

TESTIMONY ON ARTICLE V CONSTITUTIONAL CONVENTIONS

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to the
Senate Interim Committee on Campaign Finance Reform

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I am told that the issue to be discussed regarding an Article V Application for Constitutional Convention is whether the subject matter of the amendments to the United States Constitution to be addressed at the Convention is limited by the subject matter specified in the respectively state applications for the convention.

The answer is yes.

Because of its agency role, Congress may--in fact, must--limit the subject matter of the convention to the extent specified by the applying states. * * * Historical evidence already adduced buttresses this conclusion, showing that the applying state legislatures may impose subject-matter limits on the convention.

In order to carry out its agency responsibility, Congress has no choice, when counting applications toward the two thirds needed for a convention, but to group them according to subject matter. **Whenever two thirds of the states have applied based on the same general subject matter, Congress must issue the call for a convention related to that subject matter.** Congress may not expand the scope of the convention beyond that subject matter. A recent commentary summarized the process this way:

[A]pplications for a convention for different subjects should be counted separately. This would ensure that the intent of the States' applications is given proper effect. An application for an amendment

addressing a particular issue, therefore, could not be used to call a convention that ends up proposing an amendment about a subject matter the state did not request be addressed. It follows from this argument that Congress's ministerial duty to call a convention also includes the duty to group applications according to subject matter. Once a sufficient number of applications have been reached, Congress must call a convention limited in scope to what the States have requested.

[James Kenneth Rogers, *The Other way to Amend the Constitution: the Article V Constitutional Convention Amendment Process*, HARVARD J. LAW & PUBLIC POLICY 1018-19 (2007)]

Robert Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENNESSEE LAW REVIEW 693, 736-37 (2001) (emphasis added) (footnotes omitted).

Professor Natelson continued (78 TENNESSEE LAW REVIEW at 748):

A. What Happens if the Convention "Proposes" an Amendment Outside the Subject Assigned by the Applications?

Because the convention serves the state legislatures, only proposals within the subject matter fixed by the applications, and therefore within the convention call, have legal force. Actions outside the call are *ultra vires* and legally void. Yet under agency law, both at the Founding and today, an agent may suggest to his principal a course of action outside the agent's sphere of authority. This suggestion, however valuable, is a recommendation only, without legal force. For example, if a convention called to consider a balanced budget amendment recommends both a balanced budget amendment and a term limits amendment, only the former is a "proposal" within the meaning of Article V. [FN387] The latter is merely a recommendation for future consideration. [FN388] In the words

of President Carter's Assistant Attorney General John Harmon, the convention delegates "have . . . no power to issue ratifiable proposals except to the extent that they honor their commission." [FN389]

Thus, Congress may specify a "Mode of Ratification" only for proposals within the convention call, and states may ratify only proposals within the call. [FN390] If Congress, the legislatures, or the public agrees with the convention's *ultra vires* recommendation, the states may apply anew for a convention with authority to propose them or Congress itself may propose them.

[FN387]. Russell L. Caplan, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988) (CAPLAN), at 147, 157.

[FN388]. See *id.*

[FN389]. John M. Harmon, CONSTITUTIONAL CONVENTION: LIMITATION OF POWER TO PROPOSE AMENDMENTS TO THE CONSTITUTION, 3 Op. Office of Legal Counsel 390 (1979), at 410.

[FN390]. See CAPLAN, at 147.