amendments proposed by Congress: "... the notion of a 'runaway' convention, succeeding in amending the Constitution in a manner opposed by the American people, is not merely remote, it is impossible."[110] To this judgment may be added the fact that even a runaway convention's proposed amendment or amendments would be subject to approval by the legislatures or conventions of three-fourths of the states before being incorporated as part of the Constitution.

An Article V Convention Limited to the Consideration of a Specifically Worded Amendment?—H.J.Res. 57 in the 112th Congress

One point on which most observers appear to agree is that an Article V Convention, either limited or general, could not be restricted to consider a specific amendment. During the 1980s campaign for a convention to consider a balanced budget amendment, a number of state legislatures proposed specific amendment language. Some would have accepted a "substantially similar" amendment, while others attempted to limit the convention solely to consideration of their particular amendments. In its 1993 study, the House Judiciary Committee indicated the former might be qualified, but:

> ... an application requesting an up-or-down vote on a specifically worded amendment cannot be considered valid. Such an approach robs the Convention of its deliberative function which is inherent in article V language stating that the Convention's purpose is to "propose amendments." If the State legislatures were permitted to propose the exact wording of an amendment and stipulate that the language not be altered, the Convention would be deprived of this function and would become instead part of the ratification process.[111]

Walter Dellinger has further argued that exact language proposals "short-circuit" the checks and balances built into Article V by the founders. According to his interpretation, they intended to

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[108] Joseph Story, *Commentaries on the Constitution of the United States*, (Boston: Hilliard, Gray and Co., 1833) ss. 1824, volume 3, p. 688. Quoted in *The Founders' Constitution*, web edition, available online at http://press-pubs.uchicago.edu/founders/documents/a5s12.html.

[109] James Madison in *The Federalist*, Number 10, "The Size and Variety of the Union as a Check on Faction," pp. 129-136.

[110] *Constitutional Convention Implementation Act of 1984*, 98th Cong., 2nd sess. S.Rept. 98-594, p. 29.

[111] *Is There a Constitutional Convention in America's Future?* p. 6.

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provide sub-federal communities, embodied in the states, the authority to propose a convention to consider amendments, but deliberately refrained from giving the state legislatures the power to determine the exact text of the amendments to be proposed.[112]

The general acceptance of this interpretation is highlighted by the fact that a constitutional amendment has been introduced in the 112th Congress to require Congress, on the application of two thirds of the states, to call a convention to consider a specifically worded amendment proposed by the states. The convention's sole function would be "to decide whether to propose that specific amendment to the States...."[113] H.J.Res. 57 would eliminate some of the uncertainties concerning scope and format both of state applications, and of the convention itself, noted earlier in this report. It would definitively settle discussion over the constitutionality of proposing a convention to consider a specific amendment by empowering the states to do so. An asserted collateral advantage is that a convention summoned pursuant to the provisions of H.J.Res. 57 would be authorized to consider *only* the amendment in question, apparently eliminating the prospect of a runaway convention. A final point: since it makes no reference to repeal of existing arrangements, the amendment would arguably supplement, rather than supersede, current language concerning amendments proposed by an Article V Convention, in effect offering a second option for the states in the Article V process. As of August 2012, H.J.Res. 57 had been referred to the Subcommittee on the Constitution of the House Judiciary Committee, but no further action had been taken.

It may be noted that H.J.Res. 57 is a version of a proposal known as "the Madison Amendment," initially offered by the Madison Amendment Coalition, an ad hoc advocacy group established in 2010.[114] At the time of this writing, two organizations have endorsed the general concept: a task force of the American Legislative Exchange Council, identified earlier in this report as an organization of state legislators and other interested persons supporting "free markets, limited government, federalism, and individual liberty,"[115] and the National Taxpayers Union, an advocacy group promoting "lower taxes and smaller government at all levels."[116]

In the final analysis, the question "what sort of convention?" is not likely to be resolved unless or until the 34-state threshold has been crossed and a convention assembles. An estimate of the outcome of this process might well be based on the application process itself. It seems fair to assume that a convention summoned to consider a balanced budget, for instance, would confine itself to that issue. It is possible, as surmised by various observers over the years, that a convention could be "hijacked" by agenda-driven factions,[117] but it seems more likely that it would reflect James Madison's judgment in *The Federalist*, that the size and variety of the convention, as with that of the Union, would serve as a check to faction[118] Ultimately, an Article

[112] Dellinger, "The Recurring Question of the 'Limited' Constitutional Convention," p. 1632.

[113] H.J.Res. 57, 112th Congress, introduced on May 10, 2011, by Representatives John Culberson and Henry Cuellar.

[114] See "The Madison Amendment," available at http://www.madisonamendment.org/index.html.

[115] American Legislative Exchange Council website, available at http://www.alec.org/AM/Template.cfm?Section=About.

[116] "Leading Advocacy Group for Constitutional Federal Budget Reform Backs 'Madison Amendment' to Give States' Greater Say," National Taxpayers Union website, available at http://www.ntu.org/news-and-issues/government-reform/madison-amendment.html.

