

## Amendments Convention: Answering Those Not-So-Tough Questions

Are you a state lawmaker or reform advocate challenged to answer “tough questions” about a Convention for Proposing Amendments? If so, here are some answers.

Recently I traveled to Indianapolis to testify before the Indiana legislature. While there, I learned that opponents of an amendments convention are circulating questions about a convention, apparently designed to “stump” proponents.

Frankly, when I read what are supposed to be tough questions, I laughed out loud. All the questions are answered easily if you know the history and law applicable to such a convention.



The author of the questions obviously didn't. He introduced them with this statement: “No convention has been held since 1787, and after two hundred years that experience has little relevance.”

The statement is ridiculous. Americans have held hundreds, perhaps thousands, of conventions since 1787. They also have amended the Constitution 27 times, and state legislatures have submitted hundreds of applications for an Article V conventions. This and related experience is a valuable source of precedent. And the legal disputes that arose out of this activity comprise a valuable source of decided case law.

But if what the author meant is that no *interstate* convention has been held since 1787, then the statement is still ridiculous. First, it's not true: Interstate conventions were held at Hartford (1814), Nashville (1850), and, most notably, in Washington, D.C. (1861). We do not know much of what happened behind the scenes at Hartford, a small New England affair, but both the Nashville and Washington interstate conventions were large conclaves that followed Founding-Era convention rules, and the Washington Convention formally proposed a constitutional amendment. Both added to our experience.

Moreover, the Founding Generation's copious experience with both interstate and intrastate conventions has tremendous constitutional and practical relevance. This is because the language and powers bestowed by Article V carry meanings and incidental powers fixed by Founding-Era custom and law, particularly the law of agency.

[By the way, these are not the sheet's only inaccuracies---another is the old myth that the 1787 convention was a runaway.]

Anyway, here are the 11 questions the author poses, with answers to each. For further information, see my writings, linked on this website. You can supplement them with the leading book on Article V conventions, Russell Caplan's *Constitutional Brinkmanship* (Oxford University Press, 1988). Some of the book's conclusions and language have been superseded, but it remains a valuable antidote to claimed uncertainty.

1. How is the validity of applications from the states to be determined?
  - A. Initially by Congress, although congressional decisions are subject to judicial review.
2. How specific must the state legislatures be in asking for amendment?
  - A. The legislatures may apply either for an unrestricted convention or one devoted to particular subject matter. There is no rule as to specificity, other than that the legislatures may not dictate specific wording to the convention.

3. Must all the applications be in identical language?

A. No. It is enough if they identify the same problem(s) or subject-matter(s). However, prudence suggests that state legislatures coordinate with one another.

4. Within what time period must the required number of applications be received?

A. Since adoption of the 27th amendment, it is clear that there is no time period. Because, however, some are still claiming that applications can go “stale,” prudence suggests that a campaign be completed within a decade or so. (The application campaign for direct election of senators took 14 years.

5. Can Congress refuse to call a convention on demand of two-thirds of the states, and if it does, can it be compelled to act by the courts?

A. No, Congress may not refuse, and the courts can compel it to act.

6. Who are the delegates, and how are they to be chosen?

A. Delegates are representatives of their respective state legislatures, and are chosen as state law directs.

7. Can the convention act by a simple majority vote, or would a two-thirds majority be required, as in Congress, for proposing an amendment?

A. The convention acts by a simple majority of the represented states. The convention may, by a simple majority of the represented states, alter that voting rule.

8. How is a convention to be financed, and where does it meet?

A. A convention for proposing amendments is a conclave of state delegates. It therefore is financed by the states. Congress, in the convention call, specifies the initial meeting place. The convention may alter that meeting place.

9. May the convention propose more than one amendment?

A. Yes—but only if they are all within the agenda of the convention, as prescribed by the applying states.

10. Is there a time limit on the proceedings, or can the convention act as a continuing body?

A. There is no fixed time limit—the convention can meet until it decides whether to propose amendments and which ones to propose. But a convention is, by definition, not a continuing body. It has no authority beyond proposing amendments within the subject matter prescribed in the applications, and once that is performed, it must adjourn. Additionally, states may recall and/or replace their delegates at any time.

11. Can controversies between Congress and the convention over its powers be decided by the courts?

A. Controversies over the scope of the convention’s powers may be decided by the courts. However, the states, not Congress, fix the scope of such powers. The most likely area of controversy between Congress and the convention would be if the convention suggests an amendment that Congress believes is outside the convention’s agenda as fixed in the state applications. If (as is proper) Congress then refused to prescribe a “Mode of Ratification” for the suggested amendment, the courts could resolve the dispute.

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