

Gentlemen:

I have been invited to write an article for the Harvard Journal of Law and Public Policy. Your excellent published scholarship on the subject of an Article V amendatory convention prompts me to ask for your comments on the draft I have attached to this email. It is in Microsoft Word format. Any observations would be greatly appreciated.

Thomas E. Brennan

HARVARD JOURNAL OF LAW AND PUBLIC POLICY

“As founder of the Thomas M. Cooley Law School, it was my privilege, in 1982, to contribute the first article to its law review. I chose as my topic a subject that had long fascinated and intrigued me: the possibility of an amendatory convention under Article V of the Constitution of the United States. Entitled “Return to Philadelphia”, my article argued in favor of the calling of an Article V amendatory convention, not merely to propose any one specific amendment, but rather to draft and submit a number of amendments which are needed to update and revitalize the work of the founding fathers.

The faculty moderator of the Cooley Law Review at the time was Professor E. Spencer Abraham, who was later to become a United States Senator and Secretary of Energy. During his student years at the Harvard Law School, Professor Abraham had been the driving force behind the organization and establishment of the Harvard Journal of Law and Public Policy. Through his good offices, I was invited to participate in the Symposium on Federalism sponsored by the Federalist Society at the Yale Law School on April 23-25, 1982. My talk on that occasion, entitled “The Last Prerogative”, was later published in a special issue of the Harvard Journal of Law and Public Policy.

Now, a quarter century later, I have been invited to contribute an article to a commemorative issue of the Harvard Journal, ruminating, I assume, upon the events of the past quarter century as they may have impacted the subject I wrote about then.

Before looking at the intervening twenty-five years, it may be well to review the circumstances of the early 1980’s. In the eight years between 1975 and 1983 some thirty-two states had petitioned the Congress for an Article V convention to propose an amendment to the federal constitution requiring the Congress to adopt a balanced budget. Chief Justice Warren Burger had called for a period of study and discourse about the federal constitution as the nation looked forward to the 200th anniversary of the convention which drafted our fundamental charter in Philadelphia during the summer of 1787. The American Bar Association undertook and completed a study on the legal ramifications of an Article V amendatory convention.

As might be expected, the Congress of the United States was in a reactive mode. Legislation was proposed in both the House and the Senate which was designed to

control and limit an Article V convention if two additional states should add their support to the balanced budget amendment drive. Resolutions were introduced to submit a balanced budget amendment drafted by the Congress as a means of defusing the effort to call a convention.

A number of pertinent law review articles were published at about that time. The most frequent theme was that an Article V convention posed the danger of becoming a “run away” body, whose delegates might propose radical amendments emasculating the bill of rights or advancing the agendas of right wing or left wing ideologues. Fear of the unknown dominated the discussion about Article V. The litany of questions droned on and on. Would the convention be limited to the subject matter detailed in the state petitions? Could the state petitions be contingent upon such a limitation? Should a contingent petition be counted toward the two thirds requirement? Could states rescind their petitions? How would delegates be chosen? How many delegates would there be? Who would finance the convention? How long would it last? Could the Congress refuse to submit a convention proposed amendment to the states for ratification?

In 1981 when Ronald Reagan assumed the presidency, the national debt was about 35% of the Gross Domestic Product (GDP). Today it is nearing 65% and it is expected to rise to about 70% in 2007. In actual dollars, the debt was just short of a trillion in 1981. In 2006, the Congress increased the debt ceiling to nine trillion dollars, and the national debt clock on the Internet reads \$8,624,769,769,328.05 as I type these words. In spite of those chilling statistics, the movement for an Article V convention to propose a balanced budget amendment has exited center stage.

The fate of the so-called Balanced Budget Amendment reveals much about the politics of the Article V Convention. When, in 1982, 32 state legislatures were on record asking Congress to call an Article V Convention to propose an amendment requiring a balanced federal budget, only two more state petitions were needed to reach the two thirds requirement. The goal was never reached. A number of factors came into play to stifle the drive.