[117] LeMunyon, "A Constitutional Convention Can Rein In Washington," *Wall Street Journal*, March 31, 2010.

[118] James Madison, in *The Federalist*, Number 10, "The Size and Variety of the Union as a Check on Faction," pp. 129-136.

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V Convention's proposals would be subject to the checks and balances written into the Constitution, which will be examined later in this report.

Is Congress Required to Propose Ratification of Amendments Approved by a Convention?

Once an Article V Convention has drafted and approved a constitutional amendment or amendments, the next step in the ratification process is their proposal by Congress to the states for consideration and approval. The fact that Congress is authorized in Article V to designate whether amendments will be considered in the states by ad hoc conventions or by the state legislatures arguably suggests that amendments *must* be transmitted by Congress in order for the ratification process to begin. The larger question is whether Congress is *required* to propose amendments adopted by an Article V Convention to the states. The range of opinion on this issue is predictably broad.

As noted earlier in this report, Congress gave active consideration to the Article V Convention process from the 1970s through the 1990s. During this period, a number of bills were introduced that sought to establish procedures in the event state petitions reached the two-thirds constitutional threshold. In most of these proposals, Congress reserved the right to decide whether an amendment or amendments proposed by an Article V Convention should be circulated to the states for approval and ratification. This assertion of authority rests on the assumption that Article V envisions only a limited convention, called in response to state applications dealing with a particular issue, for example, state legislative reapportionment in the 1960s, or the balanced budget amendment in the 1970s and 1980s. The report to accompany S. 119 in the 98th Congress stated explicitly that

> ... the convention is without authority to propose any amendment or amendments of a subject matter different than that set forth in the concurrent resolutions calling the convention.... In other words, the convention, although a sovereign body, is subject to the limitations of its constitutional charter — the concurrent resolution by Congress — which itself merely reflects the intent of two-thirds of the States in applying for a convention in the first place.[119]

The mechanism provided in S. 119, as in nearly all bills, was a concurrent resolution which stated that Congress would not submit the amendment or amendments in question to the states because the subject matter differed from the issue or question which the convention had been called to address.

Senator Sam Ervin, Jr., a champion of constitutional convention procedures legislation, defended Congress's assertion of authority to propose or withhold Article V Convention amendments from the ratification process, but he also favored that Congress be prohibited expressly from refusing to circulate an amendment "because of doubts about the merits of its substantive provisions."[120] He asserted that "unlimited power in the Congress to refuse to submit proposed amendments for ratification would destroy the independence of the second alternative amending process." Moreover, most later versions of the proposed convention procedures recognized this point by authorizing the states to bring legal action, often in the Supreme Court, if Congress failed to act in

[119] *Constitutional Convention Implementation Act of 1984*, 98th Cong., 2nd sess. S.Rept. 98-594, pp. 40-41.

[120] Ervin, "Proposed Legislation to Implement the Convention Method of Amending the Constitution," p. 894.

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calling a convention, or failed to propose a convention's amendments by a certain deadline, most commonly 30 days.[121]

The Goldwater Institute's 2010 study, focusing particularly on the role of the states in the process, found that Congress must propose the amendments approved by an Article V Convention to the states, but that the amendments must fall within the convention's mandate:

> Because the convention for proposing amendments is the state legislatures' fiduciary, it must follow the instructions of its principals — that is, limit itself to the agenda, if any, that states specify in their applications.... If the convention does propose amendments, Congress must send on to the states *those within the convention's call* (emphasis added).[122]

It is worth noting that the Goldwater Institute study offers a potential solution to this difficult question: the report suggests that an Article V Convention wishing to offer proposals outside the scope of its mandate could make additional policy recommendations, but not in the form of constitutional amendments.[123] While these instruments would not enjoy the same constitutional status as amendments proposed by the convention, they would arguably be accorded considerable attention in Congress, the states, and the policy arena at large, and might serve as the foundation for a national debate on the questions they address.

Conversely, a substantial range of constitutional commentators holds that Congress is ultimately obliged to propose any and all amendments approved by an Article V Convention to the states. Writing in the late 1960s, when the campaign to overturn the Supreme Court's decision on state legislative apportionment[124] seemed poised to cross the 34-state threshold, Morris Forkosch asserted:

> Congress has its own independent machinery to propose amendments in the first alternative, and to give Congress the power to review the proposals necessarily deprives the second alternative of its independence. As a result, Congress would become supreme, and Article V would automatically read that "The Congress ... call a[n advisory] Convention for proposing Amendments [to it]...." This would be an adoption of the very system rejected by the 1787 Convention.[125]

Professor Gerald Gunther similarly asserted that a congressional claim of veto power over amendments proposed by an Article V Convention directly contravened the founders' intent:

> In my view, the text, history and structure of Article V make a congressional claim to play a substantial role in setting the agenda of the convention highly questionable. If the state-initiated method for amending the constitution was designed for anything, it was designed to *minimize* (emphasis in original) the role of Congress. Congress was given only two ... extremely narrow responsibilities. First Congress must call the convention when thirty-four valid applications are at hand (and it is of course a necessary part of that task to consider the

[121] See, for instance, Section 15, S. 119, 98th Congress, Constitutional Convention Implementation Act of 1984 or Section 11(c), S. 214, 102nd Congress, Constitutional Convention Implementation Act of 1991.

