



America's Last Chance: An Article V General Convention

Executive Summary

The separation of powers, the secret to America's governing success, is on life support. Checks and balances, the glue that holds our country together, have eroded. WE THE PEOPLE are being replaced by 68 square miles, in Washington DC, of centralized special interests with governing power now in the grip of career politicians, unelected bureaucrats, and judges. Congress is increasingly cynical and unwilling to legislate. States, with over half of their annual budgets coming to them in the form of highly politicized federal grants, have become sub-units of the federal government. America, as we know it, is in trouble.

Our Founders understood the history of great societies, knew this would happen, and planned for it. Their plan, found in Article V of the United States Constitution, gives the states the power to impose reforms on the federal government without having to resort to war, revolution, secession, or nullification. It is the only constitutional, legal path to restore government to WE THE PEOPLE. **How do we do it?**

State legislators across the nation know the answer. They have submitted hundreds of applications to Congress to make the call for an Article V Convention and have been ignored. They are poised, they are nonpartisan in their desire to meet in Convention to consider solutions, they are experienced, and they love America. **Why haven't the states met in Convention?**

This white paper provides the answers to these questions and the solution that will empower our state legislators to take their rightful constitutional role in restoring parity in governing between the federal government and the states on behalf of WE THE PEOPLE.

Introduction

Do the states want to meet in Convention? The answer is a resounding yes!

State legislators have been unequivocal in their desire to meet in convention to discuss our nation's problems and propose amendments to address them: they began submitting Article V applications in 1789 and have submitted over 400 more since then. Nearly 300 applications from 42 states remain in force; and only one state, Hawaii, has yet to pass an Article V application. Thirty-five applications have been submitted by both Republican- and Democrat-controlled legislatures in just the past 5 years. Yet we still haven't had a Convention. *Why?*

Why hasn't it happened yet?

Conventional wisdom holds that in spite of the continuous flow of Article V applications from the states to Congress throughout American history, there have never been enough applications addressing the same subject to reach the constitutionally-mandated two-thirds threshold needed for Congress to call the Convention. In 1993, however, former Department of Justice Attorney and St. Thomas University Professor of Law Michael Stokes Paulsen conducted an aggregation study and found valid, active applications for an

Article V General Convention from 45 states, 11 more than the 34 required for the Convention to be called. Paulsen presented his findings to Congress but was ignored.

Or was he? Although Congress failed in its responsibility to call the Convention, a flurry of Article V activity ensued in the wake of the Paulsen aggregation. Naysayers began to spread fear, uncertainty, and doubt about the safety and legitimacy of the states meeting in convention. This opposition has come primarily from those who benefit from the status quo and those who have fallen prey to their scare tactics, rather than knowledgeable, principled objectors.¹ States began rescinding their applications, with enough eventually doing so to bring the count below the two-thirds threshold required to call the convention.

In an attempt to quell “runaway convention” fears, Article V advocacy organizations began to form around various renditions of a *limited convention*, at which only certain amendments, as stipulated in the applications aggregated to trigger the call, could be discussed and sent to the states for ratification.

It was only after Congress began receiving pressure from these advocacy organizations—nearly a quarter-century after having been approached by Paulsen—that it instituted a system to track Article V applications. Congress’ reluctance to appropriately discharge its duties surrounding Article V is further documented in a series of Congressional Research Service reports that hypothesize an active role in the proceedings of a convention the very purpose of which is to bypass Congress, and question whether Congress bears any obligation to even call the Convention at all.

The Article V movement has become fractured. ACF has the solution.

State legislators are now being lobbied by both professional lobbyists and grassroots activists arguing for an array of Article V initiatives. Most, because of their subject matter, messaging, or both, have been perceived as too partisan, politically risky, or benefitting too few people to merit legislators’ limited time and attention. Consequently, no single effort has amassed enough applications to call the Convention.

Based on comprehensive research, a thorough application aggregation analysis, and our experience as veterans of the Article V movement, ACF believes an Article V Convention is achievable within the next two to four years using existing applications that can aggregate for a *General Convention*, one at which state legislators exercise their constitutional authority to set the agenda at the Convention rather than having it dictated ahead of time by language in the applications. ACF will work primarily with state legislative leaders to help them overcome Congressional inertia and finally call the Convention they’ve been requesting for years now.

