Approved 6-7-89
Date

MINUTES OF THE SENATE COMMITTEE ON WAYS AND MEANS.

The meeting was called to order by SENATOR AUGUST "GUS" BOGINA at
Chairperson

11:10 a.m./~~p~~m. on MARCH 21, 19~~8~~9 in room 123-S of the Capitol.

All members were present except:

All members present

Committee staff present:
Research Department: Diane Duffy, Kathy Porter, Ellen Piekalkiewicz. Paul West, Laura Howard
Revisor: Norman Furse
Committee Staff: Judy Bromich, Pam Parker

Conferees appearing before the committee:

INTRODUCTION OF BILLS

Senator Johnston moved, Senator Feleciano seconded, the introduction of bill draft 9 RS 1317, an act making and concerning appropriations for the fiscal years ending June 30, 1989, and June 30, 1990, to initiate and complete a capital improvement project for the Kansas correctional institution at Lansing; authorizing certain transfers; imposing certain restrictions and limitations, and directing or authorizing certain receipts and disbursements and acts incidental to the foregoing; amending section 5 of chapter 32 of the 1988 Session Laws of Kansas and repealing the existing section. The motion carried.

Senator Feleciano moved, Senator Gaines seconded, the introduction of bill draft 9 RS 1310, an act concerning imprest funds of the department of corrections. The motion carried.

Senator Johnston moved, Senator Gaines seconded, the introduction of bill draft 9 RS 1248, an act relating to sales and compensating taxes; increasing the levy thereof and providing for the distribution and use of the resultant increase in proceeds for the financing of highways and public schools. The motion carried.

HB 2027 - Appropriations for FY 1990, state public safety agencies, including youth centers

Senator Feleciano reviewed the FY 1990 and FY 1991 Subcommittee Reports for the Youth Center at Atchison. Senator Feleciano noted an area of concern he had was the need for roof repair on the school building. It was suggested that the concern for the roof at YCAT in need of repair which was discussed by Senator Allen and the roof repair at the school at YCAA be considered in the Omnibus bill.

Senator Feleciano moved, Senator Parrish seconded, to restore $25,332 from the State General Fund for Alcohol Unit Directors at the Youth Center at Beloit and recommend SRS fund Alcohol Unit Directors at the Youth Center at Atchison and the Youth Center at Topeka with federal funds.

Senator Kerr reviewed the Subcommittee Reports for FY 1989 and FY 1990 regarding the Corrections Ombudsman Board. Senator Parrish reviewed the FY 1989 and FY 1990 Subcommittee Reports concerning the Department of Civil Air Patrol and Emergency Medical Services. Senator Doyen reviewed the Subcommittee Report concerning Kansas Bureau of Investigation for FY 1989 and FY 1990. It was stated that the Joint Committee on State Building Construction had not had an opportunity to review the new lease and proposed new lease for, and addition to, the KBI facility at 1620 Tyler. David Johnson, Director, KBI, stated that the building has been reviewed by the

House subcommittee, the Department of Administration, and the RFP was submitted due to the fact their lease expires October 1, 1989. They have also received approval from the State Purchasing Officer for the proposed lease. Following discussion, Senator Winter moved, Senator Kerr seconded, to amend the Subcommittee Report by deleting the Senate Subcommittee recommendation number two, FY 1990, and request the Joint Committee on State Building Construction to review in detail the new lease for the KBI facility at 1620 Tyler and the proposed new addition to that facility and report on its finding during the Omnibus session. The motion carried.

HB 2064 - Appropriations for FY 1990, Kansas public employees retirement system, public disclosure commission, civil rights commission, corporation commission, department of administration and finance council

Senator Allen reviewed the FY 1989 and FY 1990 Subcommittee Reports concerning the Public Disclosure Commission. Senator Salisbury reviewed the FY 1989 and FY 1990 Subcommittee Reports regarding the Kansas Commission on Civil Rights. Senator Rock reviewed the FY 1989 and FY 1990 Subcommittee Report for the Kansas Corporation Commission. Additional information concerning the status of the Oil Overcharge Funds (Energy Grants Management Fund) was requested in addition to information on expenditure requirements.

Senator Gaines reviewed the FY 1989 and FY 1990 Subcommittee Report concerning the Kansas Public Employees Retirement System (KPERS). Senator Feleciano reviewed the Subcommittee Report for FY 1989 and FY 1990 regarding the Department of Administration. Senator Winter offered a motion which was seconded by Senator Gaines to amend the Subcommittee Report by reinserting $350,000 from the State General Fund for the Capitol Plaza area capital improvements which was deleted by the House Committee of the Whole.

Senator Salisbury offered a substitute motion, Senator Parrish seconded, to consider reinstating $350,000 subject to an update review of the plan by this Committee. Following discussion, Senator Salisbury and Senator Parrish withdrew the motion and second respectively.

The original motion lost on a tie of six to six with a show of hands.

Senator Allen reviewed the FY 1989 and FY 1990 Subcommittee Reports concerning the State Finance Council.

Senator Winter moved, Senator Johnston seconded, to reformat HB 2064 by dividing the appropriations into more than one item. The motion carried. Senator Winter moved, Senator Johnston seconded, to adopt the Subcommittee Report regarding HB 2064 as amended. The motion carried.

Senator Winter moved, Senator Johnston seconded, to reformat HB 2027 by dividing the appropriations into more than one item. The motion carried. Senator Winter moved, Senator Johnston seconded, to adopt the Subcommittee Report concerning HB 2027 as amended. The motion carried.

Senator Johnston moved, Senator Feleciano seconded, to report HB 2027 and HB 2064 favorably as amended. The motion carried on a bulk roll call vote.

Information relating to hearings held March 20, 1989 concerning SCR 1615 were distributed from the National Tax-limitation Committee. (Attachments 1 through 7) A letter to Senator Bogina dated March 21, 1989 from David E. Johnson, Director, Kansas Bureau of Investigation, was distributed. (Attachment 8)

The meeting was adjourned.

GUEST LIST

COMMITTEE: SENATE WAYS AND MEANS DATE: 3-21-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Marshall Crowther	Lawrence	KPERS
Jack Hawn	Topeka	KPERS
EMILY WEILMAN	TOPEKA	KCC
Eleanor Kerr	Pratt	
Joanne Ahrent	Lawrence	KCCR
Robert G. Lay	Hoyt	KCCR
Sherri Holliday	Topeka	Budget
Glenn Burnett	Topeka	Retirement
Bob McNeil	Topeka	Board of CYS
Louis Chabrier	Topeka	DOB
Sherry Brown	"	DoA
Doug Smith	Topeka	KBI
David Scott	Topeka	SRS/Youth Services
Mark Intermill	Topeka	KCOA
David Johnson	"	KPI
Judy Runnels	Topeka	Economic Lifelines
Anne Smith	Topeka	Hein & Ebert
WALT DARLING	TOPEKA	DIVISION OF BUDGET
Mary Ekstrup	"	"
Dave Pound	"	SRS
Larry Hinton	Topeka	SRS
C. Cantrell	Topeka	SRS
Kirby L. Stegman	Mayetta	Div of Bud

the national tax-limitation committee

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JUSTICE DEPARTMENT STUDY

OF

LIMITED CONSTITUTIONAL CONVENTIONS

{Summary}

Issued September 7, 1987

This study cites and reviews most of the major research, both pro and con, on the subject of a limited constitutional convention under Article V of the US Constitution. It is intellectually rigorous. It should be especially helpful to lawyers, teachers and others who wish to delve into the historical and legal logic of the issue. The study concluded:

> "... that Article V does permit a limited convention. This conclusion is premised on three arguments.
>
> First, Article V provides for an equality of the Congress and the states in the power to initiate constitutional change. Since the Congress may limit its attention to single issues ... the states also have [the same] ... Second, consensus about the need for constitutional change is a prerequisite ... [This] requirement is better met by the view that Article V permits limited constitutional conventions ... Third, history and the practice of both the states and the Congress show a common understanding that the Constitution can be amended issue by issue, regardless of the method by which the amendment process is initiated." (Emphasis added.)

Principal arguments of this study include:

1. The purpose of Article V was to give the Congress and the states equal power "to originate the amendment of errors," as James Madison wrote. The parallel state power would be destroyed by interpreting Article V to permit only general conventions.

[Continued over, please]

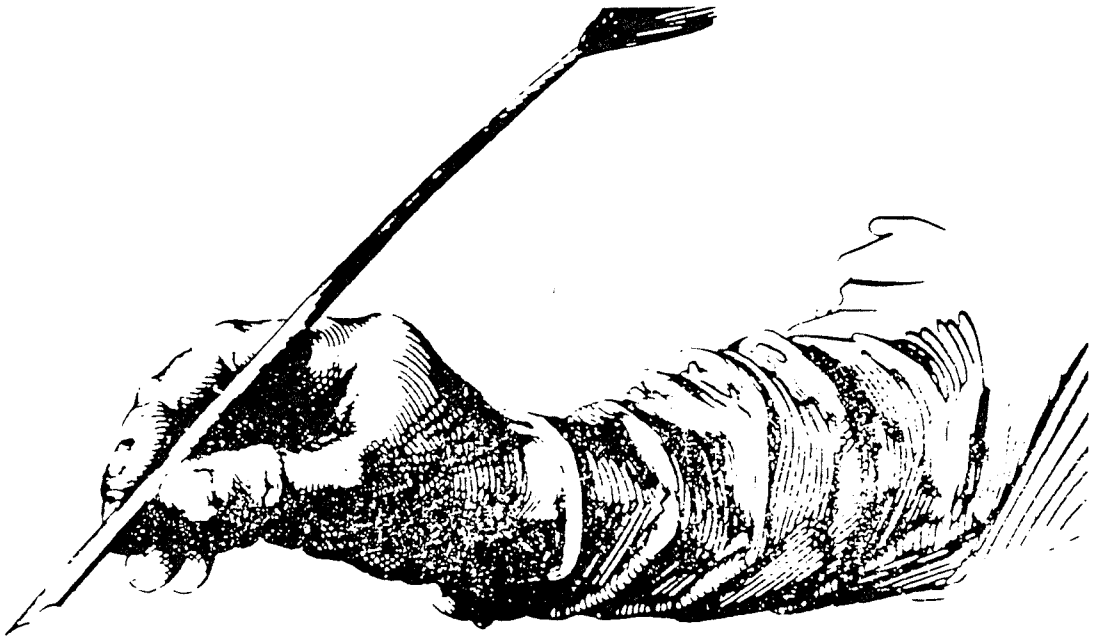
ATTACHMENT 1
SWAM 3-21-89

2. The Constitution contemplates a consensus in order to initiate, and to ratify, amendments to the Constitution. The Congress reaches a consensus when it proposes an amendment. The states reach a consensus when 34 agree on either a general convention or on a convention limited to a particular issue. At present, 39 states have issued calls for a convention, but the subjects vary from the balanced budget amendment, to prayer in the schools, to abortion. If, as the opponents claim, the states' subject matter limitations are irrelevant, then 39 is enough to trigger a convention immediately. No one is claiming that a convention must be held now on that basis.

3. Supreme Court precedents recognize that Congress has certain powers in shaping the amendment process. Either by a new Supreme Court case, or by a convention procedures bill passed by Congress and allowing accelerated judicial review, the power of (indeed, the necessity for) Congress to obey the limitations in state calls could be established for all time by the Court. Precedents suggest that this would be the outcome.

Those who claim there can never be a limited convention are badly twisting both history and logic to reach their answers. If successful, they would make the states' powers under Article V a dead letter.

{Complete copy of study available upon request. Please call John Davis, 202/547-4196.}



AMENDMENT OF THE CONSTITUTION

BY THE CONVENTION METHOD UNDER ARTICLE V

EXCERPTS FROM THE
AMERICAN BAR ASSOCIATION SPECIAL CONSTITUTIONAL
CONVENTION STUDY COMMITTEE'S TWO-YEAR STUDY
OF THE CONSTITUTIONAL CONVENTION.

IT IS PERHAPS THE MOST COMPREHENSIVE STUDY
EVER DONE ON THIS ISSUE.

ATTACHMENT 2
SWAM 3-21-89

AMERICAN BAR ASSOCIATION

SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE

LIMITABILITY

"There is the view, with which we disagree, that an Article V convention would be a sovereign assemblage and could not be restricted by either the state legislatures or the Congress in its authority or proposals. And there is the view, with which we agree, that Congress has the power to establish procedures which would limit a convention's authority to a specific subject matter where the legislatures of two-thirds of the states seek a convention limited to that subject." [P. 11]

"We are led to conclude that there is no justification for the view that Article V sanctions only general conventions. Such an interpretation would relegate the alternative method to an 'unequal' method of initiating amendments. Even if the state legislatures overwhelmingly felt that there was a necessity for limited change in the Constitution, they would be discouraged from calling for a convention if that convention would automatically have the power to propose a complete revision of the Constitution." [P. 16]

"Since Article V specifically and exclusively vests the state legislatures with the authority to apply for a convention, we can perceive no sound reason as to why they cannot invoke limitations in exercising that authority." [P. 16]

"In summary, we believe that a substantively-limited Article V convention is consistent with the purpose of the alternative method since the states and people would have a complete vehicle other than the Congress for remedying specific abuses of power by the national government; consistent with the actual history of the amendment article throughout which only amendments on single subjects have been proposed by Congress; consistent with state practice under which limited conventions have been held under constitutional provisions not expressly sanctioning a substantively-limited convention; and consistent with democratic principles because convention delegates would be chosen by the people in an election in which the subject matter to be dealt with would be known and the issues identified, thereby enabling the electorate to exercise an informed judgment in the choice of delegates." [P. 17]

CONGRESS AND THE SUPREME COURT

"It is our conclusion that Congress has the power to establish procedures governing the calling of a national constitutional convention limited to the subject matter on which the legislatures of two-thirds of the states request a convention." [P. 9]

"Article V gives Congress the power to select the method of ratification and the Supreme Court has made clear that this power carries with it the power to adopt reasonable regulations with respect to the ratification process." [P. 38]

"The Committee believes that judicial review of decisions made under Article V is desirable and feasible." [P. 20]

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE

Stanford, California 94305-6010

February 9, 1988

The Honorable J. R. Gray
Kentucky House of Representatives
State Capitol, Room 21
Frankfort, Kentucky 40601

Dear Mr. Gray:

I write to urge members of the Kentucky Legislature to approve a resolution calling for a constitutional convention to propose a balanced-budget/spending-limitation amendment to the U.S. Constitution.

There is widespread agreement that the federal budget process is in a shambles. There is no fiscal discipline. The President has been unable to control the budget process. The voters have had no greater success by electing the "right" people to Congress. Despite repeated polls showing that a large majority of the public favors a balanced budget achieved by cutting spending and opposes higher taxes, spending keeps rising, deficits stay at unprecedented levels, and many congressional leaders press for higher taxes.

The only alternative that remains is a constitutional amendment imposing fiscal discipline. By slowing spending and cutting deficits, such an amendment would have a major effect in strengthening the foundations of the economy; would foster continued economic growth without the albatross of rising federal spending and a rising debt; and would enable the individual citizen to have a greater say in how his income is spent. Yet, without external pressure, Congress is unlikely to enact an amendment that its members view as reducing their own power.

That is why state calls for a convention are so important. They are the only effective mechanism for inducing Congress to enact a balanced-budget/spending-limitation amendment. Thirty-two out of the requisite 34 states have already acted. A thirty-third state may well be decisive in getting Congress to act, as a thirty-fourth surely would be, since Congress would not want to lose its place in the headlines to a convention.