[122] Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, p. 24.

[123] Ibid., p. 25.

[124] See under "State Legislative Apportionment, 1964-1969" in CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, by Thomas H. Neale.

[125] Morris D. Forkosch, "The Alternative Amending Clause in Article V: Reflections and Suggestions," *Minnesota Law Review*, volume 51, issue 6, 1966-1967, p. 1079.

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> validity of the applications and set up the machinery for convening the convention). Second, Congress has the responsibility for choosing a method of ratification once the convention submits its proposals. I am convinced that is all that Congress can properly do.[126]

He went on to suggest that any effort by Congress to "veto" an amendment proposed by an Article V Convention might prove to be unsustainable. Its delegates, he asserted, might not go quietly, arguing instead that they acted with justification, despite efforts to restrict their mandate, and that a refusal by Congress to propose an amendment to the states thwarted "the opportunity of the people to be heard through the ratification process."[127] Ultimately, Congress might be faced with an embarrassing political dilemma:

> ... might not Congress find it impolitic to refuse to submit the convention's proposals to ratification? I suggest that it is not at all inconceivable that Congress, despite its initial belief that it could impose limits, and despite its effort to impose such limits, would ultimately find it to be the course of least resistance to submit all of the proposals emanating from a convention ... to the ratification process, where the people would have another say.[128]

Ultimately, the question of whether Congress can refuse to propose an amendment may also depend on one of the issues addressed above: what manner of convention does Article V authorize? If only a limited convention is permissible, then Congress could argue strongly that it would be within its rights to refuse proposing an amendment that addressed an issue beyond the convention's mandate. If Article V were interpreted to include a general convention, either as authorized in its call, or a convention that addresses issues beyond those cited in the applications that led to its call, then Congress would arguably have less standing to assert its role as judge of validity of Article V Convention proposals.

Additional Issues for Congress

Beyond the three fundamental questions examined above — the mandate of the Article V Convention and the authority of Congress both in calling such a convention and proposing amendments emerging from its deliberations to the states — the process presents a range of other issues for consideration by Congress.

A Role for the President?

Perhaps one of the most obvious subsidiary questions surrounding the Article V Convention process is, "what is the President's role?" The immediate answer is that the Constitution clearly designates Congress as the sole agent in federal aspects of the process—by contrast, neither the President, nor the executive branch and the judiciary, are mentioned in Article V.

One point of view, noting the language of the article, maintains that the chief executive would not have a role in the Article V Convention process. The Senate Judiciary Committee's 1971 report on S. 215, the proposed Federal Constitutional Procedures Act, in the 92nd Congress, noted simply that "[i]nasmuch as the function of Congress is simply to operate the machinery to effectuate the

[126] Gerald Gunther, "The Convention Method of Amending the United States Constitution," *Georgia Law Review*, volume 14, number 1, fall 1979, p. 23.

[127] Ibid., p. 9.

[128] Ibid., pp. 9-10.

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actions of the States and the convention, there is no proper place for a Presidential role."[129] Moreover, the committee went on to assert that the appropriate device for proposing an Article V Convention Amendment proposed in the bill was a concurrent resolution, a legislative vehicle that, by tradition, is not sent to the President for his approval.[130] Thirteen years later, without explicitly excluding the President, the same committee made what arguably was a broader claim of congressional authority over the Article V Convention process in its report on S. 119, the Constitutional Convention Implementation Act of 1984, 98th Congress:

> Although there is no explicit statement to this effect in Article V, there can be little doubt that the Congress is possessed with the authority to issue legislation on the subject matter of the "Constitutional Convention Implementation Act." Article V states in relevant part that, "The Congress ... on Application of the Legislatures of two thirds of the several states shall call a Convention for proposing Amendments." Congress' explicit authority under this provision is to "call" the convention. The powers invested in Congress under S. 119 are entirely a function of this responsibility, authorized under the "necessary and proper" clause of Article I, section 8, clause 18.[131]

In its 1974 study, the American Bar Association cast further doubt on a role for the President in the Article V Convention. The study argued that presidential approval would impose an additional requirement in the process, and that the potential of a presidential veto of a convention call would attach a de facto super-majority requirement not contemplated by the founders.[132] The report found that, under these circumstances, "the parallelism between the two initiating methods would be altered, in a manner that could only thwart the intended purpose of the convention process as an 'equal' method of initiating amendments."[133]

Some observers argue, however, that the President should have a role in certain aspects of the process. The President's constitutional authority to approve legislation is cited in support of this assertion:

> Every Order Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him....[134]

Proponents maintain that the President's authority to approve or disapprove legislation — his veto power — as provided in Article I, clause 7, would extend to a congressional call for an Article V Constitutional Convention, notwithstanding the choice of legislative vehicle. In more than 40 constitutional convention procedures bills introduced from the 1970s through the 1990s, a concurrent resolution, which does not permit presidential approval, was designated as the approved vehicle for a call for an Article V Convention. Constitutional scholar Charles Black emphatically rejected this choice, asserting that the call for a convention was too important not to come under the President's purview:

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[129] U.S. Congress, Senate, Committee on the Judiciary, *Federal Constitutional Procedures Act*, report to accompany S. 215, Report No. 92-336, 92nd Cong., 1st sess. (Washington: 1971), p. 12.