The ACF Model

The ACF model is built upon a comprehensive survey of history, constitutional scholarship, and legal opinion. We believe a thorough understanding of these matters is critical to properly lay this foundation; however, an in-depth exploration of the history and terminology of Article V is outside the scope of this paper. More information is available at our website, www.amconfdn.org.

Key Terms

For this discussion, the most important concept to understand is the difference between a *general* and *limited* convention. Additional Article V terms and information are available at our website.

- **General Convention:** At a *general convention*, the agenda is determined by the commissioned delegates, acting on the instructions given to them by their respective state legislatures, at the outset of the convention. No amendment is declared off-limits in advance by language in the applications. The very first application for an Article V Convention was for a General Convention and was

¹ Specific naysayer objections are identified and rebutted at our website, www.amconfdn.org.

passed by the State of New York to press for the Bill of Rights in 1789. It remains in force to this day.

. . . in the fullest confidence of obtaining a revision of the said Constitution by a General Convention . . . we, the Legislature of the State of New York, do on behalf of our constituents, in the most earnest and solemn manner, make this application to the Congress, that a Convention of Deputies from the several States be called as early as possible, with full powers to take the said Constitution into their consideration, and to propose such amendments thereto, as they shall find best calculated to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.²

- **Limited Convention:** A *limited convention* is commonly understood as one at which only certain amendments, as stipulated in the applications aggregated to trigger the call, may be discussed and passed to the states for ratification.

There is considerable divergence among constitutional scholars as to whether an Article V Convention may be limited in scope, and how such applications should be aggregated. Robert Natelson of the Independence Institute contends that an Article V Convention may be limited, and “Congress has no choice...but to group [applications] according to subject matter.”³ Former Solicitor General & Assistant Attorney General Walter E. Dellinger, on the other hand, describes the assumption that Congress can call a limited-subject convention “erroneous,” and argues that “such an application must be considered invalid.”⁴ Constitutional historian and former Department of Justice attorney Russell Caplan notes that the illimitability theory “holds the edge among constitutional scholars.”⁵

Strictest Criteria Approach

One of the unique features of the ACF model is our “strictest criteria” approach. In any political, scholarly, or legal endeavor, there is a diversity of opinion. At every decision point, ACF has opted to plan for the least favorable outcome. We are not undertaking this project counting on everything breaking our way.

For example, ACF is aware of six different aggregation studies. One concluded that there are already 36 valid applications for an Article V Convention, and that Congress should call the Convention immediately. ACF did its own study and determined that only 30 applications meet our strictest criteria for inclusion. More details about the various aggregation studies are available at our website, www.amconfdn.org.

Congressional Reluctance and Litigation Scenarios

Another unique aspect of the ACF model is that ACF is the only Article V advocacy organization that has given any thought to what efforts may be necessary to get the states to convention beyond securing 34 valid applications. While it is our hope that Congress acts as it should and makes the call for a Convention supported by valid applications, based on the CRS reports on Article V and Congress’ history, it is also the least likely outcome.

² Article V application by the State of New York, H.R. Jour., 1st Cong., 1st Sess. 29-30 (May 6, 1789)

³ Natelson, Robert G., (2010, December), “Amending the Constitution by Convention: A more complete view of the founders’ plan,” The Independence Institute, IP-7-2010, p. 16. Retrieved on May 6, 2018 from <http://robnatelson.com/wp-content/uploads/2016/11/II-Paper-I-Founders-Plan-II-webversion.pdf>

⁴ Dellinger, Walter E. (1979), “The Recurring Question of the ‘Limited’ Constitutional Convention,” 88 *Yale Law Journal*, 88, 1623-1640, p. 1640

⁵ Caplan, Russell L., (1988), *Constitutional Brinkmanship: Amending the Constitution by national convention*, (New York, NY: Oxford University Press), p. 138

Consistent with our “strictest criteria” approach, ACF believes it prudent to assume Congress will look for excuses to avoid calling this Convention. There are four possible scenarios, and the type of applications (limited vs. general) submitted by the states figure prominently in the outcomes.