Some opponents of a call for a convention express fear that a runaway convention might do terrible things. This is absurd. First, a convention is unlikely to be held. Second, if it is, it would be more responsible than the sitting constitutional convention composed of the Congress. Third, any amendment proposed by the convention would have to be approved by three-quarters of the states to be adopted--no mean hurdle for irresponsible amendments.

All in all, Kentucky can perform a major service to itself and the rest of the nation by becoming the thirty-third state to call for a convention.

Sincerely yours,

Milton Friedman
Senior Research Fellow

F:v
Blind copy to Lewis K. Uhler

ATTACHMENT 3
SWAM 3-21-89

QUESTIONS AND ANSWERS ABOUT A BALANCED FEDERAL BUDGET AMENDMENT

Q. What is the national budget deficit?

A. The national budget deficit is the difference between the amount of money the federal government receives in revenue and the amount of money Congress spends. Budget deficits have soared over the past 10 years. The budget deficit grew from $54 billion in 1977 to over $220 billion in 1986.

Q. What is the National Debt?

A. The National Debt is the debt of the federal government. It is the accumulation of continual budget deficits. While the budget deficits continue year after year so does the growth of the national debt. The debt is now $2.4 trillion ($2,400,000,000,000).

Q. How much is the interest on the National Debt?

A. This year the interest payment on the debt will total $205 billion. That's about 20% of the budget. It's more than the budget back in 1970 to run the entire federal government!

Q. What do large national deficits mean to future generations?

A. The $2.4 trillion national debt will cost each 1988 high school graduate $70,000 to $100,000 in taxes over their working lifetime. And that's just to pay the interest! The 1986 budget deficit of $220 billion could cost each high school graduate an additional $7,500 in taxes for interest only over their working lifetime.

Q. Why do we need a Federal Balanced Budget Amendment?

A. Congress and the president have demonstrated that they are unable to balance the Federal Budget on their own. We need new checks and balances to prevent the Congress and the president from bankrupting our country. We need to stop the federal government from spending too much money on wasteful and unneeded programs. The budget has been balanced just once in the last 27 years. They desperately need our help.

Q. How would a Balanced Budget help the economy?

A. Deficits cause high interest rates. A balanced budget would lower these rates significantly -- making it cheaper for families to purchase homes, cars, and other durable goods. The government's demand for loans crowds out private investors such as homebuyers. More money available for investment in the private sector would help the economy grow. A balanced budget would also help prevent inflation.

Q. How can we get a Federal Balanced Budget Amendment?

A. 34 state legislatures must send a balanced budget amendment resolution to Congress. The resolution asks Congress to adopt an amendment to balance the budget or convene a limited constitutional convention to propose the amendment. Currently 32 state legislatures have passed a call for a limited constitutional convention for the purpose of drafting a balanced budget amendment. After Congress or a convention proposes the amendment 38 states must ratify the proposal before it becomes law.

Q. Could a Constitutional Convention be limited?

A. Yes. The American Bar Association says "Congress has the power to establish procedures limiting a convention to the subject matter which is stated in the applications received from the state legislatures."

Here's what former U.S. Senator and Constitutional law scholar Sam Ervin said: "I think the fear of a runaway convention is just a nonexistent constitutional ghost conjured up by people who are opposed to balancing the budget, because they want to be able to promise special groups something for nothing out of an empty pocket."

ATTACHMENT 4
SWAM 3-21-89

Many who oppose a constitutional amendment for a balanced federal budget fear a "runaway" constitutional convention.

What the opponents seldom say, however, is that most imparxperts see nothing to fear from a convention. A two-year mission of the American Bar Association, which included the Dean of the Harvard Law School and other leading experts, unanimously concluded that a convention could be limited.

There Are Eight Checks on a Constitutional Convention.

The eight checks on a limited constitutional convention would ensure that it stays on the balanced budget amendment topic.

1. Congress could avoid the convention by acting itself.

If 34 states called for a constitutional convention on the balanced budget amendment, the Congress would have the option of proposing such an amendment itself. The odds are overwhelming that the Congress would prefer to do so. Why? Because the Congress would rather live with an amendment which its members drew up themselves than one which was drafted by others. Furthermore, if a convention were successfully held, it would weaken the powers of the Congress. This is something which few of the members of Congress want. They also do not want to see convention delegates elected from their home districts—delegates who might later decide to challenge the congressmen for reelection.

2. Congress establishes the convention procedures.

Any confusion about how a convention would operate would be the fault of Congress. Congress has the power to determine exactly under what conditions the delegates would be chosen, when the election of delegates would be held, where they would meet, and how they would be paid. Congress can and will limit the agenda of the convention. All 32 state convention calls on the balanced budget issue are limited to that topic and no other.

3. The delegates would have both a moral and legal obligation to stay on the topic.

There is a long history in the United States of individuals limiting their actions to the job for which they were chosen. Members of the Electoral College could, if they wished, elect anyone to be the President of the United States, even someone who was not a candidate and had received no popular votes. Yet this has never happened. There have been 19,180 electors since 1798 and only seven have voted for a candidate other than the one for whom they were elected. The odds against delegates to a convention behaving differently would be astronomical.

Also, legislation unanimously approved by the Senate Judiciary Committee in 1984 would enforce this limit by requiring that each delegate swear to an oath to limit the convention to the topic for which it was called. Similar legislation has been passed by the Senate twice on unanimous votes.

4. Voters themselves would demand that a convention be limited.

Many groups say they oppose an unlimited constitutional convention. So do advocates of the balanced budget amendment. If this is the majority opinion, as it seems to be, it is reasonable to expect that delegates elected to a convention would reflect that view. Certainly if a convention were to be held, every candidate would be asked whether he favored limiting the convention to the subject of the call. Even if the voters in some areas did favor an open convention, or some candidates lied and were elected, it is still improbable that a majority of delegates would be elected who favored opening the convention to another issue when the majority of voters do not.

5. Even if delegates did favor opening the convention to another issue, it is unlikely that they would all favor opening it to the same issue.

Opponents of the constitutional convention call on the balanced budget amendment have listed dozens of issues which they allege might be brought up at a constitutional convention. There have been allegations that the Bill of Rights would be tampered with, that amendments would be inserted banning abortion, or doing other things which polls show a majority of citizens oppose. Yet those who raise these fears have never offered any analysis of from where support for such propositions would come. Consequently, even if it were true that some delegates to a convention would favor reviving the ERA, and others might favor banning abortion, that does not mean that either group would be likely to control a convention. The odds are against it.

6. Congress would have the power to refuse to send a nonconforming amendment to ratification.

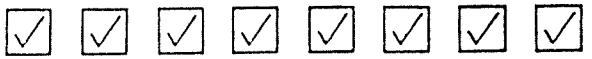
As the American Bar Association indicated in its study of the amendment by the convention mode, the Congress has yet another way of preventing a runaway amendment. It could simply refuse to send such an amendment to the states for ratification.

7. Proposals which stray beyond the convention call would be subject to court challenge.

Leaders in legislatures which have petitioned for a constitutional convention on the balanced budget issue have indicated that they would institute court challenges to any proposal which went beyond their original call. According to the American Bar Association, such challenges are possible to convention-proposed amendments, but not to those which originate in the Congress. There is an excellent chance that the Supreme Court would prohibit a stray amendment from being sent to the states for ratification.

8. Thirty-eight states must ratify.

The final and greatest check against a "runaway" convention is the fact that nothing a convention would propose could become part of the Constitution until it was ratified by 38 states. It is by no means easy to obtain 38 states to ratify any controversial proposition. The fate of the ERA and the proposed amendment granting voting representation in Congress for the District of Columbia proves this point. If there are even 13 state legislatures in the country that are not convinced that any amendment proposed by a convention represents an improvement in our Constitution, that amendment would not be ratified. It would mean nothing.



One Hundred Million To One

The odds against many of these events are remote. Even if you assume the odds of all eight of these possibilities are 50-50, the chance that all eight could happen and produce a runaway convention are only four in a thousand. But the odds against many of these events are remote. Even if you assume average odds of just 10-1, the chance of a runaway convention would fall to one in one hundred million.

However you calculate the odds, the danger of a convention "running away" is slight. Much less remote is the danger to our country of continued, runaway deficit spending. Staggering deficits stretch out on the horizon as far as the eye can see. Deficits which mean high interest rates. More high inflation. Or both. We would be fools if we attempted to prove that America would be the exception to the rule that protracted financial turmoil weakens and eventually destroys free institutions. The best way to preserve our constitutional order which we all cherish is a constitutional amendment to bring runaway federal deficits under control.

the national tax-limitation committee

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ARTICLE V STATE RESOLUTIONS

QUESTIONS & ANSWERS

By Lewis K. Uhler, President

INDEX

ATTACHMENT 5
SWAM 3-21-89

INTRODUCTION

It might seem odd that the quest for a federal amendment to limit taxes and balance the budget would be fought not only on Capitol Hill in Washington but in state capitols, as well. Why is that being done?

When the Founding Fathers met in Philadelphia to shape the U.S. Constitution, they determined first that one of the fundamental flaws of the Articles of Confederation was that it required unanimity to amend the Articles. Recognizing that the people would want to correct the document from time to time, the Founders knew that they must provide for an amendatory process that was at once difficult, but not impossible. They wanted to assure the opportunity for amendment when the consensus for a particular change was SUBSTANTIAL. They were equally determined that the amendment process not be so rigid that change would be a practical impossibility. That was the central defect of the Articles of Confederation. Hence, they decided that approval or ratification of amendments would require only a three-fourths, rather than unanimous, vote of the states.

In addition to easing the ratification rule, the Founders decided to provide two routes by which amendments could be proposed: (1) by a two-thirds vote of each body of Congress; and (2) by the states through a convention convened (by Congress) upon application of two-thirds of the states. Realizing that there might be some corrections of the Constitution which sitting members of the U.S. Congress would resist, the framers provided co-equal authority to the states to force change through the medium of a convention. Jefferson anticipated that the convention method would be used with some frequency and considered the convention a very important "safety valve" to protect the people from an abusive federal government.

Although we've not had a constitutional convention pursuant to Article V, the fact that the procedure exists tends to keep Congress more honest and responsive. For example, early in this century - after years of Senate resistance to the direct election of U.S. Senators - states began to adopt resolutions calling on Congress to pass such an amendment or to convene a constitutional convention for the purpose of framing such an amendment. When the number of state resolutions was just one shy of the required two-thirds, the Senate finally capitulated, approved an amendment and sent it to the states for ratification. The Senators recognized that unless they designed the amendment themselves, a convention might not "grandfather" them in for the balance of their terms.

ISSUES

Among the issues often raised are questions about Article V of the U.S. Constitution and its implications. To address these and other issues, I have selected a question-and-answer format:

Q. Opponents contend that there is no way to limit a convention; that the only kind of a constitutional convention which may be convened under Article V is an open convention that may consider all parts of the Constitution.

A. This claim is without foundation in terms of authority, historical precedent, common sense and political reality. The Founding Fathers intended to provide two co-equal methods by which amendments to the U.S. Constitution might be proposed. One was through Congress, and the other through the states. We know that Congress can and has proposed single, discreet amendments without opening up the entire Constitution to consideration of revisions. (Remember, whenever it is in session, Congress is a constitutional convention, since at any time that two-thirds of its members want an amendment, they can propose it.)

To be on an equal footing with Congress, the states must have the same discreet amendment authority. Furthermore, Article V refers specifically to the application of the various states as being the triggering device leading to the convening of a convention: "... on the application of the legislatures of two-thirds of the several states, shall call a convention ..." The resolutions themselves are the very "foundation" upon which a convention would be constructed. If those resolutions say, as they do in this instance, that the states want a convention for the "sole, limited and exclusive purpose of proposing a balanced budget amendment," the states are triggering a limited, not a general, convention. This is not to say that the states could not call for a general convention, but they would have to do so pursuant to a convention call which explicitly states that objective.

It is clear that the Founders intended that the power to correct perceived errors be equal as between the federal government and the states. In the Federalist Paper #43, Madison states: "It [the power to amend the Constitution], moreover, equally enables the general and the state governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."

Note that the key is "equally." The state route to constitutional change is a backstop, allowing the people to obtain amendments when Congress will not act. But historically, the state power that has been held in reserve fully matches the congressional power normally used.

Congress could rewrite the Constitution wholesale and submit it for ratification. So could a general convention called by the states. Congress could submit one or more discreet amendments. So can a limited convention called by the states.

There is a significant difference between a general convention and a limited one. Those who fear a balanced budget amendment deliberately confuse the two types of conventions. But anyone who approaches the subject with an open mind can see the difference and recognize its importance, as described below.

Q. But what about the fact that Article V speaks of a convention to propose amendments (in the plural). Doesn't that support the idea that only an open convention is within the power of the states to call?

A. Note that the first portion of Article V speaks of amendments (in the plural), also. "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution ..." Certainly no one would suggest that Congress may consider only multiple amendments at one time and not a single amendment. The use of the plural form was meant to accommodate multiple amendments, not command them. The use of the plural form with reference to a constitutional convention serves only to conform and make consistent the draftsmanship and to allow a convention to consider more than one amendment should that be the expressed desire of the states in their applications.

Alexander Hamilton's Federalist #85 sought to contrast the approval of the entire Constitution with the subsequent process of amending it after its adoption. He said, "But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly."

Q. Madison, who is believed by many to be the principal architect of the Constitution, is quoted as saying he would be fearful of any other constitutional convention. Did Madison really say that and feel that way?

A. Resorting to Madison's comments in this way is, at best, misleading, at worst, deceitful. He is quoted as saying the following: "It seems scarcely to be presumed that the deliberations of a new constitutional convention could be conducted in harmony or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first convention, which assembled under every propitious circumstance, I should tremble for the results of a second."

The easiest way to misquote anyone is to use a correct quotation but deliberately ignore the context in which it was

made. Madison made this statement, but he did so in direct reply to the anti-federalists who asked that the results of the Philadelphia convention be abandoned and a new convention be called. When a legislator moves to "recommit" a bill (to the committee from which it came), he often claims it is merely to "clean up" the bill or make improvements in it, but most often it is to kill the bill. So it was with the recommendation for a new convention, or "recommittal" of the Constitution. The proponents of that procedure knew it would kill the Constitution.

By quoting Madison out of context, the opponents of the balanced budget amendment make it appear that never again did he want the people to use their power to hold a convention. He did not say that; he did not mean that. Madison approved of the convention process as a means of amending the Constitution. He was speaking only about the proposal to abandon the <u>original</u> Constitution in favor of a new convention.

Q. How can you stop a convention from having a broad scope, since the first convention was itself a "runaway"? It was only supposed to revise the Articles of Confederation.

A. The first convention was not a "runaway" convention. Following the Annapolis convention of 1786, and pursuant to its recommendations, Congress convened another convention, resolving that such a convention appeared "to be the most probable means of establishing in these states a firm national government," and that a convention should be held "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, when agreed to in Congress and confirmed by the states, <u>render the federal constitution adequate to the exigencies of government and the preservation of the Union."</u>

The mandate to the convention was essentially wide open, as Madison himself argues forcefully and cogently in the Federalist #40. Furthermore, the convention reported its work back to Congress, which, in turn, submitted it to the states for ratification. Very clearly, the constitutional convention was convened purposely and explicitly as an "open convention," and it responded to that commission. Nevertheless, it did not presume to act independently of the body which commissioned it: the Congress. Rather, it urged Congress to make its handiwork the law of the land only following submission to and approval by three-fourths of the states.