First, the Congress has always been suspicious of an amendatory convention. Obviously, since Congress itself can propose amendments, it sees the convention as a rival. It also sees the convention as a body which might propose amendments detrimental to the Representatives and Senators themselves, such as term limitations. One strategy long employed has been simply to ignore the state resolutions. On arrival they are entered in the Congressional Record, but there is no systematic review or compilation of Article V resolutions. In short, the Congress has no official count, nor has it ever undertaken to examine the resolutions for legality or sufficiency.¹

Several scholars have taken up the tedious task of ferreting out state petitions for an Article V Convention. In 1990, it was reported that 49 states had requested a convention

¹ CONSTITUTIONAL BRINKSMANSHIP: Amending the Constitution by National Convention, by Russell L. Caplan. Preface, page xix

in one way or another, many state legislatures having passed multiple resolutions over the years.² A more recent survey shows 567 applications from all 50 states.³

Of course, when, in fact, the number of state petitions asking for a particular amendment nears the triggering two thirds, Congress jumps into action to head off a convention. Such was the scenario early in the last century when popular election of Senators was the issue. Congress itself proposed the seventeenth amendment in 1912 to ward off an Article V convention. In the early 1980's several balanced budget amendments were introduced in the House and Senate. None achieved the necessary two thirds of both houses.

At about the same time, there were several efforts to pass legislation regulating an Article V convention if one were to be called. In particular, Congressmen and Senators wanted to require that the convention's agenda would be limited to the subject or subjects contained in its call. No such statute, however, has yet been enacted.

The Balanced Budget convention was opposed by a coalition of strange bedfellows. On the left were Norman Lear's People for the American Way, and traditionally liberal labor unions such as the American Federation of State, County and Municipal Employees. AFL-CIO president Lane Kirkland blasted the convention drive, labeling it a "hypocritical and cynical hoax." On the right, such conservative stalwarts as Phyllis Schlafly, founder of the Eagle Forum, and the right wing John Birch Society urged defeat of the convention initiative.

By 1988 the drive had stalled, and some of the states which had previously passed Balanced Budget Amendment convention resolutions began to reconsider. At least three of them, Alabama, Florida and Louisiana, recanted and passed resolutions withdrawing their prior memorials. In February of 1993, Michigan and New Jersey legislators declined to support the effort, and hope for a 34 state consensus faded.

A year later, a new movement began as then Utah Governor Michael O. Leavitt proposed the convening of a national Conference of States to consider the need to update the federal constitution in light of changed circumstances since 1789. Leavitt, who is now Secretary of Health and Human Services in the Bush Administration, was then Chairman of the National Governors Association. Highly regarded, his endorsement of the idea gave it an initial thrust which saw twelve state legislatures pass resolutions of support within the first few days of January, 1995. By months' end, four more states had passed Resolutions of Participation. Most were passed on voice votes with little or no debate in the legislative chambers and no committee hearings. Only ten more states were needed to reach the 26 state majority needed to activate the conference.

At this point, Don Fotheringham, Editor of the John Birch Society's magazine, The New American, dove into action. The March, 1995 issue of his publication carried a picture of Governor Leavitt on its cover and a fully documented story alerting readers that the

² A LAWFUL AND PEACEFUL REVOLUTION: Article V and Congress's Present Duty to Call a Convention for Proposing Amendments. By Bruce M. Van Sickle. 14 Hamline Law Review. Fall 1990.

³ See Walker v Congress, www.article5.org

planned Conference of the States was in reality a rump constitutional convention, which, when gavelled into session, would undertake to draft an entirely new national constitution. The alarm was the more stunning to his constituency because he could allege, with some evidence, that the conference would be financially underwritten by liberal-leaning foundations whose agenda for America's future were anathema to Birchers; among them, the Rockefeller Foundation which had underwritten the drafting of a constitution for The Newstates of America, abolishing the existing states in favor of ten geographical administrative departments of a national government.

