CONVENTION OF STATES

Congressional Research Service Reports to Congress on Article V

Since 2012, the Congressional Research Service ("CRS") has issued two reports for Congress on Article V of the Constitution. One of them explains the history of Article V, the Founding Fathers' motivations for including its two separate mechanisms for proposing constitutional amendments, and the procedures governing states' applications for an Article V Convention.[1] The other discusses the emergence of renewed interest in invoking Article V's Convention mechanism and the questions that are sometimes raised regarding the logistics and procedures for such a Convention.[2]

While both documents contain a wealth of historical data and a survey of scholarly opinions regarding Article V, it is important to bear in mind that they are, in fact, merely a collection of data and scholarship rather than a source of definitive answers to the questions presented. The CRS does not advocate any particular position on the use of Article V to call for a Convention to propose amendments.

The reports acknowledge a number of well-established facts about the operation of Article V's Convention mechanism, including:

- Congress is obligated to call a Convention for proposing amendments if 34 states apply;
- The Founders included this process as a way for the states to bypass Congress in getting needed amendments passed;
- The process is an alternative to federal deadlock;

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[1] Thomas J. Neale, CRS Report R42592, *The Article V Convention for Proposing Constitutional Amendments: Historical perspectives for Congress* (Oct. 22, 2012).
[2] Thomas J. Neale, CRS Report R42589, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress* (March 7, 2014).

- Congress has no authority to "veto" amendments proposed at an Article V Convention; and
- The President plays no role in the process.

The CRS also acknowledges that under the plain text of Article V, Congress' authority over the amendment process is limited to (1) proposing amendments of its own, (2) summoning a Convention, and (3) submitting Convention-proposed amendments to the states for ratification.[3] However, the author of these documents reports that Congress has "laid claim to" a number of other prerogatives as well, including tracking state applications, establishing procedures to summon a Convention, setting the timeframe for deliberations, determining the number of delegates and selection process for them, setting convention procedures, and arranging for transmission of the proposed amendments to the states.[4]

While most of these functions are merely components of Congress' explicit, ministerial duties under Article V, at least two of them—determining the number and selection method of delegates and establishing Convention rules—are *not* proper functions of Congress under Article V. Any attempt by Congress to assert such authority would raise significant constitutional concerns.

As Article V expert, author, and constitutional historian Robert Natelson explains, "[T]he Article V Convention is a creature *** of the state legislatures, not of Congress, nor of the people directly. Those legislatures, therefore, determine how delegates are allocated and selected."[5] Natelson explains how this conclusion follows from historical convention practice and points out that any scheme by which Congress prescribes delegate selection procedures would undercut the Founders' very purpose for including the Convention mechanism in Article V: to bypass Congress in achieving needed constitutional amendments.[6]

The power to adopt rules for its proceedings is vested in the Convention itself, according to Founding-Era custom and historical precedent.[7] It is not a matter over

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[3] Report R42589, *supra*, p. 4.
[4] *Id.*
[5] Robert G. Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Convention Process," 78 TENN. L. REV. 693, 740 (2011).
[6] *Id.*
[7] *Id.* (*citing Dyer v. Blair*, 390 F.Supp. 1291, 1307 (N.D. Ill. 1975) ("Article V identifies the body—either a legislature or a convention—which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself."). While *Dyer* addresses ratifying conventions, the same rule applies to a proposing convention.

which Congress exercises discretion.[8] The rules set by the Convention include the rule of suffrage, but the initial rule is "one state, one vote."[9]

So these two powers—the power to regulate delegate selection and apportionment and to adopt Convention rules—are *not* within the purview of Congress. And in fact, the CRS Report's assertion that Congress has "laid claim to" these prerogatives appears to be merely a recognition of the fact that certain Members of Congress have, at various times in the past, introduced legislation purporting to address these matters. Each of these efforts has failed, and none has been attempted since 1991.

[8] *Id.* *See also* Russell L. Caplan, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION, 119-20 (1988).
[9] *Id.*, at 741.