Congress was at liberty to accept or reject the convention's recommendations in terms of both the substance of the changes and the procedure for their approval. Hence, it is safe to say that the Founding Fathers themselves did not feel that they were somehow "above" or unrestrained by their convening

authority. Those who doubt this have not read George Washington's transmittal letter, nor the debate in the convention that led to that letter. There is simply no historical precedent whatever to suggest that a convention would seek to ignore its commission, run roughshod over its convening authority and arrogate unto itself the scope and authority beyond that possessed even by its creator.

There is a sound, clear historical reason for not calling the Philadelphia convention a "runaway." The records of that convention reveal that the delegates were well aware that the Articles of Confederation could not be amended by anything but unanimous consent of the states (that provision is found in Article XIII of the Confederation).

The delegates, therefore, decided after July 1787 that they would not even attempt to amend the Articles of Confederation. Instead, they wrote a new document in full recognition that if it were accepted, it would only apply "among the States so ratifying the same." Any states not ratifying would still be under the Articles of Confederation. And if too few states ratified, all of them would remain subject to the Articles of Confederation.

Remember, when the Constitution was written, it was possible for states to leave the Union of their own accord, whenever they chose to do so. It took the Civil War, almost a hundred years later, to settle the point that once a state joined the United States, it could not later withdraw for any reason. The most authoritative study on the subject - done by the American Bar Association - concluded that a convention may be limited. Also, there have been over 200 constitutional conventions at the state level. Some state constitutions require conventions on a periodic basis. Delegates take their responsibilities seriously.

Opponents of the convention process have adopted a "Frankenstein-Monster" theory of constitutional conventions. Their fears are simply not supported by history, common sense or political reality. The specter of a runaway convention might make good science fiction copy and might feed some conspiratorial hankering, but where would a convention go with its work product if it "ran away?" Would it seek to ignore Congress and send its handiwork directly to the states for ratification? What state legislature is going to entertain seriously the ratification of some wild and woolly set of amendments that arrive in its chambers outside of the constitutionally-prescribed procedures? I believe that to state the proposition is to demonstrate its absurdity.

Those who are preoccupied with a "runaway convention" conveniently ignore the fact that the work product of a

convention must be ratified by the legislatures of 38 states before it becomes law. So the "runaway convention" argument is very misleading. The dire results predicted by the purveyors of doom could not come from a "runaway convention" but from "runaway ratification" - a total failure of the entire amendatory system or process. I'm sure Jimmy the Greek could not begin to calculate how remote such odds might be.

Constitutional authority John C. Armor has summarized the process thus:

"The sequence of events necessary for a 'runaway' Convention to occur, and for its rogue proposals to become law as part of the Constitution, require a long series of obvious failures by various parts of the governments of the United States. Critics on this point do not discuss these steps, because listing them makes the weakness of their argument apparent. Here are the necessary failures, in the necessary order, for a 'runaway' Convention to occur, and to have its proposals adopted as part of the Constitution:

1. Congress fails to act on the proposed amendment.

2. Congress calls for a Convention, but fails to limit its subject matter.

3. Any state, or possibly any individual, who feels that the Convention can and should be bound to limit, brings a legal challenge and the Supreme Court either fails to act, or rules that the Convention is unlimited.

4. The Convention actually passes proposed amendments that are beyond its subject matter.

5. Congress submits the excessive amendments for ratification.

6. Another Supreme Court challenge is brought and lost by a dissatisfied state or individual.

7. Three-fourths of the states, by either their legislatures or special conventions, as Congress has required, ratify the excessive amendments.

8. Another Supreme Court challenge is brought and lost by a dissatisfied state or individual.

"In short, for a new Convention to constitute a 'runaway,' and for those results to become effective parts of the Constitution, the following American political institutions have to fail their duties not once but repeatedly: both Houses of Congress, the Supreme Court, and the legislatures of three-fourths of the United States. The only group of political

institutions which would not have to fail would be the Presidency and the governors of the various states, since these people are not part of the amendment or ratification processes.

"The question of whether it is theoretically possible for all of these failures to occur must be answered yes. But the question of whether it is likely, or even remotely possible, has a different answer. It is a firm no." (The Right of Peaceful Change: Article V of the Constitution, pp. 27, 28)

Q. There are those who claim that once 34 states petition Congress for a convention, Congress is obliged to convene it. Convening it is mandatory. There is no discretion, even though many of the resolutions expressly give Congress itself time to act on the amendment, and only if Congress fails to act do those resolutions call for a convention. How do you respond to this?

A. If a convention were automatically triggered by 34 resolutions, Congress long since would have had to convene a convention. Why? Because at the present moment there are pending before Congress applications from 39 separate states calling for a constitutional convention. It just happens that only 32 of those applications are on the same subject - the balanced budget amendment. I believe the current situation demonstrates three important points:

* First, the convention resolution process is not just a numbers game. You don't just count to 34. You must look at the resolutions and see what they say. To trigger the process, the applications must focus on the same issue or issue area. No one I know, even those who would love to see a wide open convention, have demanded that Congress convene a convention. This can mean only one thing: the subject matter of the resolutions does count.

What the states want, and how they frame their resolutions, is what triggers the process. The only thing Congress is "obliged" to do is to receive, peruse and be guided by the directives of the state resolutions. It is only the coincidence of 34 resolutions which refer to the same subject matter, the same timing and procedures that initiates the convention process.

* Second, those who profess fear that a convention might "run away" are caught in a very uncomfortable contradiction. They certainly must acknowledge that Congress is under no duty to convene a convention until 34 resolutions on the same subject have been received. But once that threshold has been achieved, they contend, Congress can no longer be guided by those applications and is obligated to convene a convention that is entirely absent any guidelines as to subject matter or, for that matter, any rules as to its conduct, etc. While the

Constitution is silent as to the details of a convention, it is very clear as to who has the responsibility to convene it and, therefore, to shape it - Congress. Congress, which has absolutely no institutional interest in convening a convention, let alone an open convention, will look to the resolutions and seek to make the scope of such a convention as narrow as possible.

The question of state calls for a constitutional convention goes to the heart of the difference between a general convention and a limited one. Clearly, the states have the power, if they so choose, to call for a general convention. It would be unlimited in subject matter and could do all that the Philadelphia convention did. Those who oppose the balanced budget amendment concede that the states can call for a general convention.

A limited convention, on the other hand, would be restricted to a certain subject. If, for instance, 34 states should decide that it was a good idea to reinstitute prohibition in the United States, they could call for a convention limited to the reconsideration of the 21st Amendment. But, what if 20 states called for that, and 20 others called for a convention to reconsider the 19th Amendment, because they didn't like the idea that women are able to vote? Can all those state calls be added together so as to require a convention?

The answer is absolutely not, and there are two ways to demonstrate it:

(1) In calling for a constitutional convention, the states are exercising a power explicitly granted to them by the Constitution. In so doing, the states are as much bound to obey the Constitution as are the President, the Congress, the Supreme Court, the Armed Forces, etc. They can only do what the Constitution allows them to do.

The power to call a convention is like the power to withdraw funds from a bank account. The depositor may withdraw all his money, or only part of it. A total withdrawal is the use of the total power, a general convention. But, if the states choose to make a "partial withdrawal", nothing occurs unless 34 of them agree on the amount of that withdrawal, i.e., the subject matter for a convention.

(2) In its proposed Constitutional Convention Procedures Bill, the Senate has explicitly recognized the power of the states to call for a limited convention. This Bill specifies that Congress first determine (as provided in Article V) that 34 states have requested a convention on a particular subject. Congress would call the convention, limiting the delegates to the subject found in at least 34 state calls.

"The idea that the Congress, which does not want any amendments other than its own, would deliberately choose a process that was totally open, is theoretically possible, but politically frivolous." (The Right of Peaceful Change: Article V of the Constitution, p. 24)

* Lastly, in reviewing the balanced budget amendment resolutions, Congress will find in many of them an explicit grant of time (either specified or reasonable) following receipt by Congress of the 34 resolutions during which Congress may itself act on an amendment and obviate the need for a convention. If there were only one such "time capsule" resolution, it would have the effect of delaying the entire process, because there would not be 34 resolutions before Congress calling on it - now - to convene a convention. Once again, since the state resolutions are the engine that drives the convention process, the timing specified in those resolutions controls when Congress must act. And you can be sure Congress will not act before it must.

Q. Some people believe that in seeking a constitutional convention we are playing directly into the hands of a sinister, conspiratorial group, waiting in the wings for a constitutional convention. They plan to take charge of such a convention and use it to make massive, fundamental changes in the structure of the U.S. Government, converting our Nation into a European parliamentary-style government.

A. These claims certainly bring the conspiracy theory behind a constitutional convention effort to new heights. If such a sinister plot existed, and if the people involved possessed the behind-the-scenes political clout suggested, they would long since have persuaded enough liberal state legislatures to approve the balanced federal budget state resolutions and would have manipulated the leadership of Congress to call an open convention with them in control.

From having been involved in the internal political combat in the legislatures of several states regarding the balanced federal budget resolution, I can assure you that the liberal forces are pulling all the stops in their efforts to prevent us from being successful. Now, either these liberal forces are unaware of the grand design for a formal reshaping of the government of the United States through a constitutional convention, or they don't believe it can happen. If this conspiracy were so well organized, deep rooted and politically powerful, certainly its leaders could have arranged a last-minute switch of votes in our favor, allowing us to win in several more states so they could get on with their program to subvert a constitutional convention. From the results to date, it seems like a pretty ineffective conspiracy.

One of the many ways in which Washington, D.C., is not typical of the entire Nation nor of its citizens in general is the existence in the Capitol of an incredible variety of very small, very weak and very strange special interest groups. They all have letterheads; they all have offices; they all have conferences from time to time.

There are even groups in Washington who think that the United States should change its government to a constitutional monarchy. If one worries about strange proposals floating around Washington, one can waste a lifetime chasing ghosts. The key question is, which trees in this forest of odd ideas have anything remotely approaching the kind of support that history has demonstrated is necessary to amend the Constitution?

The latest experience with amendments that failed are the Equal Rights Amendment and the D.C. Representation Amendment. The latter failed so miserably that the press has not gotten around to reporting it in full. The former failed narrowly, but its history is very instructive.

Depending on the polls you consult, the E.R.A. had the support of upwards of 100 million Americans. Yet, it missed by several states from obtaining ratification. Something more than the support of 100 million Americans will be necessary to change the United States into a "parliamentary democracy." Those who advance the conspiracy theory can easily point to a few misguided eggheads and would-be scholars who favor the idea. They do have offices, and they have published a few papers.

But, this is the critical question: Where are the 100+ million supporters of this idea? Where are even a million? Even 100,000? The fact is, there aren't enough Americans who are dumb enough to favor such an idea to make even a tiny blip in the most biased public opinion poll.

Conspiracies without followers are like generals without troops. Even if they exist, they are irrelevant. At most, they are curiosities like the more exotic animals found in a zoo.

Q. If we succeed in getting resolutions from 34 states or maybe more, what would you expect Congress to do?

A. Initially, I suspect that some congressional leaders might try to "stonewall" the process by claiming that some of the resolutions are out of date, insufficiently precise, etc., trying to make a case that there are not the necessary 34 valid applications. This would be a technical, legal response which might buy a little time. But in my judgment, political considerations and realities would soon dominate the action, giving the upper hand to those responsible members of Congress

who want fiscal discipline and to other members who, though less concerned about true fiscal discipline, are very sensitive to the politics of the issue and would not want to be perceived by their constituencies as thumbing their noses at the will of the American people. Together they would bring pressure that would force Congress to take action.

Q. What action do you think Congress would take?

A. There isn't the slightest question that Congress, when actually confronted with the need to take action - either pass an amendment or convene a constitutional convention for that purpose - would opt for the former. After all, when push comes to shove, Congress would rather have a hand in shaping an amendment that will control its fiscal practices than turn that responsibility over to "mere" citizens. Congress' reaction to state resolutions regarding the direct election of U.S. Senators is very instructive here.

Those who are familiar with the thinking processes of legislators concur that Congress would dispatch the issue itself. It isn't a "runaway" convention that strikes terror in the hearts of legislators. It is the specter of a "roughshod" convention- one that might propose severe penalties for failing to balance the budget, such as deducting any deficit from the operating budget of Congress, reducing congressional pay, slapping members in jail - or, worst of all, declaring all Senators and Representatives who presided over a deficit ineligible to run for re-election. I think the people of this country - and those elected to a convention - might be just angry enough to do something like this. The mere possibility that such might be the outcome assures that Congress itself would act.

The language of the Constitution itself contains the proof of this point. The third section of the 17th Amendment contains a grandfather clause to protect the incumbent, unelected Senators as long as possible against the ravages of facing the electorate. A convention to write the amendment would not have been so kind to the Senators as they were to themselves.

The very threat that Congress' failure to agree upon an amendment might necessitate a convention is the best insurance that Congress will act. The real challenge to those of us fighting for the amendment will be to make sure that the design of the amendment is sound.

To repeat, I can't for the life of me see the U.S. Congress actually convening a convention on this issue, because we're talking about their life blood - money. They will dispatch the issue themselves.

CONCLUSION

Anyone who opposes the state resolution process must be prepared to accept blame for failure to achieve a balanced budget amendment, because the state process is essential to success. It is not enough to try to justify this opposition by claiming that the convention process constitutes a risk. One must reject reason, precedent, common sense, the plain meaning of words, the intentions of the Founding Fathers, political reality, and enter a conspiratorial fantasyland to arrive at a scenario of risk. Concurrently, one must ignore a real risk - the risk that continued deficits, overspending and outlandish federal fiscal practices will permanently damage our Nation. It is time to join together to put an end to the real risk, rather than letting a phantom risk divide and conquer us.

Above all, we must remember that it was the Founding Fathers themselves who in their wisdom included in the Constitution the convention method of proposing amendments. They knew exactly what they were doing. They gave us the power to shape our own destiny. Why on earth should we reject it?

LEGAL EXPERTS, POLITICAL SCIENTISTS AND A CONSTITUTIONAL CONVENTON

"I think that the fear of a runaway convention is just a nonexistent constitutional ghost conjured up by people who are opposed to balancing the budget, because they want to be able to promise special groups something for nothing out of an empty pocket." -- Former U.S. Senator Sam Ervin, Constitutional Law Scholar.

"I think the convention can be limited ... the fact is that the majority of the scholars in America share my view. The view that 'you can't do this' among scholars is a minority view." -- Former U.S. Attorney General Griffin B. Bell.

"Congress has the power to establish procedures limiting a convention to the subject matter which is stated in the applications received from the state legislatures." -- Official position of the American Bar Association.

"If the States apply for a convention on a balanced budget, Congress must call a convention on a balanced budget. It cannot at its pleasure enlarge the topics. Nor can the convention go beyond what Congress has specified in the call. The convention's powers are derived from Article V and they cannot exceed what Article V specifies. The convention meets at the call of Congress on the subject which the States have set out and Congress has called the convention for." -- Professor John Noonan, University of California School of Law, Berkeley.

"Amending the federal constitution by means of a constitutional convention would be one of the safest political procedures the nation could pursue. The political constraints insure that no convention can get out of control.

"There are at least six such constraints: the character of the delegates elected; the public campaign statements and promises of the delegates; the number of delegates and divisions within the convention itself which would make it extraordinarily difficult for one faction or a radical position to prevail; the constant awareness that whatever the convention proposes must be presented to Congress; the Supreme Court which, upon appeal, might well declare certain actions beyond the constitutional powers of the convention; and most important of all, [ratification] by 38 states. One could hardly imagine more effective constraints on a constitutional convention." -- Professor Paul J. Weber, Dept. of Political Science, University of Louisville.

"I agree with the substantial majority of persons who have reviewed this matter. The State-initiated mode of securing amendments is not in contemplation of wholesale revision; it is, rather, to secure State legislatures a means of getting a fairly efficient response, albeit under the auspices of a national convention, to grievances of a rather particularized and limited nature.

