Article V: Protecting the “General Liberty or Security of the People”

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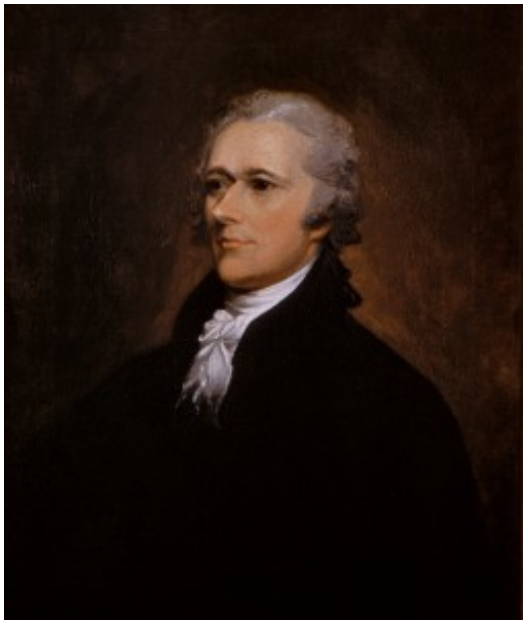
by Tara Ross

On or around this day in 1788, Alexander Hamilton was working on a paper that would defend the ability of STATES—not Congress—to begin the constitutional amendment process.[1] To date, this state-initiated process has never been used. Not even one time!

Perhaps a little background is in order.



Article V of the United States Constitution provides two methods by which it may be amended: The first option allows a supermajority of Congress to propose amendments to the states for their consideration. If 3/4 of the states ratify the proposal, then it is officially incorporated into the Constitution as an amendment.

We are used to this process, which has been successfully used 27 times. But there is another option, too.

The second option allows STATES to start the amendment process by submitting applications to Congress. If 2/3 of the states submit an application on a particular topic, then Congress MUST call a “Convention for proposing Amendments.” Any amendment proposed by the Convention becomes a part of our Constitution only when 3/4 of the states ratify the proposal.

This latter process has never been used, but many groups are lobbying their states to use it now. It is a process that scares some people. They fear that an Article V Convention will propose sweeping changes, destroying the unique nature of our Constitution. They fear a so-called “runaway convention.”

Such fears are understandable! But a study of our history and of the convention process itself reveals the many reasons that such an outcome is highly unlikely.

THE HISTORY OF CONVENTIONS

Perhaps the most important thing to remember is that the language in Article V was not adopted in a vacuum. The Founders lived in a time when conventions were commonly used for many purposes. When modern Americans think of the word “convention,” they most likely remember the Constitutional Convention—a big event that radically changed our world! By contrast, the Founders would have viewed conventions as a relatively common tool. Professor Robert Natelson counts at least 32 conventions that were used in the century before the Constitution was adopted.[2]

As Natelson recounts, the Founders thought of a convention as a “task force,” created to tackle and solve a particular problem.[3] The Founders’ language about conventions was very specific, but the definitions that they used have become muddled over time, leading to confusion and historically inaccurate

understandings of the Article V process. For instance, when the Founders said “general convention,” they meant a convention to which all states were invited. A “partial” convention would have been attended by only a subset of states. Finally, a “plenipotentiary” convention was one that was unlimited in scope; delegates could discuss any topic. Today, we tend to use the word “general” in place of the word “plenipotentiary,” which undermines our understanding of the process.[4]

Naturally, the scope of the convention could also be limited by the states. Different states might even give different grants of authority to their delegates. These delegates were expected to stick strictly to their instructions. People took this very seriously!

Consider what happened at the Mount Vernon Conference in 1785.[5] Maryland and Virginia sent delegates to meet and discuss certain navigation issues related to the Potomac River. Unfortunately, the instructions for the Virginia commissioners got lost. Thus, the Virginia delegates were in attendance, but they did not know how far their authority extended. They (erroneously) concluded that their authority extended as far as the Maryland commissioners’ authority. But it didn’t! One of these men, George Mason, later wrote that he would need to make amends for what the commissioners had done. Mason wrote Madison that he was heading to the state capital “to appologize for, & explain our Conduct.”[6]

In other words, he broke his commission, *purely by accident*, but still found the mistake to be embarrassing and horrible. He felt the need to make a trip to the capital to explain himself.

If delegates took their instructions so seriously, then what on earth happened at the Constitutional Convention in 1787? Wasn’t *that* a “runaway” convention in which the delegates pretty seriously overstepped the limits of their authority?

Well, actually, no.