[130] Ibid.

[131] *Constitutional Convention Implementation Act of 1984*, 98th Cong., 2nd sess. S.Rept. 98-594, p. 21.

[132] American Bar Association, *Amendment of the Constitution by the Convention Method Under Article V*, p. 27.

[133] Ibid., p. 28.

[134] U.S. Constitution, Article I, Section 7, clause 3.

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> ... a convention call would have the force of law — significant, vital law, comparable to a law establishing any other body with power to act. (As a contrasting example, S.J. Res. 197 [in the 92nd Congress], setting up an arbitration board ... went to the President.... What possible reason could there be for not following this procedure as to the setting up of a constitutional convention, more important by several orders of magnitude than an arbitration board? Can it be thought that Article I, Section 7, can be evaded by mere *nomenclature* [emphasis in the original] — by merely calling something a "Concurrent" rather than a "Joint" Resolution?[135]

Supporters of the President's role in the Article V Convention process also note that the legislative models offered by constitutional convention procedures bills in the past were more than simple "calls" for a convention. They prescribed a form and procedures for a convention, authorized use of federal resources and facilities, and provided for public funding of convention expenses. As Arthur Bonfield noted,

> ... Congress must necessarily make more than a mere call for a convention. Such a call would be meaningless without the inclusion of the specific terms upon which such a body is to be constituted, organized, and conducted. These terms to be spelled out by Congress would appear similar to the general kinds of legislation with which Congress normally deals. Consequently, no reason of logic dictates its different treatment in respect to the need for Presidential approval.[136]

From the standpoint of the broader national welfare, the same author noted that as the President is the only federal official elected and responsible to the American people as a whole, "[h]is participation in this process that would intimately affect all Americans and our nation as a whole seems, therefore, especially proper and natural."[137]

The House Judiciary Committee's 1993 study identified a potential alternative, noting that a call for an Article V Convention and the legislation carrying the call into effect need not be part of the same vehicle. This suggests a two-step process in which Congress could, on its own authority, pass a concurrent resolution summoning the convention, while additional arrangements implementing the convention call could be contained in a law-making measure, subject to presidential approval.[138]

Moving beyond the convention call to the actual proposal of amendments passed by an Article V Convention, most observers maintain that, as with the method of congressional proposal, the President would not be a part of the process. In this instance, it is asserted that the Supreme Court's ruling in *Hollingsworth v. Virginia* that the President's signature was not necessary when Congress proposed amendments to the states would arguably apply to those offered by a convention.[139]

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[135] Black, "A Letter to a Congressman," p. 208.

[136] Bonfield, "Proposing Constitutional Amendments by Convention: Some Problems," p. 675.

[137] Arthur Earl Bonfield, "The Dirksen Amendment and the Article V Convention Process," *Michigan Law Review*, volume 66, 1967-68, p. 986.

[138] *Is There a Constitutional Convention in America's Future*, p. 14.

[139] See above at footnote 12.

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"Checks and Balances" in the Article V Amendment Process

As noted above, the work of an Article V Convention, once proposed, would be subject to various checks and balances, including congressional authority to designate ratification by ad hoc conventions or state legislatures and the requirement that all amendments proposed must be ratified by three-fourths of the states. In addition, for nearly the past century, Congress has also required that amendments be ratified by the states within a seven-year time limit.

Congressional Authority to Propose Ratification by Convention or Legislature

Article V states explicitly that amendments "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress." For amendments proposed by Congress, the convention alternative has been provided only for the 21st Amendment, which repealed the 18th Amendment, and with it, prohibition. All other amendments were sent to the state legislatures for ratification.