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"It is altogether in keeping with the proper use that Congress, as it convokes the convention, appropriately limit the convention to the purpose it was convoked for in the first instance. Insofar as, by some untoward event, that convention -- called for that purpose, and under these auspices -- were to suddenly run away with itself ... It would be entirely proper [for Congress] to reject that [runaway] amendment." -- William W. Van Alstyne, William R. Perkins and Thomas C. Perkins, Professor of Law, Duke University.

"Apocalyptic visions of a runaway convention have nothing to do with anything except fear-mongering. Suppose you, or I, or anyone, were given the task of managing a convention that instead of dealing with the budget balancing [constitutional amendment] would fundamentally alter the constitution in such a way that three-quarters of the states would approve. Immediately the immensity of the task and the sheer unlikelihood of its accomplishment would come crashing down on us. No one would bet a dollar on its behalf. (Those who wish to contribute to my income should write proposing wagers.) The case for a runaway convention is patently absurd." -- Professor Aaron Wildavsky, Political Science Dept., Graduate School of Public Policy, University of California, Berkeley.

"It would seem to be consistent with, if not compelled by, the article for Congress to limit the convention in accordance with the express desires of the applicant states. If Article V requires that a convention be called by Congress only when a consensus exists among two-thirds of the states with regard to the extent and subject matter of desired constitutional change, then the convention should not be free to go beyond this consensus and address problems which did not prompt the state applications." -- Note, "The Proposed Legislation on the Convention Method of Amending the United States Constitution," 85 Harvard Law Review 1612, 1628 (1972).

"The two amendment processes, therefore, must be viewed as equal alternatives. The reports of the convention do not rebut this conclusion and provide no indication that the Framers intended for State legislatures to concern themselves only with total constitutional revision, while Congress alone would initiate specific amendments." -- Robert M. Rhodes, "A Limited Constitutional Convention," 26 U. Fla. Law Review (1973), 1, 9.

"On the strict legal question, the better view is that there is nothing in Article V to prevent the Congress from limiting the constitutional convention to the subject that made the states call for it." -- Professor Paul Bator, Harvard Law School, "A Constitutional Convention: How Well Would It Work?" (American Enterprise Institute Forum, 1979).

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THE RIGHT OF PEACEFUL CHANGE:

ARTICLE V OF THE CONSTITUTION

John C. Armor

About the Author

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THE RIGHT OF PEACEABLE CHANGE:

ARTICLE V OF THE CONSTITUTION

by John C. Armor

April, 1984

Article V

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, or by conventions of three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

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Introduction

The most important aspect of the amendment process in the Constitution of the United States is not what it allows to happen, but what it prevents. The Framers of our Constitution said in so many words that their work was not perfect. They expected that with time and experience, there would be changes. And they provided a mechanism for change in Article V.

The Framers were students of history. They knew from the experiences of Ancient Greece and Rome, and from the current experiences in Europe, that the price of major, structural changes in governments was usually paid in blood. When they met in Philadelphia in 1787 to draft our Constitution, they knew that millions of people had died, in all eras of history, in international and internecine wars, whose goals were to cause or prevent such governmental changes.

So, the most important aspect of Article V is not any amendment that has ever been made, or any that ever will be. It is the very existence of this mechanism that keeps change from being so easy that our government becomes unstable, but does make it possible, so that change can occur without people killing people. In this article, the Framers gave us the right to peaceable change.

The front pages of modern newspapers demonstrate the accuracy of the Framers' vision. The daily slaughter that goes on in the streets of Beirut, Lebanon, is over the structure of that nation's government. Because the different factions cannot live with one another under the existing government, and because they lack any usable equivalent of Article V, they are killing each other. And Lebanon, unfortunately, is typical.

Most of the 166 nations of the world today lack a means of peaceable change, even on paper in their constitutions. Of those which have a theoretical means, only a handful have demonstrated that it can be effectively used, without the nation degenerating into one or another of the forms of tyranny, or into rebellion or warfare.

The first great value of Article V, then, is that it gives u this right on paper, and that historically, it has worked. Listed in

he index are the tables which show first the history of amendments that were successful, and then the far longer list of amendments which were proposed in one forum or another, but were not successful.

For present purposes, it is enough to note that the amendment process is long and difficult. Even those with apparent widespread support, do not necessarily succeed. The Bill of Rights, as it was passed by Congress in 1791, contained twelve amendments. Ten succeeded, but two failed. So, the Bill of Rights as it exists in the Constitution contains only ten amendments.

For the average citizen, Article V is like the phone number for the fire department. Almost all of the time, it is totally irrelevant. But, when an emergency comes up, it has to be there, and be immediately usable, or else. But, Article V is not such a clear-cut process as pushing certain buttons in a certain sequence. Trying to understand it in the middle of a political emergency is not the easiest task in the world.

The process of amendment is, by itself, politically neutral. If enough people believe that a certain change should be made, the process will begin. And if those beliefs are sufficiently widespread among the people and durable in time, the amendment will be successful. The neutrality of Article V is demonstrated by the 18th and 21st Amendments. The first one established Prohibition in 1919; the second one repealed it in 1933. Both occurred under Article V. The only thing that had changed was the opinions of the American people on the subject of Prohibition.

There are, however, negative aspects of the fact that we turn our attention to Article V only when there are groundswells of public opinion in favor of particular changes. Since the subject matter of the Article is the framework of our federal government, it is unavoidably political. But, it becomes more so when the discussions of it occur under the pressures of specific proposals. The meaning and effective use of Article V is routinely distorted by some of those who oppose a particular amendment. This has happened before in our history. It is happening now. And, it will likely happen again in the future.

This discussion of Article V is being published at a time when the proposed Balanced Budget Amendment to the Constitution is at critical stages, both in the Congress, and in the legislatures of the states. It is very discouraging that in the midst of the public debate on this subject, the Constitution itself is being dragged from pillar to post. The intentions of the Framers

concerning Article V, the circumstances under which it can b used, or should be used in the judgment of the people, and th exact steps which would take place, are being distorted by people who ought to know better. There are lawyers, legislators, and members of the press who, through ignorance (or worse), are in effect, attacking Article V itself.

The Framers said, almost 200 years ago, why they were giving us Article V, the right of peaceable change. And they also said why they were providing two different routes to amendment of the Constitution, proposal by two-thirds of Congress, or by a convention called by two-thirds of the states, followed by ratification by three-fourths of the states.

The reasons they wrote then are just as fresh and valid today, as they were when stated, almost two centuries ago. And, they apply with equal force to all of the amendments that ever have been proposed, are presently proposed, or may be proposed in the future.

Therefore, this discussion is limited solely to Article V. How we got it, why we got it, how it has been used throughout our history, and the exact steps that will take place as it is used again. Nothing will be said about the merits or demerits of the Balanced Budget Amendment, or about the merits or demerits of any other amendment, past, present, or future. The important question here is about the processes of Article V.

There are many examples in history of those who sought to distort Article V, in order to accomplish their particular goals in passing or defeating a particular amendment. There will be many more such examples. To those of us who care about the integrity of the Constitution itself, this is a great danger. Long after the battle over any particular amendment has been consigned to the history books, we Americans will need a continuing and healthy Article V to address new subjects in new times.

Article V, this small but critical corner of the Constitution, needs defenders today. If we are to defend the right of peaceable change, for use by future generations when and as they see fit, it is mandatory that as many as possible of us understand its origins, its methods, and its importance in the American system of government. It is for that purpose this booklet has been written.

Washington, D.C./
Baltimore, Maryland
April, 1984

After the Bill of Rights, So What?

The Central Importance of Article V

The Framers were students of history. They knew that almost no major governmental changes had occurred in the world prior to 1787 other than by warfare. (Not much has changed in the two centuries since then. This is still true for the vast majority of the world's 166 nations.) Our nation was the first ever to state in its basic documents that it is the right of the people to establish their own forms of government, and to alter them as they choose.[1]

The Framers well understood, therefore, that a means of peaceable change was a mandatory part of the Constitution, were it to survive. Also, they did not write Article V on a clean slate. Our previous government under the Articles of Confederation contained an amendment process in Article XIII.

The Articles could only be amended by a Congressional proposal that was accepted **unanimously** by the 13 States. By 1787, this provision was a proven failure. The government was collapsing. It had no direct power to raise money, and no ability to pay its debts, including to its soldiers who had fought and won the Revolution. Numerous proposals to improve the Articles were submitted and adopted by most of the states. But none could gain unanimous acceptance.[2]

On the other hand, the Framers understood that the Constitution should not be changeable at the whim of a temporary majority. If it could, the government would lack stability. Even the most democratic Framers, like James Madison, warned of the possible "tyranny of the majority."[3]

So, the Framers knew that the process should not be impossible, as in the Articles. But, it should be both difficult and broad in scope, so that no change would be made unless it came from the beliefs of a substantial majority of citizens, held over a long period of time, and shared in almost all parts of the Union.

History has proven the Framers correct on this point. The ivil War was fought over the subject of the structure of the ederal government. The Confederate States of America wanted

the right to nullify laws of the federal government which they di not feel should apply within their territory. But all of the other changes, or would-be changes, in the government of the United States have been sought or accomplished under the terms of Article V (see Tables I-III).

Remember that our Bill of Rights, stating our most basic and important freedoms, was a product of Article V. We have changed the methods by which we choose presidents and senators, we have far more than doubled the electorate, by adding black people, women, and citizens over the age of 18. We have terminated slavery, and guaranteed equal rights to all citizens. We have changed the form of taxation. And we have made other, lesser changes, without the necessity for bloodshed.

And in each instance where an amendment has failed, one of the key examples being the proposal to allow state senates to be disproportional to population, in time those who supported the amendment have accepted the verdict of the nation as a whole, and our Constitution has endured. (We did, of course, make one obvious mistake along the way--Prohibition, which was established by the 18th Amendment, and abolished by the 21st Amendment.)

The main point is this, even today thousands and even millions of people, are being killed in nations around the world, because they lack the mechanism for peaceable change, which the Framers gave us in Article V. Sometimes we take our rights as Americans for granted. We need only look beyond our borders in any direction except north, to see their value to us, by the price that others are paying for the lack of such rights.

Undeniably, the first ten Amendments to the Constitution, the Bill of Rights, are far and away more important than all the rest of the amendments. The great guarantees of freedom of religion, freedom of the press, freedom of speech and the like, are more than just additions to the Constitution, they are part of its heart.

Many commentators consider the Bill of Rights not just as amendments, but as part and parcel of the Constitution. This is so because their addition was done by the Framers, in the very first session of Congress, and the promise to add them was the factor that allowed ratification of the Constitution. Without the Bill of Rights, there would have been no Constitution itself.[4]

Even though it is doubtful that the people of the United States will propose and pass later amendments of the importance of the Bill of Rights, this does not diminish the importance of the Article V process. This process is our Constitutional safety valve.

makes ours one of the handful of the world's nations in which the people can make major changes in their form of government by peaceful means. The continuing vitality of this power, regardless of when and how it is used, is the key to the long-term survival of our Constitution and our form of government.

What If Congress Won't Listen?

The precise reasons that the Framers gave us two methods of amendment, one through Congress, the other through the State legislatures

It was the obvious necessity for means of peaceable, governmental change that caused the Framers to establish the first half of Article V, proposal of amendments by a two-thirds majority of both Houses of Congress, and ratification either by conventions or by the legislatures, in three-fourths of the states. Other than changing the process from effectively impossible to merely difficult, this was the same pattern that was used in the Articles of Confederation.

Late in the convention, however, George Mason raised the question of what would happen, should the people, through their state legislatures, express a desire for a change that Congress would not agree to. He suggested the alternative method of amendment, in which two-thirds of the states could call for a new Convention, in order to propose amendments.

At two points in **The Federalist**, the Framers describe the amendment process, and the reasons for it. These words are as fresh, and clear, and valid today, as they were when written, almost 200 years ago.

> "[Article V] guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and State governments to originate the amendment of errors, as they may be pointed out by experience on one side, or on the other."[5]

The Framers had, and expressed, a strong sense of their own fallibility. They expected that changes would become necessary. And they did not believe that either the Congress or the state legislatures held a monopoly on the wisdom of any particul change.[6]

The importance of the second method of amendment, coming from the states, is underscored by its being described again in the summary of the most important points in the entire **Federalist.** The Framers noted the objection of opponents, that Congress, in order to protect its prerogatives, might refuse to consent to an amendment that the people consider desirable. The problem is phrased this way, in **The Federalist,** No. 85: "[I] t has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed."

The answer to this problem, based on human nature, is found in the second half of Article V. After stating that "public spirit and integrity" should cause the national leaders to follow "the reasonable expectations of their constituents," the Framers state the guarantee against national blockage of an amendment:

> "[T] he national rulers, whenever nine States concur, will have no option on the subject. By the fifth article of the plan, the Congress will be obliged 'on the application of the legislatures of two thirds of the States [which today is 34], to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.' The words of this article are preremptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body."[7]

The Framers assumed that over the years the two methods of amendment would be used equally. Early on, Thomas Jefferson even assumed that we would have a new Constitutional Convention every twenty years or so.[8] (Cont. p. 12)

"No Taxation Without Representation"

The concept of representative government, which rests on the consent of the governed, and is carried out by representatives who are democratically chosen, derives from a number of sources. Most of them were religious.

The Puritans, the Congregationalists, and the Quakers, among others, came to this nation with the

concepts of participation and voting in their religious bodies. (Among the Quakers, votes were not taken. Instead, discussion continued until consensus was reached.) In all instances, these practices in the religious sphere were translated into civil government.

There was one unique source of the tradition of participation and popular control. The colony of Virginia was founded as a corporation. But, all members of that corporation had a right to vote, much like Lloyd's of London, today.

This tradition existed in some colonies for more than a century prior to 1776. But it was, of course, a series of oppressive measures voted by the English Parliament which compelled the colonies first to join together, and then to choose popular sovereignty as the basis of all governments in the new United States. Those measures, which ultimately produced the Constitution and its critical Article V, were the Stamp Act, the Townsend Acts, the Tea Tax, and the "Intolerable Acts."

Every history book refers to these Acts. But, none give the details of the taxes which caused the Americans to declare our independence, and to fight and win a war. Here are some of those details:

The Stamp Act was passed in 1765, requiring revenue stamps on all newspapers, pamphlets, licenses, and commercial and legal documents. The level of taxation was measured in pence, or pennies. It caused, however, the Stamp Act Congress, in which delegates from nine colonies met in New York to draft a petition to the King. The Stamp Act was repealed in 1766, but at the same time Parliament passed the Declaratory Act, asserting its right to tax the Colonies at any time, and in any way they considered appropriate.[9]

The Townsend Acts were passed in 1767. They imposed duties on a number of commodities which were essential in the colonies and which were imported from England. Glass, lead, painter's colors, tea, and paper were included. A representative tax level was 3 pennies per gallon on molasses. These Acts also suspended the New York Assembly for refusing to supply lodging and supplies for British troops. Protests in the colonies grew, and in 1770, the

Townsend Acts were repealed, except for the tea tax.[10]

In 1773, in order to assist the British East India Company in selling its surplus tea, Parliament passed the Tea Act. It gave the Company a monopoly on shipping tea to America, and imposed a duty of a few pennies to be collected when the tea was unloaded. It is interesting to note that Dutch tea was available in America at the same price as English tea with the tax included.[11]

Nonetheless, the response in Massachusetts was the Boston Tea Party. The Sons of Liberty, disguised as Indians, raided ships of the East India Company and dumped the tea in the harbor.