- (1) The states file 34 or more limited applications. As has happened in the past, they are ignored, forcing the states to take action in federal court. Consistent with Dellinger & Caplan, Congress argues that they have no constitutional authority to call a limited convention. Whether the court hearing the case is composed of strict constructionists or jurists inclined to protect an expanded role for the federal government, **the states would most likely lose.**
- (2) The states file 34 or more limited applications. Congress calls the Convention, but as suggested in the CRS report, attempts to control it. In this scenario, the states would be forced to sue Congress for attempting to assume powers not specifically granted to it in Article V.

For the foreseeable future, strict constructionists will hold the majority in the Supreme Court, so the Court would most likely rule that both the limited application and Congress’ grab for authority do not comply with Article V. Both the states and Congress lose this case, but **the states are the ultimate loser because there is no Convention.**

- (3) The states file 34 or more general applications. Congress ignores them, and the states sue in federal court. Because there is no limiting language providing Congress with a constitutional escape hatch, and because, for the foreseeable future, strict constructionists will hold the majority in the Supreme Court, **the states would most likely prevail.**
- (4) The states file 34 or more applications for a general convention. Congress calls the Convention but attempts to control it in some way. Because the majority of the Justices are strict constructionists, the court would support the general convention and throw out Congress’ demand for extra-constitutional power over the convention and **the states would prevail.**

In light of the historical record and a careful assessment of the full range of scholarly opinion, ACF has concluded that the most effective strategy to prevent Congress from evading its responsibility to call the Convention and meddle in its proceedings is to focus our efforts and attention exclusively on applications for a general convention, and prudence demands that we lay the groundwork to prepare the states for litigation.

The ACF Strategy

What Sets ACF Apart: Comprehensive non-partisan support for state legislators

ACF is the only Article V advocacy organization that has devoted any thought, planning, or resources to support state legislators beyond securing 34 applications. Our strategy anticipates and plans for pushback from Congress and others invested in the status quo, and proactively engages the media. We have a plan to equip state legislators to effectively participate in the Convention and support them all the way through ratification of amendments.

ACF is also the only Article V advocacy organization that is working for a General Convention. We exist for one purpose only: to bring about this Convention and support the states through the ratification of whatever amendments come out of it. Then we will disband. Our only agenda is to give state legislatures a forum in which they can exercise their constitutional prerogative to set their *own* agenda. That means we can be non-partisan in both name and practice. State legislators need not fear associating themselves with ACF or a General Convention because they themselves are in the driver’s seat: they are not tying themselves to someone else’s political agenda or a controversial message.

While we consider these distinctive factors critical in facilitating the states' success, ACF stands ready to collaborate with any organization that is willing to partner with us in supporting an Article V General Convention in a non-partisan manner.

Counting to 34: How close are we to a Convention?

As mentioned in the previous section, in addition to surveying other scholars' work in this area, ACF has conducted our own aggregation study using our "strictest criteria" model. Our study counts those states with a valid general application, along with those that have an application that specifies a subject of special interest to the state but does not contain limiting or exclusionary language. Using this standard, we have determined that 30 states have valid, active applications to Congress for an Article V General Convention. More detailed information is available at our website, www.amconfdn.org.

Mobilize the States

ACF will be working with 4-8 additional states to submit an application for a General Convention or remove limiting language from an existing application. We will then reach out to legislative leadership in the states that have submitted an application, asking them to notify Congress that they have a valid, active application for an Article V General Convention, and that they expect Congress to discharge its constitutional responsibility to call the Convention. Consistent with our "strictest criteria" model, we will also work to prepare the Attorneys General in these states to file suit in federal court to compel Congress, should the need arise.

Prepare & Support the States

ACF will work with all 50 states to support legislators to effectively participate in the Convention. We will provide expert, non-partisan training regarding Article V topics such as delegate selection and oversight, Convention rules, amendment formulation, and the ratification process. We are also preparing to provide logistical support for the Convention itself, including facilities, communications, and media coverage. We plan to provide states with support all the way through the ratification of the amendments that issue from the Convention.

