Why an Article V Application for a Balanced Budget Amendment is Safe

Written by Attorney Mike Stern on 2/15/2015 to a state legislator who was concerned about a possible "runaway convention".

Dear State Legislator:
I served as a counsel to Congress for many years, including 8 years as Senior Counsel to the House of Representatives. Since leaving the Hill, I have written extensively on a variety of legal issues related to Congress and the legislative process, including the Article V process for proposing amendments initiated by the state legislatures. A link to a law review article I published several years ago on the Article V convention may be found at **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904587#%23**. I am writing to clear up significant misconceptions which are being circulated regarding the Article V process.

The first thing to understand about the Article V convention is that it has only the limited power to propose amendments to the Constitution. This is nothing more than the power that Congress has every day that it is in session.

The reason the Framers put the Article V convention into the Constitution was that they understood that there were some types of amendments Congress would not propose, namely those that reduced its own power or protected the interests of the states versus the federal government. The authority to initiate an alternative method of proposing constitutional amendments was therefore given to the state legislatures. But this authority is no greater that Congress's authority to propose amendments. To the contrary, it is subject to even more checks and balances that make the notion of a "runaway convention" entirely fantastical.

Step One is that two-thirds of the state legislatures must apply to Congress for a convention for proposing amendments. This means that 34 states must agree that a convention should be called and the subject on which it should deliberate. A state could apply for a convention without a specified subject, but no one is suggesting that any state do that.

Step Two is that Congress must call the convention. That means that Congress must find that 34 state legislatures have submitted valid applications and that those applications agree on the subject of the convention. By calling the convention, Congress necessarily finds that the applications for a limited convention are valid and that they agree on the permitted scope of the convention. Congress will likely include language in the call that emphasizes the limited scope of the convention and warns that any proposed amendments outside that scope will not be valid. Whether or not this language is expressly in the call, this will be Congress's view because it is the only plausible legal position and because Congress has no interest in giving the convention any broader authority than necessary.

Step Three is the convention must assemble, discuss and debate proposals and ultimately decide whether or not to propose an amendment. Because at least two-thirds of the delegations will be from states that have already agreed to the subject of the convention (e.g., a balanced budget amendment), it is rather unlikely that a majority of delegations would be interested in addressing other subjects, even if the convention had the power to do so. But because the convention does not have this power, doing so would be futile (see Step Four) and the delegates will know this.

Nevertheless, a number of states have been sufficiently concerned about a "runaway convention" that they have put even more checks in place. They have adopted state laws that provide for recall and

replacement of delegates who vote for consideration of out of scope amendments. Other states will provide instructions to their delegates at the time they are selected. In the (unlikely) event that delegates seek to violate these limitations, they can be challenged at the convention by fellow members of their delegation, by the state legislature or its authorized representative, or by an official designated by law. Because the convention is a meeting of states, it will look to the state law of the state which the delegate represents and/or to the state legislature for an authoritative determination of whether the delegate continues to have valid credentials. In the extremely unlikely event that the convention were to decide the credentials issue contrary to the views of the state legislature, the legislature's legal remedy would be to bring suit against the delegate in its state courts. There is no need for the state to have any physical jurisdiction over the place where the convention is located.

To give some context to the possibility that any individual delegate could "run away," consider the situation of presidential electors. These individuals pledge to vote for a particular candidate, but in almost all cases this has been only a moral obligation, not a legally enforceable one. Yet only a handful of electors have broken their pledges throughout history. For a convention to "run away," dozens of delegates would have to be willing to violate their moral obligations and face potential legal consequences. This borders on the absurd.

Step Four is that any amendment proposed by the convention must be submitted to Congress before it can be sent to the states for ratification. Under Article V, Congress must decide the method of ratification for each proposed amendment. This must be done by a concurrent resolution adopted in both houses of Congress. That means that if anyone in Congress believes that the amendment proposed by the convention exceeds its authority, they have the right to raise a point of order against the ratification resolution and have their colleagues decide whether the proposed amendment is valid.

Some have raised the fear that the composition of Congress might change between the time of the convention call and the time when the amendment is proposed by the convention. In this scenario Congress now has a majority (in both houses) who believe that a convention cannot be limited. But even if this were to occur, it would not lead Congress to submit the amendment for ratification. The new majority would find that the amendment was invalid because Congress never had the authority to call a limited convention in the first place.

It is also sometimes suggested that if the convention proposes a really popular amendment, Congress might ignore its invalidity and submit it for ratification anyway. But this overlooks three points. First, the whole point of the Article V convention is to circumvent Congress so it is very unlikely that it will propose amendments that Congress loves. Second, if an amendment were really that popular, Congress could just go ahead and propose the amendment on its own authority. Third, if Congress were to submit an out of scope amendment for ratification, that amendment would still be subject to challenge in the courts. Thus, it would be foolish for the convention to propose any amendment that is not clearly within the scope of its authority.

Step Five is that the amendment must be ratified by three-fourths of the states. Thus, even if one hypothesizes the extraordinary unlikely possibility that an out of scope amendment is proposed by a convention, is submitted to the states by Congress and survives judicial challenge, **it still must be ratified by 38 states.** This is simply not going to happen with any amendment that is viewed as either unwise or illegitimate by a substantial portion of the population.

Best regards,

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