The British response was the "Intolerable Acts" of 1774. The port of Boston was closed until the colony paid for the destroyed tea. The Massachusetts Charter was abrogated, and town meetings were forbidden in Boston without permission of the Governor. A provision was included that no English officials, either civilian or military, would be tried in colonial courts. Instead, these and other trials would take place only in England. And a new Quartering Act was passed, requiring Massachusetts to provide lodging and food for the soldiers occupying Boston.[12]

The "Intolerable Acts" led directly to the convening of the First Continental Congress in 1774. The events were now underway which would lead to Lexington and Concord, the Declaration of Independence, the Revolutionary War, and ultimately to the Constitution of the United States.

The English colonial laws which produced by far the largest revenues were the Sugar Acts of 1764 and 1766. They produced a low revenue of 14,091 £ sterling in 1765, and a high of 42,570 £ sterling in 1772.[13] But the Sugar Acts were not the sparks for rebellion.

The hated Stamp Act (1765) was in effect for only one year, and produced only 3,292 £ sterling in revenues. The Townsend Acts, which were the primary focus of revolutionary activity, produced a high of 13,200 £ sterling in 1768, but had declined to only 912 £ by 1774.[14]

Even if we assume that the American colonists rebelled against the sum total of English taxation, the specific facts are most curious. The highest total taxes were 45,499 £ in 1769. They came close to that level in 1772, but had dropped to 60% of that level by 1774.[15]

The English had a legitimate and practical reason for imposing taxes on the colonies. The English war debt for defending the Americans against both the Indians and the French, reached a maximum of 140,000,000 £ sterling.[16] But the taxes collected by the English never amounted to more than .03% (one-thirtieth of a percent) of this debt. One American scholar has even said this about the inadequacy of English colonial taxation, "These parliamentary revenues from the colonies were never sufficient to meet the charges of collection."[17]

On a per capita basis, the English tax burden suffered by our forefathers was in fact only a **maximum** of 1.82 pennies per year. Of course, a penny then was worth much more than a penny at any time since. A low but tolerable annual income for an individual in the colonies was 15 £ sterling, or 1,800 pennies. So, for a low income person, the total annual tax rate was exactly .1%.

Most of the colonists were subsistence farmers, who used little or no money. If we assume that the whole burden of English taxation fell on only a third of the colonists, that still made the effective tax rate only .3%.

To compare tax burdens then and now, the English taxes, which led to the American Revolution, were less than federal or state income taxes, less than excise taxes, and less than import duties. They were even less than the lowest of modern taxes, the sales taxes that exist in every state in the Union.

It is no wonder that our history books, in discussing the "oppressive" English taxes that caused us to go to war, do not tell us either the rates of those taxes or their total impact. If they did, the comparisons might cause even elementary school children to ask some very embarrassing questions. They might ask why it was that we fought and won a war on the issue

of "no taxation without representation," to eliminate a very moderate sales tax of a few pennies a year. They might even just look at the receipt, with great interest, the next time they buy a hamburger.

Experience has not borne out those assumptions. The reason probably is that Congress sits as a continuous Constitutional Convention. It can at any time, if two-thirds of each House agree, propose any amendment on any subject. And, most of the time, Congress does represent the will of its constituents. So, we have never had another Constitutional Convention, and the second method of amendment has been used only once before, in a situation that was exactly what the Framers described and anticipated.

T Minus Two and Counting

Is the holding of a Convention mandatory from the moment that the 34th State issues its call?

The answer to that question is in the hands of the states. If they pass absolute calls for a convention, then the answer is yes. But, if they issue conditional calls for a convention, the answer is no. The choice of which applies, however, must remain solely in the hands of the state legislatures.

All of the 32 calls to date for a Constitutional Convention on the subject of the Balanced Budget Amendment are written conditionally. There are differences in terms and language, but on this point they all agree. Each state has asked Congress to propose a Balanced Budget Amendment. And each state has said, if Congress fails to act, then the call for a convention is operative.[18]

Some of the states have set deadlines by which Congress must act. Others have not set a specific date, which means that a reasonable time to act would be implied. But the fact that the states have been prudent, and made their calls conditional, means that the event which would trigger the necessity for holding a convention would not be the action of the 34th state. It would be the failure of Congress to act on the amendment.

If the second half of Article V had never before been used in our history, this question might pose a problem. But it has been used before.

The full history of the adoption of the 17th Amendment is given in the box on "The Swamp Water Theory." The gist of it is this: until 1912, the members of the Senate were selected by the State legislatures, rather than elected by the people. The mood of the country having become more democratic, five times the House passed an amendment to make the Senate elected.

But the Senate, liking things as they were, killed the amendment in committee, each time. Meanwhile, state legislatures began to pass conditional calls for a new convention to pa the amendment. When 31 of the then-required 32 states h

cted, the Senate relented and passed the amendment. In the rocess, they added a grandfather clause to protect their existing terms in office.

As reluctant as the Senate was to act, it was more reluctant to let a convention write the amendment, and possibly put all non-elected senators out in the street. This is the proof of the Swamp Water Theory, that Congress will swallow anything if it has only two alternatives, and the other one is worse. This example from our constitutional history is also the proof that even if 34 states issue conditional calls for a new convention, that the result will not be a new convention; instead, it will be belated action by a reluctant Congress. (Cont. p. 16)

The Swamp Water Theory

As all experienced elected officials are well aware, sometimes there is a sharp difference between the paper pattern that was followed to get a result, and the actual forces which were essential to that result. So it is with the second half of Article V.

On paper, every amendment to date has been proposed by Congress, and ratified by the states. But the history of the 17th Amendment shows that it was passed only because the states took the initiative under the second part of Article V.

Until 1912, all members of the U.S. Senate were appointed by the state legislatures, rather than elected by the people. The senators found that arrangement to be very comfortable. But the rising tide of democracy in the United States demanded a different result.

Five times, beginning in 1893, the House passed a proposed amendment that would have made the Senate elected, rather than appointed. Five times that proposal died in committee in the Senate. But, in the meantime, the state legislatures began to act. By 1912, 31 states, or one short of the then-required number, had issued conditional calls for a Constitutional Convention. Then, as now, they left Congress the option to act first and pass the amendment itself.[19]

So it was that in 1912, the Senate read the handwriting on the wall, and passed the 17th Amendment. It was ratified a year later, and in its language

contains proof of the political dynamics which led to its passage. Section 3 contains a grandfather clause, which says, "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid. . . ."

The grandfathers who wrote that grandfather clause are long dead. But their words demonstrate a universal political truth. If a Convention had been necessary to make the Senate elective, that Convention might have done what the original Convention did. It could have made its terms effective immediately, putting the entire, recalcitrant Senate out on the street, and staggered the terms of the new, elective body, as in Article I, Section 3, Clause 2, of the original Constitution. But by writing the 17th Amendment themselves, the current Senators were able to protect themselves to some degree.

The universal political truth, therefore, is this: If a legislative body is faced unavoidably with a choice between two evils (in its view), and if one has the potential to be far worse than the other, it can be expected to choose the second alternative. I call this the swampwater theory. Congress will swallow anything, if its only choice is unmistakably worse.

In short, Congress did in 1912 what the state legislatures had demanded under the second half of Article V, because the Senate could no longer duck the issue, and that was a better choice than allowing a new Convention to take place.

Exactly the same logic applies today. A Convention could be truly Draconian. It might not only define and require a balanced budget, it could provide that unless Congress passed such a budget by 1 July of every fiscal year, all pay and benefits to all members of Congress would be cut off (with no right of reimbursement), until and unless such a budget was passed. On the other hand, Congress would never do such a thing to itself, if it wrote the amendment.

So, on paper the second half of Article V has never been used. But as a matter of political reality, it was used very effectively in 1912. It was used for exactly the kind of purpose which the Framers intended--to obtain an amendment the people wanted

but to which Congress would not agree. And the methodology used in 1912 was exactly the same as that being used today.

Is It Katie Bar the Door?

Once a Constitutional Convention is convened, can it be limited in subject matter?

The question of whether a new Convention could be limited in its subject matter is related to the history of the one and only Constitutional Convention ever held in this country, in Philadelphia in 1787. Critics today pose the conclusion that the convention of 1787 was a "run-away," and therefore assert that any new Convention could be the same. The answer to the two questions is not the same, and the history from 200 years ago does not support the idea of a "run-away" convention today. Nonetheless, a clear understanding of what did and did not happen both before and at the original Convention, is a proper starting point.

In 1785, Virginia and Maryland were almost at the point of going to war with each other over the subject of shipping rights in the Chesapeake Bay. George Washington intervened personally, to ask the two states to send delegates to meet with him, and see if the differences could be resolved.

Distrust was so high that this meeting could not take place anywhere in either state, including at Washington's home at Mount Vernon. So, it was held on a boat in the Chesapeake. But its results were excellent. All differences were resolved.[20]

Congress then called for a meeting of "Commissioners" from all states, to convene in Annapolis in 1786. Only five states sent delegates, but among them were leaders such as Alexander Hamilton. The purpose of that meeting was to propose laws concerning trade to be passed by Congress. Lacking a quorum, they could not act. But before disbanding, they asked Congress to request another meeting in Philadelphia, with a broader mission.[21]

Congress agreed, and here is exactly what it said, by Resolution, on 21 February 1787:

> "[W]hereas experience has evinced that there are defects in the present Confederation . . . and [a] Convention appearing to be the most probable means of establishing in these states a firm national govern-

> ment . . . on the second Monday in May next a Convention of delegates . . . be held in Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures. . . ."

The gist of the argument that the convention was a "runaway," was that it did not simply amend the Articles of Confederation. It wrote an entirely new Constitution. To this argument, the Framers made three responses in **The Federalist.**

The first was that twelve of the thirteen states specifically agreed to what was done. Rhode Island, which represented one-sixtieth of the nation, chose not to participate. That state had declared itself independent **prior** to 4 July 1776. It remained independent, and did not ratify the Constitution until 1790, when the federal government threatened to treat it as a foreign nation, exchanging ambassadors and imposing import duties.[22]

The second argument was that whatever the convention might have done, its work was ratified by the Congress, which after only eight days of debate, approved it and submitted it to the states for ratification.[23]

The third point is that the Framers recognized that amendment could not occur under the Articles of Confederation, without unanimous consent of the states. Therefore, in Washington's letter transmitting the Constitution to Congress, for it to submit to the states, he said,

> "[I] t is the opinion of this convention, that as soon as the conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same. . . ."

The Resolution went on to state that the House should be elected, the Senate appointed, that the Senate should count the votes for president, and that the new government should begin to function under the new Constitution. The key phrase is, "by the states which shall have ratified the same." In fact, when Washington took office in 1789, two states had not ratified, Rhode Island and North Carolina. Neither was represented in Congress, neither had participated in the first presidential election, won by George Washington.[24]

In theory, the Articles of Confederation were still in effect, as to those two states only. But neither had any interest in maintaining a federal government solely for their purposes. They were not forced into the United States under the new Constitution against their will. In fact, they eventually ratified, making the action unanimous.

So, it can be argued that the present Constitution was unconstitutional, or more accurately, "unconfederational," when Washington took office in 1789, before North Carolina and Rhode Island had ratified. However, there are several differences between what happened in Philadelphia in 1787, and what might happen now (perhaps in St. Louis), that suggest this problem might not arise again.

First of all, there was no Supreme Court under the Articles. There was also no tradition that such a Court could strike down as unconstitutional, any actions taken by any other branch of government, in violation of the Articles. Lastly, the requirement of unanimous consent to amendments in the Articles was agreed, early on, to be one of the principal problems with the Articles.

What the critics are suggesting is that because the first Convention changed the mode of ratification, a new Convention might do the same. The answer is that under the present Constitution, we have a valid and workable ratification process. If any Convention were to propose a different method, it would not apply until it became part of the Constitution. There is a long line of Supreme Court cases which hold that a proper test of a restriction on political activity is whether that restriction has been successfully met in the past.[25] Suffice to say, the unanimous amendment process in the Articles would not be legitimate under the present lst Amendment, since it was never successfully used; whereas, the present amendment process would be upheld and would be enforced. A change in the amendment process itself could only become a part of the Constitution by succeeding through the **existing** ratification process.

And lastly, since the results of any Convention now held would have to pass first through Congress, and then would be reviewable by the Supreme Court (should any state challenge the process as illegitimate), it would take failures first by the Convention, then by the Congress, then by the Court, to allow such a thing to happen.

Had Rhode Island attended the convention in 1787, the "runaway" argument would have no validity whatsoever, since the delegates were all appointed by and acting for the state legisla-

tures, and all present agreed both that the Articles were to flawed simply to be repaired, and that the amendment process h to be changed.

Consideration of the present question, whether a new Convention could be a "run-away," has gone on for approximately 80 years. Especially in the last 20 years, numerous law review articles, and a Special Study by the American Bar Association, have been prepared and published on the subject. The leading publication concluding that a new Convention could have its subject matter restricted, is discussed in the box on "The Arguments for Limitation." This was prepared, and officially endorsed, by the American Bar Association, through a special committee of experts and acceptance by its House of Delegates. (Cont. p. 23)

The Arguments for Limitation

The most detailed analysis of the Article V provisions for a Constitutional Convention, was published by the American Bar Association in 1974. This statement is a definitive one, for the depth of its analysis, for those who wrote it, for those who accepted and endorsed its conclusions, and for the circumstances under which it was developed.[26]

The two most important points are that the Committee which prepared it included three judges, two law school deans, and two former presidents of state constitutional conventions, among others. Its conclusions were accepted by the ABA House of Delegates in August, 1973. Most importantly, the Special Committee who drafted this paper were acting at a time when the Dirksen Amendment had crested, and would apparently fail, and when no new subject had garnered state calls for a Convention from even a third of the states. In short, the ABA study was written and approved at a time when the merits of many procedures for a new Convention were **not** entangled in the merits of any specific proposal. Although this study began when the Dirksen Amendment was a live issue, by the time it was prepared, approved, and published, there was no substantive Constitutional battle underway.

These are the conclusions of the Special Committee, which were adopted by the ABA House of Delegates:

1. Congress should establish procedures for the Convention method of amending the Constitution.

2. Congress has the power to limit a Convention to the subject or subjects named in the required 34 state calls.

3. There should be limited judicial review of the actions of Congress concerning a Convention.

4. Delegates should be elected in proportion to population.[27]

The most important point, then as now, was whether a Convention could be limited in its subject matter. In answering this question, the ABA looked first to the history of constitutional conventions in the United States. Although there has been only one national Convention, the original one in Philadelphia in 1787, "[t]here have been more than 200 conventions in the states," with "at least one in every state."[28]

The experience in the states shows that conventions are either limited to certain subjects or are unlimited (the latter meaning free to deal with any subject), depending on the purposes for which they were called. The ABA concluded, from the history of the adoption of Article V, that the same distinction applies to any new, national Convention.

They discussed at length the debate on Article V, concluding that the third and final version of the Article gave the states the option of calling for either a limited convention or a general one, and that the Congress was bound to carry out the choice of the states, if 34 states concur.[29]

The review by the ABA was exhaustive, going back to the very first state call, received in May 1789. They included a table of states and subject matter of all calls from 1789 to 1973. The total number of calls was 356, and the subjects ranged widely. (The more obscure ones included Presidential disability and succession, a new type of Supreme Court, Presidential tenure, and U.S. participation in a world, federal government.)[30]

In Table III, at page 47, the state calls are brought up to 1983, and listed by subject, for all those on which at least ten states have acted. This is the ABA conclusion concerning a limited Convention:

"In summary, we believe that a substantively-limited Article V convention is consistent with the purpose of the alternative method since the states and people would have a complete vehicle other than the Congress for remedying specific abuses of power by the national government; consistent with the actual history of the amending article throughout which only amendments on single subjects have been proposed by Congress; consistent with state practice under which limited conventions have been held under constitutional provisions not expressly sanctioning a substantively-limited convention; [footnote omitted] and consistent with democratic principles because convention delegates would be chosen by the people in an election in which the subject matter to be dealt with would be known and the issues identified, thereby enabling the electorate to exercise an informed judgment in the choice of delegates." (Emphasis added.)