The alternative of ratification by state conventions or legislatures at the discretion of Congress was introduced by James Madison at the Philadelphia Convention and was adopted by a wide margin; beyond that, however, the reasoning of the founders is unclear. In their earlier discussion on how the Constitution itself was to be adopted, the delegates indicated that ratification by ad hoc conventions, on which they ultimately settled, would be more democratic and more reflective of the public will than by state legislatures. State legislatures, it was assumed, would be less open to change, and more interested in preserving the status quo.[140] This understanding evidently motivated the framers of the 21st Amendment, which effectively ended prohibition; according to one source, pro-repeal Members "favored this mode of ratification because they believed that they clearly had popular sentiment on their side, and furthermore, they distrusted the response to the issue of rural-dominated state legislatures."[141] One commentator observed that "[t]he convention, therefore, is the only mechanism of ratification which assures the expression of the people.... it seems apparent, however, that the convention mode will be used only when there is a powerful public opinion in its favor."[142] A contrary view was expressed by another scholar, who suggested that since amendments have been proposed by a convention, Congress should choose the state legislatures to ratify them, on the grounds that

> ... there should be two different bodies, one to check on the other; the different sets of delegates to the Convention and to the state's legislature may and should produce different reasons and arguments for so amending the Constitution.[143]

Thus the Constitution, in this seemingly minor delegation of authority, arguably endows Congress with a powerful check to the work of an Article V Convention.[144]

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[140] Philip L. Martin, "Convention Ratification of Federal Constitutional Amendments," *Political Science Quarterly*, volume LXXXII, no. 1, March, 1967, pp. 61-71.

[141] Grimes, *Democracy and the Amendments to the Constitution*, p. 110.

[142] Martin, "Convention Ratification of Federal Constitutional Amendments," p. 71.

[143] Forkosch, "The Alternative Amending Clause in Article V: Reflections and Suggestions," pp. 1079-1080.

[144] "Congress has *complete freedom of choice* between the two methods of ratification recognized by Article V — by the legislatures of the States, or by conventions in the States (emphasis added)." U.S. Congress, The *Constitution of the United States of America, Analysis and Interpretation* (Washington: GPO, 2004), p. 952. Available at
(continued...)

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Approval by Three-fourths of the States Required for Ratification

A second constitutional check on amendments proposed by an Article V Convention also applies equally to those proposed by Congress: they must be ratified by a supermajority of three-fourths of the states. Here again, the founders' intentions are clear. As James Madison wrote in *The Federalist*:

> That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.[145]

Amendments to the Constitution, whether proposed by Congress or an Article V Convention, were thus intended by the founders to reflect the measured and deliberate opinion of the nation. Their purposeful selection of the most stringent super-majority requirement provided in the Constitution strongly suggests the founders' sense of the gravity that applies to the amendment process.

Ratification Within Seven Years of Proposal

As noted earlier in this report, for the 18th, 20th, and all subsequent amendments, Congress has set a time limit of seven years for ratification. This standard is not found in the Constitution, but it has been confirmed by the Supreme Court in its 1921 ruling in *Dillon v. Gloss*.[146] In this case, the Court, "finding no express provision in Article V," authorizing the deadline nonetheless thought it was "reasonably implied" therein "that the ratification must be within some reasonable time after the proposal."[147] Notwithstanding this long tradition, a ratification deadline is not required by the Constitution, and it is possible that an Article V Convention might choose not to include one for any amendments it might propose.

This leads to a subsequent question: would Congress have the authority to attach a ratification deadline by including one in the concurrent resolution by which it transmits to the states an amendment or amendments proposed by an Article V Convention? Proponents might well argue that historic precedent suggests Congress does have this power, based on contemporary practice of including the ratification deadline in the resolution proposing amendments, rather than in the body of the amendments themselves. For instance, while the 18th, 20th, and all subsequent amendments have included a seven-year sunset provision for the ratification process, since the proposal of the 23rd Amendment, the time limit has been included *not* in the body of the amendment itself, but in the authorizing or "resolving" language found in the resolution proposing the amendment.[148] The argument here is that since Congress would use a concurrent

(...continued)

http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-8-6.pdf.

[145] James Madison, in *The Federalist*, Number 43, "Powers Delegated to the General Government: III," p. 315.

[146] 256 U.S. 368 375 (1921).

[147] *The United States Constitution, Analysis and Interpretation*, p. 950, Available at http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-8-6.pdf.

[148] For instance, in the 18th Amendment, Section 3 *of the amendment itself* preserves the ratification deadline. By comparison, the 26th Amendment (setting the voting age at 18) included the deadline in the resolving clause or preamble of the joint resolution (S.J.Res. 7, 92nd Congress) that proposed the amendment.

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resolution to propose an amendment drafted by an Article V Convention (as envisioned in the various convention procedures acts discussed earlier in this report), it would also have the authority to include the traditional seven-year deadline in the resolving language of the resolution.

Details of the Article V Convention Process — Is Congress a Clerk or the Guardian?

Article V's barebones provisions provide little guidance on the role of Congress in the Article V Convention process. As noted earlier, the minimalist interpretation would assign a purely ministerial or clerical role to Congress: it should call a convention; impose minimal requirements on the convention as to its form, procedures, and agenda; and should refer whatever amendment or amendments are proposed by the convention to the states in timely fashion. In other words, call the convention, and then stand aside. There is, in fact, justification for this course of action from the pens of the founders themselves; as noted earlier, Alexander Hamilton explained the Article V Convention process in unmistakable terms:

> By the fifth article of the plan, the Congress will be obliged ... to call a convention for proposing amendments.... *The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body* (emphasis added)."[149]

This point of view is held in varying degrees by proponents of the Article V Convention. The Goldwater Institute's 2010 study summarized it as follows:

> The ministerial nature of congressional duties and the requirement that it call a convention at the behest of two-thirds of the state legislatures supports the conclusion in the previous section that in the state application-and-convention process, Congress acts primarily as the legislatures' agent. From the nature of that role, it follows that Congress may not impose rules of its own on the states or on the convention.... In the state-application-and-convention procedure, the states are in the position of the property owner, Congress in the position of the manager, and the convention for proposing amendments in the place of the contractor.[150]

Congress, however, has historically interpreted the language authorizing it to "call" an Article V Convention as providing a broad mandate to establish standards and procedures for such an assembly. In its 1984 report on S. 119, 98th Congress, the Senate Judiciary Committee expressed its judgment that

> ... [a]s a necessary incident of its responsibility to "call" the convention, Congress must have the authority to determine that the constitutional preconditions exist for such a convention.... The Congress, as well, clearly possesses the authority to set forth the necessary and attendant details of the convention.[151]

The House Judiciary Committee considered both points of view in its 1993 print, *Is There a Constitutional Convention in America's Future?*, ultimately suggesting that Congress does have a role beyond that of calling the convention and then standing aside, but noting that the extent of that function is open to dispute:

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[149] Alexander Hamilton, in *The Federalist*, Number 85, "Conclusion," p. 546.

[150] Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, p. 21.

[151] *Constitutional Convention Implementation Act of 1984*, 98th Cong., 2nd sess. S.Rept. 98-594, p. 21.

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> Congress, according to most commentators, has only two roles in the Convention process: To call the Convention and to choose a method of ratification. However, all are agreed that a range of ancillary functions are necessary and proper to carry out the primary roles. The disagreement begins in deciding the limits of the ancillary functions.[152]

Some of these ancillary functions associated with an Article V Convention are considered below.

Providing a Framework: The Precedent of Congressional Proposals to Shape an Article V Convention

As noted in the previous section, Congress has historically interpreted the language authorizing it to "call" an Article V Convention as providing a broad mandate to establish standards and procedures for such an assembly. This viewpoint evolved during the 1970s and 1980s as Congress considered legislation to establish procedures for an Article V Convention: by the mid-1980s, these bills generally included quite specific standards for state petitions, delegate apportionment formulas and delegate qualifications, convention procedures and funding, specific limits for the life of a convention, ratification procedures, and judicial review.

Between 1973 and 1992, 22 bills were introduced in the House and 19 in the Senate that sought to establish a procedural framework that would apply to an Article V Convention. Proponents argued that constitutional convention procedures legislation would eliminate many of the uncertainties inherent in first-time consideration of such an event and would also facilitate contingency planning, thus enabling Congress to respond in an orderly fashion to a call for an Article V Convention. The Senate, in fact, passed constitutional convention procedures bills, the "Federal Constitutional Convention Procedures Act," on two separate occasions: as S. 215 in 1971 in the 92nd Congress, and as S. 1272 in 1983, in the 98th Congress. Neither bill was considered in the House, although the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on the general issue in 1985. As the prospect of an Article V Convention receded in the 1990s, congressional interest waned. Between 1991 and the time of this writing, no relevant legislation has been introduced. Although the content of these bills evolved over time, most of them were broadly similar, sharing various common elements, among which were the following.

State Application Procedures

All bills prescribed a standard format and content for state applications, provided delivery standards for applications, and set schedules for submissions to Congress, and for congressional declarations of receipt. Most proposals included a contemporaneity provision, essentially establishing a time limit, usually seven years, after which state applications would expire.

Application, Receipt, and Processing in Congress

The Secretary of the Senate and the Clerk of the House of Representatives were generally authorized to receive and retain applications, report them, and report to their respective chambers if the constitutional requirement was met. Most bills required the adoption of a concurrent resolution by the two chambers that valid applications had been received from two-thirds of the

[152] *Is There a Constitutional Convention in America's Future?*, pp. 28-29.

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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.

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State Authority to Rescind Ratification of Proposed Amendments

Most versions of the bill authorized the states to rescind ratification of proposed amendments at any time before the constitutional ratification threshold of three-fourths of the states was attained.

Judicial Review

Later versions of constitutional convention procedures bills generally authorized judicial review and set procedures for court consideration of proposed amendments.

In the event the number of state applications for an Article V Convention approached the two-thirds constitutional requirement, Congress could choose to revisit this issue. If so, legislation introduced during the later decades of the 20th century could provide a range of models for procedures to provide for an Article V Convention.

What Are the Current Procedures for Receipt and Processing of State Applications by Congress?

The process by which the states currently register, and Congress acknowledges the receipt of, applications for an Article V Convention, as well as the occasional application for a specific amendment, is another area in which there are few established procedures. For this particular activity, Congress performs an essentially ministerial function.