Fotheringham had led the John Birch Society's fight against the balanced budget amendment convention. He ordered 100,000 copies of *The New American*, and got them delivered to Birch Society members across the country who had opposed the earlier convention effort. Governors and legislative leaders, primed to push for early and summary approval of conference participation resolutions, found their efforts bogged down in committee hearings. Conference opponents were able to marshal media interest as they charged that an unauthorized rewriting of the federal constitution was in the offing. The battle raged to a dramatic climax when a Montana House Judiciary Committee heard Utah Governor Leavitt in a toe to toe debate with Fotheringham and then voted six to five against participation in the conference.

Despite that apparent setback, that interest in an Article V convention has waned. In fact, there has been a resurgence of attention to Article V in recent years. New voices are being heard and new channels of communication are being used to advance the idea of an amendatory convention, as well as to oppose the calling of one. The catalyst in all of this is the ubiquitous Internet. Ask the Google search engine to look for web sites which contain the words "Article V constitutional convention" and in 22 seconds you will have a list of 1,230,000 entries. They will run the gambit from sites demanding the immediate call of an Article V convention, such as www.cc2.org, www.article5.org, and www.tell-usa.org to categorical opposition in sites like www.noconcon.com.

There has been a renewal of scholarly interest in the Article V Convention as well. In addition to Russell L. Caplan's excellent "Constitutional Brinkmanship," published in 1988 by the Oxford University Press, one might profitably read "Contemporary Questions Surrounding the Constitutional Amending Process" by John R. Vile, published in 1993 by Praeger Publishers, Richard E. Labunski's "The Second Con Con: How the American People Can Take Back Their Government," published in 2000 by Marley and Beck, and Sanford Levinson's provocative treatise, "Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We The People Can Correct It), Oxford University Press, 2006.⁴

Federal Judge Bruce M. Van Sickle has contributed a significant law review article to the Article V literature. Published in Volume 14 of the *Hamline Law Review*, Van Sickle concluded in 1990 that the United States Congress had already long since defaulted on its obligation to call a convention for proposing amendments to the federal constitution.

⁴ Some other renown scholars who have weighed in on the subject in recent years are Mark Tushnet and Frank Michelman of the Harvard Law School, and Akhil Reed Amar of Yale Law School.

That sentiment has been echoed most vigorously by a newspaper man from the State of Washington. Bill Walker is a self educated constitutional scholar and irrepressible activist who has taken it upon himself to conduct a one man campaign for the Article V Convention. He began by tendering a request to be a candidate for delegate to the convention from his home state. Of course, there was no such position available, as he well knew, but the rejection gave him a basis to start suing the government. In two federal court cases, *Walker v United States* and *Walker v Congress* he has bolstered the argument for an immediate Article V Convention with mountains of legal citations and reams of legalistic polemic. Undaunted by failure, he applied, *pro se*, to the United States Supreme Court for a writ of certiorari. Summarily turned away, he has concluded that the court, by rejecting his application, has established a precedent that the Congress has the right to veto sections of the United States Constitution at will. Walker's web site, www.article5.org, is reminiscent of pre Revolutionary pamphleteers like Tom Paine.

It has often been observed that an amendatory convention is unlikely unless the body politic shall be faced with some critical challenge. This may be conventional wisdom, but it is not a setting for the exercise of wisdom in a convention. Bitter opposition to the war in Iraq, gubernatorial protesting of federal deployment of the National Guard in peacetime, or Wall Street gloom about a monstrous national debt do not auger well for a national assembly dedicated to calm deliberation about the discovered faults of the 1789 constitution.

Still, the agenda of third millennium politics in America may well be reaching such a crescendo that only an Article V convention can offer hope for succor. If nothing else, it might draw attention to the words of the existing constitution and educate the American people on the intentions of the founding fathers about such matters as the power to make war, the limits of appropriations for standing armies, the disabilities of naturalized citizenship, the reserved sovereignty of the several states, and the right of the people to amend the constitution through democratic consensus as opposed to judicial fiat.