Then the ABA addressed the power of Congress to pass a procedures bill which would limit the Convention. They conclude that since Congress has the duty of determining when 34 state calls have been received, it can examine them to see whether they seek a general Convention, or if they deal with the same specific and limited subject or subjects. They conclude that it would be improper of Congress to expect or require that the applications be identical in their wording. Since this method of amending the Constitution was established by the Framers for situations where the states want a change and Congress has not acted, the congressional review of the state calls should not be permitted to delay or defeat the purpose of such calls.[31]

The ABA noted that the Supreme Court had in the past decided questions concerning the amendment process, always dealing with mechanics, and not with the merits or demerits of any proposal. They concluded that in the unlikely event that Congress disobeyed the terms of Article V, the Court could issue a declaratory judgment as it has in the past.[32]

The last major question was election of delegates. The delegates in 1787 were "appointed" rather

than "elected." They voted by state, with the majority of a state delegation determining its vote. The ABA concludes that such a pattern would not be suitable today, and would probably be unconstitutional under the Court's "one man - one vote" decisions.[33]

The ABA concludes that delegates should be elected from each state in proportion to its members in the House. It rejects the idea that representation should be keyed to the Electoral College votes from each state. (In light of recent Supreme Court decisions, it is likely that if Congress passes a Convention Procedures Bill using the Electoral College as a basis, that this would be upheld. This pattern is common to both past and present procedures bills.)[34]

There have been numerous law review articles published by individuals, reaching the same conclusion as the ABA, namely that a limited Convention could be requested by the states, and if so requested, it would then be mandatory for Congress to convene a limited Convention. Two of the principal articles are by former Senator Sam Ervin, generally respected as one of the best constitutional scholars ever to serve in national office, and by the late Senator Everett Dirksen. Of the Framers, Senator Dirksen said this:

"They decided that whenever the people felt that an amendment to the Constitution was required they could not be denied by the Congress the right to propose that amendment. Such an amendment would be proposed by a convention assembled on the application of the legislatures of two-thirds of the several states. The people would speak through their state legislatures."[35]

On the subject of limitation, Senator Dirksen concluded:

"First, I apprehend that when the applications are for a stated purpose or amendment . . . then in effect the state legislatures, which alone possess the initiative in convening a convention, have by their own action taken the first step toward limiting the scope of the convention. It would then remain for the Con-

gress to implement this attempt to limit the convention by making appropriate provision in its call."[36]

On both points, Senator Ervin concurred with the conclusion, that the second method of Article V was intended to allow the states to compel Constitutional consideration of any subject of their choice, and that Congress could call a limited Convention, if that was the choice expressed by the requisite 34 states.[37]

Although there are some authorities who argue the contrary, that a Convention cannot be limited, the weight of authority, especially of those who did not have a personal ax to grind when they addressed the subject, is in favor of limitation by the states, recognized and applied by a Congressional procedures bill.

The leading article concluding that a new Convention could not be restricted in subject matter, is discussed in the box on "The Arguments against Limitation." This article was written by Professor Gerald Gunther of Stanford, who is also a leading expert on the Constitution. (Cont. p. 26)

The Arguments Against Limitation

The latest, and most widely circulated article arguing that a Convention cannot be limited, is, "Constitutional Brinkmanship Stumbling Towards a Convention," by Professor Gerald Gunther. His article was published in the ABA **Journal** in 1979, five years after the ABA itself took its stand contrary to his position.[38]

He asserts first, that, "It is fair to say that the questions of what a convention might do, and especially whether it could and would be limited to the balanced budget issue, were largely ignored [in the states passing calls]."[39] Whether or not that was once fair to say, it no longer is. As the records of the state hearings over the last three years demonstrate, the question of limiting a Convention has come to dominate over the merits or demerits of the amendment now sought.

His article is one of assertions, unsupported and not footnoted.

"One of the very few issues about the convention route on which there is full agreement among scholars is that, once 34 proper applications for a convention are before Congress, Congress is under a duty to call a convention and does not have a legitimate discretion to ignore the applications."[40]

While this is true of **un**conditional state calls, it does not address the conditional state calls being used now, as they were in 1893 through 1911. If Congress acts on its own (under pressure), it does not ignore any state calls. But it does make them no longer effective, according to their own terms.

On the subject of whether the states may validly issue limited state calls, he agrees that the weight of authority is that they can. "A larger number of scholars believe that applications that are somewhat limited, can be considered valid. . . ."[41]

In posing the dangers of using the second half of Article V he says that Congress, "acting on the belief that all conventions had to be general ones, . . . might disregard . . . [the limitations in] the applications and issue a call for a general convention."[42] The idea that Congress, which does not want any amendments other than its own, would deliberately choose a process that was totally open, is theoretically possible, but politically frivolous.

Then he assumes that a limited Convention would be called, but says that, the delegates, "could legitimately speak as representatives of the people and could make a plausible case that a convention is entitled to set its own agenda."[43] It does not seem from this article that the Professor has read the ABA Special Study, especially its sections on the two-century experience with state conventions, in which limitations on conventions, if made, were enforced by both legislative and judicial actions.

Then, the Professor makes contradictory arguments. First, he says that Congress could not refuse to submit excessive amendments (if proposed) to the states for ratification, but second, that the Court would probably lack authority to act on this point. If Congress refuses to submit excessive amendments, and

if the Court cannot act, then the buck stops there. Even if the Convention ignores its limitations, the harm is immediately prevented, if Congress submits only the limited amendments for ratification.

The Professor says that his own "best judgment is that 'Applications' from the states can be limited in subject matter. . . ." But he goes on to say that such limitations, "should be viewed as . . . essentially a moral exhortation to the convention."[44] He acknowledges that his understanding would undercut the Framers' intention that the Congressional and state methods of initiating amendments be parallel and complementary to one another.

He assumes, contrary to both their history and their words, that the Framers intended the Convention route to be useful only against total and extraordinary nonresponsiveness by Congress. He ignores the statement of the Framers that the two parts of Article V were designed to allow "errors to be corrected as they were perceived" either by Congress or the states.

Some other authors have agreed with the central premise of Professor Gunther that a new convention should be avoided at all costs, though on different reasoning. Ralph M. Carson wrote that a new Convention is undesirable for four main reasons: (1) A new Convention could not be limited. (He assumes this, and does not discuss it.) (2) Life is so much more complex today that major revisions in the Constitution could not be effectively drafted. (3) We no longer have people in our midst to serve as delegates, who match the quality of the Framers. And (4), a new Convention, unlike the original one, would take place in the glare of broadcast media, and therefore could not deliberate secretly, and arrive at fair compromises.[45]

Professor Robert G. Dixon, Jr., states the opposition to the state-initiated amendment process even more boldly, "Is Article V irrelevant to the grander issues of constitutional form and policy which we call constitutional law?"[46] He argues essentially that all of the Constitutional amending that we require is done either by Congress under the first part of Article V, or by the Supreme Court in the guise of "interpreting" the Constitution.

Although they use different logic and language, the articles opposing the use of the second half of Article V have one, common denominator. They conclude that it is too dangerous in today's world, for the people of the United States to have a direct role in the process of Constitutional amendment. Although they advance reasons why the process should not be used, in fact, they believe that the Framers should never have given it to us in the first place.

Although none of them say this in so many words, all of them mean it: the Constitution is too important to be left to the people of the United States.

Skipping a good bit of the legalese, the reasons in favor of limitation begin with the state calls themselves. In general, they ask for a Convention for the "sole" purpose of proposing a balanced budget amendment. Seventeen of them specifically provide that they are "null and void" in the event that either the Congress or the Convention seek to exceed that limited subject matter. Since the actions of those seventeen states are necessary for Congress to call a Convention, it seems highly unlikely that Congress would disobey that instruction.

Eighteen years ago, Senator Ervin proposed a bill that would define how Congress would set up a Convention. It included provisions under which Congress could recognize and enforce any subject matter limitations that the states might provide. He said at the time that the bill should be considered before any amendment was proposed, so the merits of Constitutional procedures would not be entangled in the merits of any particular proposal. He was right. But no action was taken. There are two bills now pending in Congress which have many of the same terms as the Ervin proposal, including subject limitation.[47]

Should 34 states issue calls, and should Congress be unable or unwilling to pass the proposed amendment itself, it is a near certainty that it will pass a Convention procedures bill. This assertion is based on the difference between the Constitutional majorities required. Any amendment requires two-thirds of each House; whereas, a procedures bill would require only a simple majority. Since the President is on record as favoring the amendment, he should be expected to sign such a bill. And since it requires only a simple majority of Congress to convene a Convention, the same votes necesary to create the Convention would be necessary to seek to limit it.

The argument against limitation is quite clear and simple. It is that the members of a Constitutional Convention represent the sovereign people directly. Their power does not come from the states, nor does it come from the federal government. Therefore, as soon as the gavel falls at such a Convention, any and all proposals can be made.

The first logical error made by those who argue that a new Convention could be a "run-away," is the misreading and misrepresentation of the history of the original Convention in 1787. All its actions were authorized by all of the states except Rhode Island, and also accepted by the Congress, before the new Constitution was submitted to the states for ratification.[48]

The second logical error made by these critics is to assume that what happens in 1984, or at some time in the near future, is the same as what happened in 1787. We now have a Supreme Court whose duties include the final interpretation of the constitutionality of the actions of any other part, branch, or agency of the federal government. At the time of the 1787 Convention there was no Supreme Court, there was no assertion that the existing government, the Articles of Confederation, were the "supreme law," and there was no arbiter of any kind which was in a position to challenge the legitimacy of any actions taken at any time by any part of that former government.

The last logical error made by the critics is the assertion, without discussion, that a new Convention which was a "run-away," would therefore threaten the destruction of basic American freedoms. The obvious and critical flaw in this analogy is that any amendments proposed by a Convention, whether major or minor, have no legal effect whatsoever until they have succeeded in the ratification process. As the history of the rejection of some amendments passed by Congress demonstrate, there are many steps between the proposal of any amendment, and its ultimate ratification, and success in the first step is no guarantee whatever of success in the second (see Table I, on page 42).

The sequence of events necessary for a "run-away" Convention to occur, and for its rogue proposals to become law as part of the Constitution, requires a long series of obvious failures by various parts of the governments of the United States. Critics on this point do not discuss these steps, because listing them makes the weakness of their argument apparent. Here are the necessary failures, in the necessary order, for a "run-away" Convention to occur, and to have its proposals adopted as part of the Constitution:

1. Congress fails to act on the proposed amendment.

2. Congress calls for a Convention, but fails to limit its subject matter.

2a. Congress does limit the subject matter, but the Convention chooses to ignore its limits.

3. Any state, or possibly any individual, who feels that the Convention can and should be bound to limits, brings a legal challenge, and the Supreme Court either fails to act, or rules that the Convention is unlimited.

4. The Convention actually passes proposed amendments that are beyond its subject matter.

5. Congress submits the excessive amendments for ratification.

6. Another Supreme Court challenge is brought and lost by a dissatisfied state or individual.

7. Three-fourths of the states, by either their legislatures or special conventions, as Congress has required, ratify the excessive amendments.

8. Another Supreme Court challenge is brought and lost by a dissatisfied state or individual.

In short, for a new Convention to constitute a "run-away," and for those results to become effective parts of the Constitution, the following American political institutions have to fail their duties not once but repeatedly: both Houses of Congress, the Supreme Court, and the legislatures of three-fourths of the United States. The only group of political institutions which would not have to fail would be the Presidency and the governors of the various states, since these people are not part of the amendment or ratification processes.

The question of whether it is theoretically possible for all of these failures to occur must be answered yes. But the question of whether it is likely, or even remotely possible, has a different answer. It is a firm no.

New Framers and a New Philadelphia

If a new Convention is called, how many delegates will there be, how will they be elected, how will they vote?

In the 1787 Convention, each state was free to send as many delegates as they chose although most sent three. The delegates voted not as individuals, but as delegations, each state having one vote, and that vote being controlled by a majority of that state's delegates. Given the tremendous diversity in the populations of the states at present, and also given the more democratic cast of American politics in the 20th century, neither of these patterns would be likely to be followed in a new Convention.

The bill proposed by Senator Ervin many years ago, like the two now pending before the Congress, would provide for each state to have the same number of delegates to a Convention as it has members in the Electoral College. Also, those delegates would be elected from existing districts, matching those of the members of the Senate and the House of Representatives from each state. These proposed laws by Congress to govern a new Convention, are in line with analogous laws now on the books in most states, which suggest similar results.[49]

All states now have provisions for electing their own state conventions to propose constitutional changes, and most have provisions in place for ratification conventions, if needed. The common denominator of these laws across the country is nonpartisan elections by district, usually with runoff elections if no candidate receives more than 50% in the first election. Because these patterns are well known, well established, and have been used hundreds of times with respect to state constitutional conventions, it is likely that they will be adopted for this purpose.[50]

As for the number of delegates, the membership allotted to each state in the Electoral College would probably be used. This would include the District of Columbia, since it has been allotted Electoral College votes. Some adjustment for the residents of the territories--Gaum, Virgin Islands, Puerto Rico, etc.-- would probably be made.

As for procedures, in the original Convention the states voted as states, through a majority of their delegations. The largest state was then Virginia, with one-sixth of the total population. The smallest was Rhode Island, with one-sixtieth. (Rhode Island, by the way, did not participate.) Given the more democratic cast of the United States today, and in the interests of allowing and promoting fair consensus, it is more likely that the result would be a two-thirds vote of the delegates, whether that rule is established by law from Congress, or by the Convention for itself.

The only reliance available concerning the quality of the delegates elected is the national experience in Philadelphia in 1787, and the experiences of all the states in conducting one or more conventions concerning their own constitutions. Historically, that experience has been excellent.[51] The obvious importance of the issues being presented, has usually attracted excellent candidates. And because these are nonpartisan elections, organizations such as the Jaycees and the League of Women Voters, as well as more traditional political organizations, become active in trying to find and elect the most able delegates. Sometimes these organizations have even banded together to jointly endorse the best possible candidates.

In short, although this is a political process and contains no guarantees, the history of the process suggests that those elected will be at least as qualified as the leading political figures in each state, but that they will approach their task from a nonpartisan standpoint.

We Have Nothing to Fear But Fear Itself

What are the real risks, if any, to basic American freedoms such as religion, press, speech, and the others?

This is the point at which public discussions of the Constitution get notoriously sloppy. Those who oppose the merits of the present amendment under discussion, claim that a new Convention could destroy our basic rights, especially those fundamental freedoms found in the lst Amendment. There is nothing new in this argument. It was made 85 years ago by those who wanted to prevent the Senate from being elected by the people directly. It was made 20 years ago by those who wanted to prevent the possibility of one of the two houses of each state legislature being apportioned on a basis other than strict population.

Many of the individuals and many of the groups who have been dragged into the debate over the conditional state calls for a new Convention, have become involved solely on this issue. But it is a false issue.

The proper question is not what might happen under the wildest stretch of the imagination, but instead, what are the genuine risks, based on an honest examination of our Constitutional history.