In the absence of guidance from Congress, the state legislatures have historically forwarded their applications for an Article V Convention to an almost bewildering range of congressional officers and offices. For practical purposes, this is an area where the Senate and the House of Representatives, acting either jointly or individually, might choose to designate a single official or office to whom such applications should be addressed, such as the Secretary of the Senate and the Clerk of the House of Representatives, or, alternatively, the Speaker and the President pro tempore of the Senate. The law governing the transmission of state electoral college proceedings offers a potential example: in this instance, each state is required to transmit the vote of its electors to the President of the Senate (recall that the Vice President presides over the joint electoral vote count session in his capacity as President of the Senate), the secretary of state of their state, the Archivist of the United States, and the judge of the federal court in the district in which the electors assemble.[153] By designating specific officials, the statute avoids the uncertainty faced by states as to whom their electoral college results should be addressed, and by specifying multiple recipients, it ensures that the certificates will be safely delivered and retained.

Once they are received by Congress, state applications for an Article V Convention are classified as "Memorials."[154] As such, they may be addressed to the House or Senate as a whole, to the Speaker or the presiding officer of the Senate, or to individual Senators or Representatives. Memorials are printed on an occasional basis in the *Congressional Record* after they have been received.

[153] 3 U.S.C. 11.

[154] For additional information, see CRS Report 98-839, *Messages, Petitions, Communications, and Memorials to Congress*, by R. Eric Petersen.

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The Senate assigns a "POM" (petitions or memorials) number to each memorial and prints the full text of memorials received from state legislatures from time to time under the heading "Petitions and Memorials" in the *Record*, as authorized by Rule VII of the *Standing Rules of the Senate*.[155]

House practice differs somewhat: memorials are customarily presented by the Speaker, in accord with Rule XII, clause 3 of the *Rules of the House*. They are assigned a number, and printed and recorded separately from other communications in the *Congressional Record*, under the heading "Memorials." Unlike the Senate, the House includes only a digest of the state measure.[156]

Rescissions of applications for an Article V Convention, which in recent years have been more common than new applications, are recorded the same way.[157]

The Senate and House of Representatives both place the consideration of constitutional amendments under the jurisdiction of their respective Committees on the Judiciary, and Memorials containing state applications are customarily referred to these committees. Both applications and rescissions are apparently retained by the Judiciary committees during the tenure of the Congress in which they were received, after which time they are transmitted to the National Archives and Records Administration for retention by the Center for Legislative Archives. There does not, however, appear to be a central repository where these documents are retained for the historical record. According to the National Archives, state applications are scattered through the center's various congressional document holdings.[158] Given this finding, and the fact that no single legislative branch officer or entity currently is tasked with recording and retaining all state applications for an Article V Convention, no definitive official list of such calls exists.

This is also an area in which the Senate and House of Representatives, acting jointly or separately, might consider more systematic procedures for the treatment of state applications for an Article V Convention, or for specific amendments, particularly with respect to retention of state applications by a single, designated, repository, for a period longer than the life of the current Congress in which they were received. Such action would also offer a corollary benefit for the purposes of accurate historical record keeping in the future.

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

An initial response to this query might be that Members of either house of Congress would be prohibited from serving as delegates to an Article V Convention. The House Judiciary Committee's 1993 study makes note of this argument, which stems from the Constitution's provision that

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[155] See *Standing Rules of the United States Senate*, Rule VII, paragraph 1, available at http://rules.senate.gov/public/index.cfm?=Rule VII.

[156] See *Rules of the House of Representatives*, Rule XII, clause 3, at http://www.rules.house.gov/singlepages.aspx?NewsID=133&rsbd=165.

[157] Friends of the Article V Convention (FOAVC) maintains what it claims is a complete online archive of *Congressional Record* (and earlier congressional journals) images of state petitions, or digests thereof. This collection begins with 1899 and continues to the present. It is available at http://foavc.org/file.php/1/Amendments/index.htm.

[158] Letter from Rodney A. Ross, National Archives and Records Administration, Center for Legislative Archives, dated March 12, 2007. Available from the author of this report.

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> 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.

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argue that the convention's size or vote allocation formula should more accurately reflect the great variations in state population than does the electoral vote delegate allocation model.[163] Expanding the number of convention delegates beyond the 535 or 538 previously contemplated would be one response to such concerns; another might be weighted voting, with the votes assigned to each state's delegation adjusted to reflect the population differential, regardless of the number of convention delegates. On the other hand, it could be argued that the allocation of electoral votes reflects the federal principal of fundamental equality among the states, notwithstanding the various population differentials. In fact, it could be noted that each state cast just a single vote in all deliberations at the Philadelphia Convention, and that, moreover, Article V also assigns equal weight to the various states in the ratification process, notwithstanding their population.

A subsidiary question would involve voting within delegations at the convention: if each state casts a single vote, what form would internal state delegation balloting take? Would a majority of delegate votes be required to cast the state vote in favor of a proposed amendment, or for that matter on any question before the convention, or would a plurality suffice?

Would the Convention Require a Super Majority of State or Delegate Approvals to Propose Amendments?