Unhappily, the devil is in the details. Before a convention is gaveled to order, there must be at least a preliminary game plan for its operation. Admittedly, no steering committee adopted scenario will bind the delegates themselves once they are seated. Nevertheless, without a blueprint, there can be no meeting of the minds on the kind of a thing the convention might be. And without a common vision, only a tower of Babel will emerge.

So who should be the architect? Who should decide the How, When, What, Where and Who of the Article V Convention? Certainly not the United States Congress. By definition, the convention alternative for proposing amendments was intended by the framers to be just that: an alternative to Congressional action. It is simply unthinkable to put the Congressional fox in charge of the conventional hen house.

But if not Congress, who? The President? The Supreme Court? The federal bureaucracy? Not hardly. They are all creatures of the constitution. If the constitution is to be amended in any particular, it must be amended by its creator, We, The People of the United States.

It follows that the blueprint for the convention must come from the people of the several states. It must be a popular blueprint; a game plan which from the outset has the imprint of citizen hands. It must, in short, be a plan which bubbles up from the people rather than one which is handed down from on high.

How is this to be achieved? Very simply. There are thousands upon thousands of civic minded citizens in America, who, if asked to think about our nation and its fundamental structure, and to discuss the need for, and the mechanics of an Article V Convention, will happily come forward, and give their time, talent and treasure to the undertaking. In short, it is submitted that there is broad constituency of friends of the Article V Convention who can come together, communicate on the Internet, and in person, organize themselves as a committee, exercise their constitutional right peaceably to assemble, and settle among themselves all of the logistical problems which are associated with holding the convention. If this is done responsibly, and without hint of bias toward any particular agenda items, the result will be gratefully received by responsible citizens throughout the land.

Having said that, I will venture a few thoughts on my own, which I will address to anyone who considers himself or herself to be a friend of the Article V Convention. These are just opinions, mind you, but they may be fodder for discussion.

First, as to the selection of delegates, I believe that delegates to an Article V should be selected just as the delegates to the 1787 convention were chosen; by the several states in whatever manner each state may determine. Some states may choose delegates by statewide election, some by election districts, some by legislative or gubernatorial appointment. Some may even have referenda on how to select them. In any case, each state is sui generis and capable of making that decision for itself.

Second, as to the number of delegates, I think the existing constitution shows the way. It provides that each state shall have at least one representative in the House of Representatives, and that no state shall be deprived of its equal representation in the Senate. If every state has at least one representative, it follows that the population of the smallest state is equal to one half of the number of persons to be represented by each delegate, rounded to the nearest whole number. Each state then, would have as many delegates as the ratio which its population bears to twice the population of the least populous state. This formula would produce a body of approximately 279 persons, a much more workable number than the 535 members of the Congress.

Third, as to the quorum necessary to do business, the wording of Article V again can be consulted. It provides that a convention shall be called when requested by two thirds of the states. If less than two thirds want to meet, there is no convention. It follows that the continuing approbation of two thirds of the states is necessary to sustain the legitimacy of the convention.

Fourth, as to the proposing of amendments, it is clear, and generally agreed that the convention is not a constitutional convention empowered to rewrite the United States

Constitution. It is an amendatory convention, empowered only to submit specific amendments to the existing document. Logic and wisdom suggest that amendments be proposed one at a time, so that the states can act upon each as a discrete subject. As a practical matter, any attempt to log roll a number of subjects into a single amendment would be doomed to failure because it would invite opposition from many quarters.

Fifth, as to the votes necessary to propose an amendment, I submit that, while a simple majority may be sufficient to do the ordinary business of the convention, the actual vote to propose an amendment should reflect something of the super majority required to adopt constitutional change. I would urge that no proposal be adopted by the convention unless approved by the delegations of two thirds of the states, and by a majority of the delegates to the convention. This dual standard would assure that the proposal is neither sectional nor lacking in popular support..

These thoughts have bubbled in my brain for some time, and I thank the Harvard Journal of Law and Public Policy for the opportunity to disgorge them.”

Thomas E. Brennan
January 17, 2007