It is theoretically possible, for instance, that the American people could choose to set aside all of their basic freedoms, and could use the amendment process to establish in this nation either a monarchy, or a military dictatorship. Both are possible, but since neither has any legitimate chance of success, or any likelihood of attracting any significant support, no one bothers to debate either possibility. And yet, the present argument of the dangers to the lst Amendment is based on the same assumption as those two extreme examples; namely, that Americans are willing and ready to abandon their basic freedoms.

Critics are fond of referring to polls in which the Bill of Rights is presented in modern language with no identification, and citizens are asked to state whether they agree or disagree. Th results, frankly, are pretty discouraging to people like me, wh

pend our careers trying to protect and advance 1st Amendment freedoms.

Sometimes Americans are illogical in their approach to this Amendment. They count on and claim their right to speak, write, and believe their own ideas, but they support laws and programs which would restrict the rights of others, usually minorities, to do the same things. Not enough Americans fully understand that the freedom of one is the freedom of all, and that the guarantees of the 1st Amendment are indivisible.

Give the devil his due. Assume that if the 1st Amendment was put to a majority vote of all Americans, it would not pass. That still does not answer the practical question about a new Convention. The reason is that we already have the 1st Amendment. It does not need to be passed. For harm to come, it would have to be repealed.

Because the Framers made amendment so difficult, there is a vast middle ground between the strength of opinion and support that are necessary to pass any amendment, and those which are sufficient to defend it once it is in the Constitution. The time that had to pass between the passage and repeal of Prohibition, demonstrates the change of opinion that had to take place. In modern times, we need look no further than the Equal Rights Amendment to demonstrate the point.

All of the reputable, national polls agreed that during the time that the ERA was out for ratification among the states, a majority of all Americans supported it. Those who opposed it were a minority, but a determined one. And, it did not pass. Why not?

The first reason is a matter of statistics and political reality. In theory, 51% would be sufficient to pass any amendment. If it enjoyed that level of support in every state, and in every district for state legislatures, then it would inevitably have to succeed. It would not only be ratified by three-fourths of the states, it would be ratified unanimously.

But Americans are not homogenized, like milk or peanut butter. Each state is not an exact duplicate of national opinions. Each district is not a duplicate of statewide opinions. There are, as the Framers wrote about and well understood two hundred years ago, differences of opinion based on region, sex, race, religion, interest group, and many other personal factors. A support level of 51% would not even guarantee that half of all states would ratify any amendment.

ERA demonstrates the truth about the amendment process. It takes a high level of support, sustained over a long time, to pass any amendment. Remember that in Presidential elections, a difference of 10% (meaning a margin of 55% to 45%), produces a landslide. It takes at least that kind of support, if not more, to gain ratification for any amendment. When the position is one of defending against a bad amendment, rather than supporting a good one, the side in that position can lose by a landslide in the polls, but still succeed in stopping the amendment.

Those who say that it is realistically possible for portions or all of the 1st Amendment to be repealed, are necessarily saying that the 1st Amendment would have less supporters who would be less determined than were the opponents of the ERA. It takes a distrust of the American people, a fundamental distrust of democracy itself, to reach such a conclusion.

Furthermore, taking that position ignores the stance that is already being shown by most of the American media. They rise up in defense of the 1st Amendment, even when the publication or speech that they are defending is one that they personally abhore. Although the press generally supported ERA, there were many exceptions in various parts of the country. If the subject is the maintenance of the 1st Amendment, the ranks of the press will be unbroken.

It is not just politics that makes strange bedfellows. The defense of any and all of our basic, Constitutional freedoms, does the same thing. Our basic freedoms may not have all of the friends and supporters that they should have, or could have. But they have more than enough to defend against any misguided attempts to reduce or repeal any of them.

What is often phrased as a defense of the Constitution by avoiding the risks of a new Convention, is in fact an attack on the Constitution, and on the principle of popular sovereignty on which it is based. This principle was first stated in documents of any government, as opposed to the musings of philosophers, in our Declaration of Independence:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,--That whenever any

Form of Government becomes destructive of these ends, it is the right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

The Article V Little Shop of Horrors

What are the precise evils and dangers that the opponents of Article V claim?

Those who attack the present conditional calls for a new Convention, exactly like those who attacked the conditional calls used twice before in our history, have many routes to their conclusions. But, they agree on the final result. They fear, or they claim to fear, the erosion of basic American freedoms as a result of such a Convention. Here are their points, one at a time:

Charge: The second method in Article V has never been used.

Fact: The second method in Article V has been used twice in our history. It was successful in 1912 with respect to the 17th Amendment, and was used then exactly as the Framers anticipated. It was used in the 1960s in the same manner and for the same reasons, though unsuccessfully, with respect to the Dirksen Amendment.

Charge: If 34 states act, a new Convention must be held.

Fact: The calls are conditional, exactly as they were the last two times this method was used. Although the Constitution allows the states to force the calling of a new, general Convention, it does not compel the states to use this entire power at once. As a matter of Constitutional theory, Constitutional history, and plain common sense, the states do have the right to give Congress one last chance to act, before their calls become effective. The trigger for a new Convention, if that point should ever in our history be reached, will not be the actions by the states, it will be the inaction by Congress.

Charge: Congress will not act, and the state calls will then become effective, causing a new Convention.

Fact: This assertion ignores the Swamp Water Theory, which applies if Congress is faced with only two choices, passing the amendment that is sought and writing its language for itself, or refusing to act and allowing a new Convention to write it for them. Both history and practical politics tell us that under those circumstances, Congress will act.

Charge: If a new Convention is called, it cannot be limited n subject matter.

Fact: This assertion ignores the fact that all of the states have placed in their conditional calls statements to the effect that a new Convention should be for the "sole and express" purpose of the Balanced Budget Amendment (just as in prior generations they have been restricted to the subjects of the 17th Amendment, or the Dirksen Amendment). This charge also ignores the fact that 17 of the states have made their calls "null and void" in the event that a new Convention seeks to stray into other areas than the one designated.[52]

On this particular point, the critics contradict themselves badly. There are presently in the hands of the Secretary of State of the United States more than 34 state calls for a new Convention. They deal, however, with a variety of subjects, and there are no more than 32 of them on any one subject.[53] If the critics were right, that limitation sought by the states is irrelevant and ineffective, then a new Convention would be mandatory as of this moment. Not a single member of either the House or the Senate has suggested that this is so. And since the Constitution leaves the counting of the state calls to the Congress, this charge by the critics necessarily assumes that at least one-half of each House will, in a fit of temporary insanity, count all of the state calls together, regardless of subject matter.

Charge: Regardless of limitations imposed on a new Convention by the Joint Resolution of Congress which calls the Convention, the delegates could break loose into other areas.

Fact: This charge ignores the history of the 1787 Convention in which all states except Rhode Island (which did not participate), and the Congress itself, approved what the Convention did, prior to the beginning of the ratification process. It ignores the history of hundreds of state constitutional conventions. It ignores the fact that delegates to any such Convention will be seeking to accomplish results, not to engage in meaningless gestures. The making of proposals which are doomed to failure, either by a Congressional refusal to submit them for ratification, or by rejection at the hands of the states, would only earn for such delegates disrespect, and decrease the chances of success of any of their legitimate proposals.

Lastly, and perhaps most importantly, this charge ignores the fact that in 1787 we had no Supreme Court, much less a tradition that that Court would stand as the guardian of the onstitution itself. This charge assumes not only that the

Convention would ignore the Constitution and the laws, but that the Supreme Court would also ignore the Constitution and the laws.

Charge: A "run-away" Convention could destroy the basic freedoms of Americans.

Fact: Even assuming that all prerequisite failures occur, in the Convention, in Congress, and in the Supreme Court, this charge is still invalid because of the nature of the ratification process. Any amendment, whether its source is the Congress or a Convention, is nothing more than a proposal, with no legal force or effect, until and unless it is ratified by 38 states, either by the legislatures, or if Congress shall so choose, by special conventions within each state for that purpose. Unless the people of 38 states, through their representatives, are willing and ready to abandon basic American freedoms, no proposal either by Congress or a Convention, poses any real threat to those freedoms.

Charge: The Convention process, the second half of Article V, is too dangerous to use. This argument gets to the nub of the Constitutional debate. When critics go this far, as Melvin Laird did in a recent article in the **Washington Post**, they are saying that the Framers should never have given us a second method of amendment, one which allows us to overrule the judgments of Congress.[54] They are saying that Washington always knows what is best for the people, better than the people do for themselves.

Fact: The Laird article, which is being widely circulated around the country by those who oppose the present generation's use of the second half of Article V, abuses our Constitutional history and distorts the words of our Framers.

It begins with this quotation from James Madison, ". . . The prospect of a second [constitutional] convention would be viewed by all of Europe as a dark and threatening Cloud hanging over the Constitution." Madison restated and expanded on the same point in **The Federalist**, No. 38. Either through carelessness, or intent to deceive, the author of this article, and all those who circulate and refer to it, are ignoring the question which Madison was there addressing.

He is answering critics of the 1787 Convention. Some of them were saying that the whole Constitution should be rejected, and another Convention be convened immediately. They were proposing the well-known political ploy of postponing a decision by studying the question to death.

Although his words are taken out of context to give th impression that Madison opposed the idea of ever holding a ne

Convention, he was not so opposed. He stood firmly with his mentor, Thomas Jefferson, in holding that a new Convention should be an option available to the people, if they chose through the states to demand one. By taking Madison's words out of context, his views are seemingly turned into the opposite of what they really were.

The critics in 1984 are resurrecting and reusing the same arguments that were pressed in 1912, in the attempt to stop the state calls which ultimately produced the 17th Amendment. While they claim now, as they did then, that they are defending the Constitutional rights of the people, that is not their real message. The heart of their position, the one which they dare not express in public, is that the people are not to be trusted with the final say on the form of their government, and the use, abuse, and limitation on its various powers. They are attacking the basic principle stated in our Declaration of Independence, and the central premise of our Constitution.

They are saying that the people acting through their state legislatures, should not possess the right of peaceable change. They are attacking the very right on which the long-term survival of our Constitution depends. While claiming to defend our freedoms, they are attacking the process by which we got them, and without which we cannot keep them.

Those who claim Constitutional grounds for opposing conditional state calls, whether on this subject or any other in the future, are not defending our Constitution. They are only defending the status quo in Washington, against the logical and legitimate use of that Constitution.

In Our System of Government, Where Does the Buck Stop?

What is the relationship between Article V, especially the second half, and the central premise of American government, which is popular sovereignty?

The fundamental political question in the United States is, where does the buck stop? It is, who holds the ultimate power under the Constitution? The answer to this question would seem obvious. All high school students (and most elementary students) know it. Our government is based on popular sovereignty. All governments--federal, state, and local--possess only those powers which the people have given them, through the various constitutions and charters.

This concept was first stated in the basic documents of any nation, in our Declaration of Independence in which we say that the "just powers [of the government] are derived from the consent of the governed." This concept was repeated in many forms by many of the Framers. It is also stated in George Washington's Farewell Address, in which he cautioned us on many points concerning the protection and maintenance of our new Union and our new Constitution. He said this:

> "The basis of our political systems is the right of the people to make and alter their constitutions of government. But the constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all."[55]

The same concept is stated in the Constitution, which begins with these words, written in very large capital letters, "WE THE PEOPLE . . ." Why belabor such an obvious point? The reason is that many commentators, including some lawyers and legislators, have apparently neglected their homework.

Those who ask whether the people can be trusted with Constitutional questions, are turning the fundamental issue c

American government upside down. Ever since 4 July 1776, the roper question is, can the people trust the government, not can the government trust the people?

Both halves of Article V are concerned with our fundamental right to form and define governments of our choosing. And both halves of Article V are derivative; either the members of Congress, or the members of state legislatures, may begin the amendment process. But it should not be forgotten that both groups are acting as representatives of the people. (There is a move afoot among some groups to amend the Constitution of the United States to add the processes of initiative and referendum. But until and unless such a further amendment is made, the only ways in which popular sovereignty can be expressed on the subject of Constitutional amendment, is either through Congress or through the state legislatures.)

In considering the amendment process, it is important to remember that the Framers did not believe that either route was more important than the other, nor did they believe that either Congress, or the state legislatures taken as a group, were superior to the other in this regard. In fact, according to their writings, they assumed that the two methods of initiating amendments would be used about equally.

The Framers did express in **The Federalist** their belief that the state governments were closer to, and more amendable to, the will of the people, than was the federal government. This belief may have even more validity today, since Congressmen now represent districts of 520,000, rather than the 30,000 as originally established, and also recognizing the fact that many of our state governments are larger than the entire nation was, with its population of 3.5 million souls in 1776.

Those who say that the second method of amendment in Article V is too dangerous to use, are reversing the answer to the most basic question, who possesses the ultimate power? They are saying that the people cannot be trusted with sovereignty, that if Congress disagrees with the people, Congress wins and the people lose.

The heart of the errors of those who urge us to treat the second method of Article V as a dead letter, is that they agree with King George III, rather than with George Washington. Although their arguments are laced with references to the "good of the people," and "security of our way of life," they boil down to two simple ideas--democracy is too dangerous, and the nation's aders should not trust its people.

With our experience of 207 years as a free people, and 195 years under our Constitution, we should recognize such argumen for what they are, and reject them as untenable.

TABLE I

History of All Amendments Submitted for Ratification, But Not Ratified

House and Senate Salaries Amendment[1]	would have prohibited any raises voted by the Congress from becoming effective until the next Congress convened
Apportionment Amendment[1]	would have stopped the growth of the House of Representatives at 100 members
Labor Law Amendment	would have prohibited any jurisdiction in the Congress over the terms and conditions of workmen, leaving that to state legislation
Child Labor Law Amendment	would have allowed Congress to act with respect to the hours, wages and conditions of child laborers, only
Titles of Nobility Amendment	would have withdrawn U.S. citizenship from any citizen who accepted any title of nobility
Equal Rights Amendment	would have stated that equality under the law shall not be denied on account of sex
District of Columbia Voting Rights Amendment[2]	would give voting representation in the Congress, to the District of Columbia

[1]These two amendments were part of the Bill of Rights when it was adopted by the Congress. They failed to be ratified.

[2]This amendment is still out for ratification. From its track cord to date, however, it seems likely to fail.

TABLE II

Constitutional Amendments Proposed in Congress, But Not Passed

NOTE: The information below on the more than 2,000 proposals which have been made in Congress for Constitutional amendments between 1789 and 1926 is drawn from these three sources: Ames, Herman V., The Proposed Amendments to the Constitution during the First Century of its History (1897); Senate Document 93, 69th Congress, First Session (1926); and Ames, Herman V., "The Amending Provision of the Federal Constitution in Practice," 63 American Philosophical Society Proceedings 62, (1924). No researcher has brought this material up to date, but the variety of proposals made between 1789 and 1926, and the relative difficulty of getting any of them adopted by Congress, are fairly representative of both points through 1984.

Number of Constitutional Proposals in the First Century

More than 1,300 (this many are known; some records not kept)

Number of Individual Constitutional Amendments Proposed in the First Century

More than 1,900 (this many are known; some records not kept)

Number of Proposed Amendments Which Passed One House but not the Other, Between 1789 and 1926

16 passed the House, but not the Senate
16 passed the Senate, but not the House

Subjects Covered by One-House Amendment Proposals

Apportionment of House
Computation of Number of House Members
Freedom of Religion and Conscience
Freedom of Speech and Press
Right to Keep and Bear Arms
Criminal Trial Provisions and Property Right Guarantees

TABLE II—continued

Trial by Jury
Protection of Individual Rights from Infringement by States
Redistribution of Powers among Three Branches of Government
Reservation of Non-Delegated Powers
Prohibition of Second Criminal Trial for Same Offense
Freedom of Religion, Speech and Press
District Election of Members of Electoral College
Designation of Presidential Candidate by Presidential Electors
Maximum of Two Terms for President and Vice President (NOTE: like many of these proposals, this ultimately was adopted in one of the existing Amendments. This particular proposal was first made in 1825.)
Prohibition of Payment of Debts of Confederate States of America
Congressional Control of Election of Presidential Electors
Prohibition of Appropriations for Any Religious Body or Sect
Payment of War Claims to Disloyal Citizens
Women's Suffrage
New Date for Inauguration Day

(NOTE: Several of these proposals came up more than once, and some passed both Houses in different forms, but were not adopted as proposed Amendments until a third form was developed.)