The Constitution is silent on the vote required to propose amendments in an Article V Convention. It might be argued that since the Constitution offers no guidance, it would be appropriate for the convention, or Congress, if it has passed an Article V Convention procedures act, to set the standard for successful proposal to the states. A strong argument could be made for adopting the two-thirds majority requirement already necessary for congressional proposal of amendments. One commentator argued for approval by two-thirds of the delegates to an Article V Convention, and suggested that Congress should include such a provision in any convention procedures legislation it considered.

> Congress should also provide that an affirmative vote of two-thirds of the delegates would be required to propose any given amendment to the states. In this way, it would assure a symmetry of concurrence in the bodies empowered to propose constitutional amendments — whether the body was Congress or a convention.... A two thirds requirement in such a convention would also guarantee that no amendment, regardless of its means of proposal, is ever submitted to the states before an overwhelming consensus as to its desirability is evidenced in a nationally oriented body.[164]

Proponents of a less restrictive requirement might suggest that, at two-thirds, the bar has been set too high, especially considering the stringent constitutional requisite that any amendment be approved by three-fourths of the states, and usually within seven years, in order to be ratified. The convention, they might argue, should send the amendment to the states and let the people decide. Moreover, they might note that while Article V sets two very specific super-majority requirements for constitutional amendments (a two-thirds vote of both houses for congressionally

[163] For instance, if delegates were apportioned according to the electoral college formula, each of California's delegates would represent 679,000 people, while each of Wyoming's three delegates would represent 190,000, by this measurement, providing a substantial arithmetical advantage to residents of the latter state. 2012 Census figures, computed by CRS.

[164] Bonfield, "Proposing Constitutional Amendments by Convention: Some Problems," p. 676.

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proposed amendments, and ratification by three-fourths of the states), it provides no super-majority for amendments proposed by an Article V Convention. The inference here is that since the founders did not set a higher hurdle, they were satisfied that majority approval, or perhaps even a plurality vote in the convention, would be sufficient to propose amendments to the states.

The Role of the District of Columbia and U.S. Territories in an Article V Convention

Article V itself is silent on membership in an Article V Convention, so it is arguable that Congress, in summoning a convention to consider amendments, might choose to include the District of Columbia and U.S. territories as either full members at a convention, or possibly as observers. As noted previously, some versions of the Article V Convention procedures bills introduced in the late 20th century did provide for delegates representing the District of Columbia, although not for U.S. territories. There does not appear to be an impediment to participation by representatives of the federal district, although the ratification process for amendments is obviously limited to the states. An argument can be made for including Washington, DC, because it is part of the continental United States, is situated in the area of the original 13 states, and its residents have always been American citizens. Within this larger question, a further issue for Congress would be whether Washington should be accorded full membership in an Article V Convention, or observer or delegate status, as is the case with its representation in Congress. Here again, it could also be inferred that what the Constitution does not prohibit, it permits: since Article V does not set positive qualifications for the convention, the District of Columbia could be provided full voting membership. On the other hand, it could also be argued that Article V vests authority over the amendment process exclusively in Congress and the states, and that to expand membership in an Article V Convention to include delegates from the federal district was never contemplated by the founders, and is arguably extra-constitutional, if not unconstitutional.

The question of territorial representation at an Article V Convention is arguably more problematic. None of the convention procedures bills introduced from the 1970s through the 1990s provided delegates for any of the unincorporated territories or other possessions of the United States — American Samoa, Guam, the Commonwealths of the Northern Marianas and Puerto Rico, and the U.S. Virgin Islands. A case for territorial representation at a convention might turn on the point that these jurisdictions are controlled by the United States, their inhabitants are American citizens or nationals, and that they enjoy the privileges and protections of the Constitution. By extension, it may be asserted that that the territories at least deserve a seat at the table, perhaps as observers or delegates, rather than voting members.

However the question of District of Columbia and territorial representation at an Article V convention was decided, it must be recalled that, in the final analysis, none of these jurisdictions would take part in the ultimate process of ratifying any proposed amendments. Here the constitutional language is prescriptive, specifying that amendments must be ratified by vote of "the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof...."

Concluding Observations

The Article V Convention for proposing amendments was the subject of considerable debate and forethought in the Philadelphia Convention of 1787. Clearly intended as a balance to proposal of

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amendments by Congress, it sought to provide the people, through their state legislatures, with an alternative method of offering amendments to the nation's fundamental charter, particularly if Congress proved incapable of, or unwilling to, initiate amendments on its own. It also enjoys distinction as one of the few provisions of the U.S. Constitution that has never been implemented. Under these circumstances, the Article V Convention presents many questions that Congress would be called on to consider, and perhaps answer, in the event a convention became a serious possibility. If so, Congress would not be without resources. It is perhaps fortunate that guideposts, if not simple answers, exist in the broad range of sources cited in this report: the original intent of the founders as preserved in the record; historical examples and precedents, particularly those of the last decades of the 20th century; a large body of scholarly writing on the subject; and not least, the work and products of two decades of serious congressional consideration, from the 1970s to the 1990s, of the question of an Article V Convention.

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