True, the *Continental Congress* did not think that the delegates would propose a whole new form of government! Instead, Congress had asked the convention to meet for “the sole and express purpose *of revising the articles of Confederation* and reporting to Congress and the several legislatures such *alterations and provisions therein* as shall . . . render the federal Constitution *adequate to the exigencies of government and the preservation of the Union*.”[7]

Obviously, the delegates DID exceed what Congress expected of them, but this is only half the story. The other half? The states’ instructions to their delegates, by and large, gave them more latitude to act.[8] And they worked hard to respect the instructions that had been given to them! Early in the proceedings, for instance, George Read of Delaware asked that a certain line of discussion be postponed. He reminded the Convention that “the deputies from Delaware were restrained by their commission from assenting to any change of the rule of suffrage, and in case such a change should be fixed on, it might become their duty to retire from the Convention.”[9]

In short, the delegates would have felt bound by their states, not by Congress. The states were in charge.

CREATING ARTICLE V

The Constitutional Convention of 1787 met and wrote the language of Article V against this historical backdrop. Any provisions in the document that they wrote should be taken in this context.

The first proposal for a method of constitutional amendments came on May 29, when the so-called Virginia Plan was presented to the Convention. The language in that plan was not specific, but it proposed "that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."[10]

Imagine a world in which Congress was not involved in the amendment process at all! That's where the Convention delegates began their discussions.

Later, on August 6, the Committee of Detail presented a report in which the language of this section had been revised slightly: "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."[11]

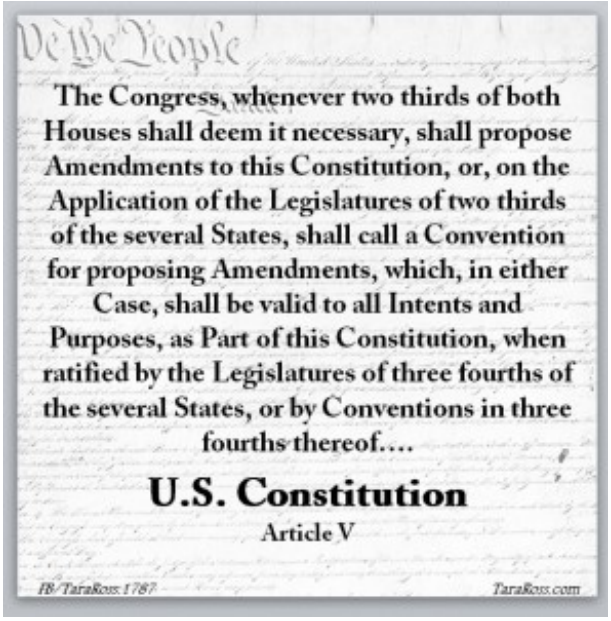
Now Congress was involved, but its role was still fairly logistical. It "shall" call a Convention when the states ask for one.

The language changed yet again on September 10, in response to concerns expressed by Elbridge Gerry and Alexander Hamilton. "State Legislatures will not apply for alterations but with a view to increase their own powers," Hamilton told the Convention.[12] "The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments."[13] He did not think there was too much danger in giving Congress power to propose amendments, "as the people would finally decide in the case."[14]

Thus, the language changed again! Now it provided that the "Legislature of the U— S— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution . . . ."[15]

There was just one small problem. Some delegates thought that the new wording gave Congress too much authority to preempt the states. Matters came to a head on September 15, when George Mason expressed his fear that the "plan of amending the Constitution [is] exceptionable & dangerous."[16] Both of the modes, as they then existed, depended upon Congress to act. He thought "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case."[17]

The language that was finally approved in our Constitution allows Congress to propose amendments on its own, but it also *requires* Congress to call for a convention if 2/3 of the states make application. Article V reads:



> *The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, 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 . . . .[18]*

Congress has no power to reject the states' application. It *must* call a convention. As Hamilton would later write, "[t]he words of this article are peremptory. The Congress '*shall* call a convention.' Nothing in this particular is left to the discretion of that body."[19]

Some opponents of the Article V Convention process have made note of the plural "amendments" in the constitutional text. They argue that states must call for a plenipotentiary convention or none at all. Such an interpretation does not make sense, when the debates in the Constitutional Convention are taken into consideration.

The delegates to the Convention were trying to give the states a way to defend themselves. Why would they then handicap the states by restricting what kinds of conventions they may or may not call?

As one *Harvard Journal of Law & Public Policy* article concludes:

> *[T]he purpose of the Convention Clause is to allow the States to circumvent a recalcitrant Congress. . . . The prospect of a [plenipotentiary] convention would raise the specter of drastic change and upheaval in our constitutional system. State legislatures would likely never apply for a convention in the face of such uncertainties about its results, especially in the face of a hostile national legislature. States are far more likely to be motivated to call a convention to address particular issues. If the States were unable to limit the scope of a convention, and therefore never applied for one, the purpose of the Convention Clause would be frustrated.[20]*

POSSIBLE CONTROLS FOR AN ARTICLE V CONVENTION

Because states are in charge of an Article V Convention, this leaves all sorts of possibilities for states to control the parameters of such a proceeding. Of course, the Convention will be only as good as the states' instructions.