Amendment Proposals in Congress in 1884

Prohibition of Grants or Loans to Private Corporations
Limitation of Time to Make Financial Claims
Power of Congress to Write Laws on Marriage and Divorce
Change in Veto Power
Line Item Veto in Appropriations Bills
Joint Resolutions to be Submitted to President
Additional Protection for Civil Rights
Exemption of Farm Products from Congressional Control
Override Presidential Veto by Majority, Not Two-Thirds
Senators to be Popularly Elected
Election of Certain Officers of Government

TABLE II—continued

Creation of Two Additional Vice Presidents, Definition of Duties
Export Tax on Cotton
Popular Election of the President
State Taxation of Corporations
Narrow Definition of "Legal Tender"
Limitation of the National Debt
Requiring Gold or Silver as Basis for Money
Six-Year, Single-Term Presidency
Creation of a Commission to Call for a Constitutional Convention
House also to Ratify Treaties
Six-Year, Single-Term Presidency with Pension for Life
Congressional Consent for Reciprocal Treaties on Revenue

Amendment Proposals in Congress in 1924

Apportionment of Congress after Each Census
Uniform Federal Laws on Marriage and Divorce
Regulation of Employment of Those under 16
Extension of Definition of Treason
Ratification of Constitutional Amendments by Referendum
Approval of Declaration of War by Referendum
Allowing Income Taxes on State Bonds
Regulation of Employment of Women, and Those under 18
No Use of Public Money for Religious Institutions
Change in Inauguration Day, and Electoral College Date
Making Fraud in Military Procurement an Act of Treason
Six-Year, One-Term Presidency with Popular Election (NOTE: the single most popular subject for proposals for amendment in the history of the United States is alteration or abolition of the Electoral College. There has been, almost from the beginning, a consensus that change was necessary. But, there has never been a consensus on what the change should be.)
Eight Years for Ratification of Amendments, and only by Either Conventions or by Referenda
Three-Fourths Vote of both Houses to Declare War
In Event of War, Congress May Conscript Wealth as well as Manpower
Four Year Terms for House

TABLE II—continued

(NOTE: In both of the years which were chosen as representative, there were more proposals than those listed. Subjects which were identical were not repeated. Anyone interested in the entire span of proposed amendments during the first century and a third, will find them in a table at the end of Mr. Ames' book, and in Senate Document 93, both cited above.)

TABLE III

Amendments Proposed by Ten or More State Calls

Subject	No. of Calls[1]	No. of States[1]
Direct Election of Senators	75	31
Antipolygamy	30	27
Limitation of Taxation by Repeal of the 16th Amendment	42	34[2]
Revision of Article V	19	14
Apportionment of State Legislatures	54	36[2]
Redistribution of Presidential Electors	11	11
Revenue Sharing	21	18
Balanced Budget Amendment	35	32

[1]The total calls are usually more than the total states, due to some states passing multiple calls in successive years.

[2]Some states repealed their calls, before other states adopted theirs. The minimum required was not in effect at any one time.

FOOTNOTES

[1]Dr. Albert Blaustein, *Independence Documents of the World*, 1977.

[2]During the discussion of Article V, which extended between 29 May and 19 June, Charles Pinckney said this to the Constitutional Convention, "It is to this unanimous consent, the depressed situation of the Union is undoubtedly owing." Max Farrand, *The Records of the Federal Convention of 1787*, 1966 Edition, Vol. 3, p. 120.

[3]*The Federalist*, No. 10.

[4]Eric Eriksson, *American Constitutional History*, 1933, pp. 214-238, especially pp. 234-236, concerning the critical states of New York and Virginia, in which ratification nearly failed.

[5]*The Federalist*, No. 43.

[6]"I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs, and to expose the union to the jeopardy of successive experiments in the chimerical pursuit of a perfect plan." *The Federalist*, No. 85.

[7]*The Federalist*, No. 85.

[8]Letter from Thomas Jefferson to James Madison, 20 December 1787.

[9]A detailed history of the passage of each of these revenue acts, and the responses of the American colonists to each, is found in R. C. Simmons, *The American Colonies*, W. W. Norton & Co., New York, 1981, at pp. 296ff.

[10]Ibid.

[11]Ibid.

[12]Ibid.

[13]The revenues produced from the various English colonial taxes are taken from *Historical Statistics of the United States*, Department of Commerce, 1976, Part 2, Table Z-611-615, "Tax Collections in America under Different Revenue Laws: 1765 to 1774."

[14]Ibid.

[15]Ibid.

[16]Charles Andrews, *The Colonial Period of American History* Yale University Press, New Haven, 1938, gives a complete history of the English effort to impose revenue measures, and to set up an effective customs service to limit the rampant smuggling. See pp. 85-220.

[17]Ibid., at 215.

[18]This assertion comes from the author's review of all 32 state calls, passed to date.

[19]Archives, Secretary of State's office, Washington, D.C.

[20]The history of this meeting is given in *The Constitution of the United States, Analysis and Interpretation*, Congressional Research Service, Library of Congress, 1973, "Historical Note," p. xxxvii.

[21]"Documents Illustrative of the Formation of the Union of the American States," H. Doc. No. 398, 69th Congress, lst Session, pp. 41-43, 1927.

[22]The skittishness of Rhode Island, and its reactions to the pressures placed on it, are reflected in its lengthy ratification document. See, *Elliot's Debates*, Book I, Vol. l, pp. 334-337.

[23]*The Federalist*, No. 40.

[24]Max Farrand, *Records of the Federal Convention*, Vol. 2, p. 665-666.

[25]The standard of possibility of use first appears concerning political freedoms, in *Williams v. Rhodes*, 393 US 23 (1968), and is reaffirmed in numerous cases, most recently, *Anderson v. Celebrezze*, __ US __, 103, S. Ct. 1564 (1983).

[26]*Amendment of the Constitution by the Convention Method under Article V*, Special Constitutional Convention Study Committee, American Bar Association, Chicago, 1974. [This is cited hereafter as the "ABA Report."] The nine members of the Special Committee, who are listed on pp. ii-iii of the Report, included two United States District Judges, a Judge of the D.C. Superior Court, a present and a former law school dean, two former presidents of state constitutional conventions, a former Deputy Attorney General of the United States, and a private practitioner experienced in the subject. This group unanimously supported all of the conclusions, with the sole exception that one member did not believe that the "one man-one vote" rule should apply to the election of delegates to a new Convention.

[27]The full text of the House of Delegates Resolution, which put the American Bar Association itself on record in support of these points, is found in the ABA Report at pp. vii-viii.

[28]ABA Report, p. 2.

[29]Ibid., pp. 11-17.

[30]Ibid., pp. 60-61, gives a table of all 356 state calls for a Convention which had been made to date.

[31]Ibid., pp. 17-19.

[32]Ibid., pp. 20-25, especially the discussion of *Powell v. McCormack*, 395 US 486 (1969) which appears at pp. 22-24.

[33]Ibid., pp. 34-36.

[34]See H.R. 3373 and S. 119.

[35]*The Article V Convention Process: A Symposium*, Da Capo Press, New York, 1971, Everett McKinley Dirksen, "The Supreme Court and the People," at p. 26.

[36]Ibid., at page 31.

[37]*The Article V Convention Process: A Symposium*; Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," respectively on the two points, at pp. 43-44 and at 46-48. Note this statement on the latter page, "The role of the states in filing their applications would be to identify the problem or problems that they believed to call for resolution by way of amendment. The role of the convention that would be called by reason of such action by the states would then be to decide whether the problem called for correction by constitutional amendment and, if so, to frame the amendment itself and propose it for ratification as provided in article V."

[38]Gerald Gunther, "Constitutional Brinkmanship: Stumbling Toward a Convention," *American Bar Association Journal*, Vol. 65, p. 1046, July 1979, hereafter cited as "Gunther."

[39]Gunther, p. 1047.

[40]Ibid., p. 1048.

[41]Ibid.

[42]Ibid.

[43]Ibid.

[44]Ibid., p. 1049.

[45]*The Article V Convention Process: A Symposium*, Da Capo Press, New York, 1971; Ralph M. Carson, "Disadvantages of a Federal Constitutional Convention," at pp. 85-94.

[46]*The Article V Convention Process: A Symposium*; "Article V: The Comatose Article of Our Living Constitution?", Robert G. Dixon, Jr., p. 95, at p. 111.

[47]See H.R. 3373, and S. 119.

[48]See footnote 22 above.

[49]A. L. Sturm, *Methods of State Constitutional Reform*, 1954.

[50]Cf., 15 Delaware Code Annotated Section 7706.

[51]ABA Report, pp. 14-16.

[52]The quotations come from the author's review of all 32 state calls passed to date.

[53]"There are nearly forty states which currently have pending before Congress valid Constitutional Convention applications. Why isn't Congress presently required to establish such a Convention? For the simple reason that there are not two-thirds calling for the same **kind** of Convention. . . . In other words, there has not already been a Convention because it is understood that the Constitution requires consensus—before a Convention can be called more is required that 34 states apply for a Convention; rather, there must be 34 states calling for a Convention on the same subject-matter." [Emphasis in the original.] Stephen J. Markman, Chief Counsel, U.S. Senate Subcommittee on the Constitution, before the Michigan State Senate Committee on Administration and Rules, 29 March 1984.

[54]Melvin Laird, "James Madison Wouldn't Approve," Op-Ed page, *Washington Post*, Monday, 13 February 1984.

[55]George Washington, "Farewell Address, *American Jurisprudency Desk Book*."

Note: The American Bar Association Report, *Amendment of the Constitution by the Convention Method Under Article V*, contains, at pp. 41-46, extensive footnotes on their conclusions. It also contains, at pp. 79-80, an exhaustive bibliography on the subject. Anyone wishing to explore this subject in depth should begin with this source.

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Markman, Stephen J., "Testimony before the Michigan State Senate, Committee on Administration and Rules, on Constitutional Convention Procedures, 29 March 1984.

Legislation

H. 3373 (Convention procedures bill, now pending in the House of Representatives).

S. 119 (Convention procedures bill, now pending in the Senate).

Report of the Committee on the Judiciary, United States Senate, on S. J. Res. 58, 10 July 1981.

Cases

Although the subject of this monograph is Constitutional law at the most basic level, and although the author is a Constitutional lawyer, it is by design that no cases have been cited. First, there have never been any cases squarely on the Article V Convention process. Second, this monograph is intended for a lay audience. Third, for those with a taste for cases, those that apply by analogy are discussed at length in the ABA Report, and in *The Article V Convention Process: A Symposium*, among other sources cited above.

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612-1837
(913) 232-6000

DAVID E. JOHNSON
DIRECTOR

ROBERT T. STEPHAN
ATTORNEY GENERAL

March 21, 1989

Senator Gus Bogina
Chairman
Ways and Means Committee
Capitol Building, Room 120-S
Topeka, Kansas 66611

Dear Senator Bogina:

Please find enclosed letters of support from the Kansas Peace Officers Association, Kansas Sheriff's Association, Kansas Chief of Police Association and the Johnson County Chiefs of Police Association, for funding of an Automated Fingerprint Identification System requested by the Kansas Bureau of Investigation. The funding for this project is included in HB 2027 and HB 2063.

I respectfully request consideration of this support when considering HB 2027 and HB 2063.

Sincerely,

David E. Johnson

DAVID E. JOHNSON
DIRECTOR

DEJ/njr

cc: All members Senate Ways and Means Committee

ATTACHMENT 8
SWAM 3-21-89

Kansas Peace Officers' Association

INCORPORATED

P.O. BOX 2592 • WICHITA, KANSAS 67201

February 1, 1989

Director, David E. Johnson
Kansas Bureau of Investigation
1620 Tyler
Topeka, Kansas 66604

Dear Director Johnson,

The Board of Governors of the Kansas Peace Officers' Association at the last board meeting, voted unanimously to lend support in your efforts in obtaining the AFIS system. We are willing to do anything we can to help obtain this system.

I can not think of a better use of funds by the State to enhance law enforcement in this State than the purchase of an AFIS system. We are all aware of the importance and the benefits this system can lend to every department in the State.

If I or any officer or board member may be of assistance to you or the KBI in this effort, please do not hesitate to call on us.

Sincerely,

Delbert E. Fowler

Delbert E. Fowler
President

In Unity There Is Strength

Kansas Sheriffs Association

P.O. Box 1853
Salina, Kansas 67402-1853

913-827-2222

February 27, 1989

David E. Johnson, Director
Kansas Bureau of Investigation
1620 Tyler
Topeka, Ks. 66604

Dear Director Johnson,

The Kansas Sheriffs Association wishes to offer its wholehearted support to you in your efforts to purchase an A.F.I.S. system.

This system would be an invaluable tool for every law enforcement agency in the state.

Please to not hesitate to call on us if we can be of assistance in any way.

Yours truly,

Marion L. Cox

Marion L. Cox
President

Darrell L. Wilson

Darrell L. Wilson
Secy/Treas.

KANSAS ASSOCIATION ★★★★ K.A.C.P. CHIEFS OF POLICE

February 14, 1989

Mr. David Johnson
Director
Kansas Bureau of Investigation
1620 Tyler
Topeka, Ks. 66612

Dear Director Johnson:

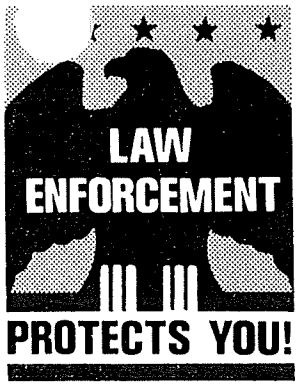
The Kansas Association of Chiefs of Police endorses and supports the Kansas Bureau of Investigation in their endeavor to obtain, install and operate the Automated Fingerprint Identification System (AFIS). We in law enforcement recognize the urgent need for this technological enhancement. The service this will provide throughout our entire state is both valuable and necessary in our efforts to combat and control the mobile criminal element. We commend you for your initiative in this area and appreciate what you have done and are doing to assist the law enforcement community of Kansas.

Sincerely,

Ronald E. Pickman

Ronald E. Pickman
President
Kansas Association of Chiefs of Police

REP/bc



Johnson County
Police Chiefs Association

David E. Johnson
Director, Kansas Bureau of Investigation
Division of The Office of Attorney General
State of Kansas

Dear Dave,

On behalf of the members of the Johnson County Police Chiefs Association, I would like to take this opportunity to voice our support in your efforts to obtain the AFIS (AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM) system.

We are well aware that under the current system, a high proportion of recovered latent prints are never used to search fingerprint files for comparisions, but instead are simply stored on the chance that they maybe useful in the future.

The AFIS system would aid in solving crimes that could proceed to an extended pattern if apprehensions are not made, and it has the potential to significantly reduce suffering of victims and increasing the recovery fo property.

The AFIS system would be a tremendous benefit to Law Enforcement and the citizens of Kansas, now and in the future.

If we can aid you in this endeavor in other way, please do not hesitate to contact me.

Sincerely,

Carlos E. Wells
President
Johnson County Police Chiefs Association