Timeline: 2-4 Years

ACF's timeline is a short 2-4 years. In light of legislators' numerous other responsibilities, including having to campaign for reelection as often as every 2 years, it is difficult to sustain long-term legislative enthusiasm for any initiative, particularly in states with term limits. A number of Article V advocacy organizations experienced this as their efforts began to stall in 2018. Additionally, there are many who believe that if this convention does not take place very soon, the problems it is meant to address will become irreparable.

| <u>Milestone</u> | <u>Target Date</u> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| 1. Announcement that the call for the Convention <u>will</u> be made | May 2020 |
| 2. Announcement that the call for the Convention <u>has</u> been made | July 2020 |
| 3. Pre-convention Assembly schedule announced (educational seminars exclusively for state legislatures to prepare them for effective participation in the Convention) | August 2020 |
| 4. Coverage of the Pre-convention Assembly begins (a major media event) | November 2020 |
| 5. Convention date is announced | December 2020 |

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|-----------------------------------------|---------------|
| 6. Convention opens; coverage begins | November 2021 |
| 7. Convention outcomes announced | December 2021 |
| 8. Ratification progress coverage | December 2022 |
| 9. Amendment ratification announcements | December 2023 |

After the Convention: Benefits to State Legislators

After the War for Independence, the states came together and created the federal government as a co-equal entity to handle functions that it didn't make sense for them to undertake individually: tasks like diplomacy and settling disputes between one another. The states were never intended to be subservient to the federal government as they have become in many respects today. An Article V Convention is the constitutional vehicle to restore the states to their role as a check on federal overreach and champions of their citizens' liberties and freedoms.

State legislators can realize the following tangible benefits from the Convention:

- No more unfunded mandates and one-size-fits-all “solutions” dictated by unelected federal bureaucrats: state legislators can be empowered to respond to their own constituents instead of dutifully executing programs and having the majority of their budgets under the control of Washington.⁶
- End the forced subsidy of policy and program decisions made by their counterparts in other states.⁷
- Prevent Washington from using federal block grants to extort compliance in areas where it clearly has no constitutional jurisdiction.
- The states can be unleashed as fifty “laboratories of democracy,” learning from one another what works and what doesn't, free to adapt to local conditions, and able to respond to changes on the ground much more quickly and effectively than the federal government can.
- Local control is a **winning issue with voters**, especially millennials. In overwhelming numbers, young voters want the poor cared for, consumers protected, and the environment kept clean. But in even larger numbers, they agree that the federal government is inefficient, wasteful, and untrustworthy.⁸ Americans across the political spectrum express frustration that Congress' reelection rates seldom dip below 90%, even though an approval rating above 25% is headline news.

Summary

- State legislators of both parties have demonstrated that they want to use the authority granted to them in Article V to address their concerns and those of their constituents.

⁶ To read testimony given by Utah Senate President Wayne Niederhauser on behalf of the Council of State Governments to the House Committee on Oversight & Government Reform's Subcommittee on Intergovernmental Affairs, please visit https://oversight.house.gov/wp-content/uploads/2017/04/Niederhauser_Testimony.pdf

⁷ To learn more about how state labor law policies impact workers in surrounding states, please visit <https://news.illinois.edu/view/6367/204531>

⁸ Read *Millennials, the Politically Unclaimed Generation* here: <https://reason.com/poll/2014/07/10/reason-rupe-2014-millennial-survey#.11aq2yr:a5ca>

- Congress has shirked its constitutional responsibility to call a Convention; and the fear, uncertainty, and doubt spread by naysayers has successfully divided support for a Convention between various limited-subject applications.
- Limited-subject applications are more vulnerable to politicization and litigation.
- A General Convention is the only politically viable approach.
- A General Convention is the best way to prevent Congress from attempting to use limiting language as an excuse to shirk its duty to call the Convention or interfere with its proceedings.
- The states have already submitted to Congress, at a minimum, 30 of the 34 applications needed to call a General Convention.
- ACF has a plan to secure the remaining needed applications, mobilize the states to notify Congress, file suit in federal court if needed, equip state legislators to effectively participate in the Convention, engage the media, and support the states right up through the ratification of amendments.

A Call to Action

One of the founding principles that made the United States unique was the concept that the power of the government comes from the *consent of the governed*. Our problem isn't that a handful of bad laws have gotten on the books here and there. Nor is it the occasional self-serving politician. It's that too much power has aggregated in Washington. And the people who work there have lost sight of that important principle.

WE THE PEOPLE: our rights, our liberties, our future...they are in **our** hands. The only peaceful and legal means to rebalance power and impose badly-needed and widely-supported reforms is through an Article V Convention. If we don't take this opportunity to define our future, someone else will do it for us.