States can appoint & limit their own delegates. If an Article V Convention were to be called, then *states* would control the proceedings. The U.S. Congress would have no input into the matter (even if it tried to

pretend otherwise). Thus, the states have the opportunity to insert many safeguards into the process. They can revoke their delegates' credentials if delegates go outside the scope of their authority. They can recall delegates. Indeed, in our world of social media and 24-hour news channels, state legislators will know within a matter of minutes (or seconds!) if delegates overstep their bounds.

States Can (and Should) Limit the Scope of the Convention. States can control the convention in another way: They have the exclusive authority for determining what topics can and can't be discussed at the Convention. But let's say that the Convention comes up with some crazy proposals anyway. The Convention's proposals are not worth the paper they are written on unless 3/4 of the states decide to ratify them. Such a supermajority of states is highly unlikely to ratify a bunch of crazy ideas or a wholesale rewriting of the Constitution!

Human nature! States will get help from an unexpected source: The delegates' own self-interest. Think of what a person could be giving up if he "goes rogue" and participates in a runaway convention. Such a person could be vilified and hated across the country. And, remember, more than one person has to be willing to throw his reputation away. Again, it seems unlikely that a whole convention full of people would be willing to publicly label themselves as dishonorable people who can't be trusted.

Of course, this isn't to say that Congress won't try to grab control. But the best solution to that problem is rather simple: education! The more educated we are, the better we can keep Congress properly restrained to its own sphere.

Surely the Founders would have expected voters to educate themselves. And they would have expected state legislatures to pay careful attention to the appointment of delegates—and equal attention to the quality of the delegates' commissions and instructions. They would not expect us to leave a constitutional tool unused simply because we need to learn more about it.

CLOSING THOUGHTS

In *Federalist Paper No. 85*, Alexander Hamilton argued that the Article V amendment process is a tool for states to use when the national government spins out of control. He concludes: "**We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."**[21]

The theme was common among Federalists! Tench Coxe wrote in the *Pennsylvania Gazette* that the states "can always procure a general convention for the purpose of amending the constitution" and that those amendments can be introduced into the Constitution "although the President, Senate and Federal House of Representatives, should be unanimously opposed to each and all of them. Congress therefore cannot hold any power, which three fourths of the states shall not approve."[22]

In other words, Hamilton and other Federalists envisioned states relying upon the Article V constitutional amendment process as a means of self-defense when the national government encroaches too far on "the general liberty or security of the people."[23]

Many people feel that we are there now. Yet still they resist using this provision in the Constitution. They fear that a provision intended to make a small change will instead make sweeping, permanent changes to the structure of the entire Constitution.

Perhaps it is worth remembering that the Convention, properly used, cannot make such sweeping, disastrous changes unless 38 states are ready to ratify them. And, if they will, perhaps our Republic is lost anyway.

ENDNOTES

[1]. The Federalist No. 85 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (1961).

[2]. Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments*," 65 Fla L. Rev. 615, 620 (2013).

[3]. I have relied heavily on Natelson's work in this subsection, and I highly recommend reading his *Florida Law Review* article for a more detailed discussion of founding-era conventions. *See generally id.*, *available at* http://www.floridalawreview.com/wp-content/uploads/5-Natelson.pdf.

[4]. *Id.* at 629-30 (discussing the definitions of various terms used in association with founding-era conventions).

[5]. My post summarizing the Mount Vernon Conference can be found here: http://on.fb.me/1HIXUN3.

[6]. U.S. Nat'l Archives & Records Admin., *Letter to James Madison from George Mason* (Aug. 9, 1785), Founders Online, http://founders.archives.gov/documents/Madison/01-08-02-0179.

[7]. The Federalist No. 40, at 244 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961).

[8]. *See* Natelson, *supra* note 2, at 674-80 (discussing the various states' instructions).

[9]. 1 The Records of the Federal Convention of 1787, at 37 (Max Farrand ed., 1937) (hereinafter Records of the Federal Convention).

[10]. *Id.* at 22.

[11]. 2 *id.* at 188.

[12]. *Id.* at 558.

[13]. *Id.*

[14]. *Id.*

[15]. *Id.* at 559.

[16]. *Id.* at 629.

[17]. *Id.*

[18]. U.S. Const. art. V.

[19]. The Federalist No. 85, at 525 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (1961).

[20]. Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 Harv. J.L. & Pub. Pol'y 1005, 1018 (2007).

[21]. The Federalist No. 85, at 525-26 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (1961).

[22]. Natelson, *supra* note 2, at 623-24 (quoting Tench Coxe, *A Friend of Society and Liberty*, Pa. Gazette, July 23, 1788, *reprinted in* 18 The Documentary History of the Ratification of the Constitution 277, 283–84 (Merrill Jensen, John P. Kaminski, & Gaspare J. Saladino eds., 1976–2012)).

[23]. The Federalist No. 85, at 525 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003)

(1961).