TESTIMONY OF MICHAEL L. STERN

BEFORE THE COMMITTEE ON STATE GOVERNMENT

PENNSYLVANIA HOUSE OF REPRESENTATIVES

April 13, 2015

Thank you for the opportunity to address the Committee today to discuss the role of the states in initiating constitutional amendments under Article V of the federal Constitution. My testimony will briefly describe the process prescribed by the Constitution and address some of the concerns about a so-called "runaway convention." I will then provide the Committee with the background and current status of the movement to call an Article V convention for a balanced budget amendment.

The Article V Convention

Article V of the U.S. Constitution provides two methods of proposing constitutional amendments. First, it provides for Congress itself to propose amendments "whenever two thirds of both Houses shall deem it necessary." Second, it provides that "on the Application of the Legislatures of two thirds of the several States," Congress "shall call a Convention for proposing Amendments."

The first method (the congressional method of proposal) is the one that has been used for every one of the twenty-seven amendments to the U.S. Constitution. Although the First Congress proposed a number of amendments that limited congressional powers or privileges

(such as the Bill of Rights and the amendment to limit congressional pay raises), subsequent Congresses have shown little interest in following this example. In recent times Congress has conspicuously failed to propose amendments that would limit federal power or might interfere with the political ambitions of its members, such as amendments to balance the budget or to impose term limits.

This would have come as no surprise to the Framers, who understood that Congress could not be relied on to check itself. The system they designed not only divided powers within the federal government, but also between the federal and state governments to provide a "double security" for the rights of the people. As James Madison explained in The Federalist No.51, under this system "[t]he different governments will control each other."

The second method of proposing constitutional amendments under Article V directly corresponds to this structural principle. If Congress had been given a monopoly over proposing constitutional amendments, the states would have no way of initiating constitutional change to limit the power of Congress and the federal government. As George Mason argued during the Philadelphia Convention, such a congressional monopoly would mean "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case."

The Framers considered the state method of proposing constitutional amendments to be a key structural safeguard to protect the states and the rights of the people against potential overreach by the new national government. For example, in The Federalist No. 43, Madison took pains to note that Article V "equally enables the general

and the State governments to originate the amendment of errors." And in The Federalist No. 85, Alexander Hamilton emphasized the state method as a means of correcting any perceived errors in the Constitution, explaining that "alterations may at any time be effected by" the requisite number of states. Because of this state power of proposing amendments, Hamilton declared, "[w]e may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority."

Unfortunately, uncertainties and fears regarding an Article V convention have prevented it from serving its intended function as a bulwark against federal overreach. In particular, some suggest that an Article V convention might "run away," deviating from the purposes for which it was sought by the state legislatures and proposing instead radical or ill-considered amendments. As a consequence, states have been reluctant to apply for an Article V convention, even when faced with the very kind of "runaway Congress" and out of control federal government that the state method of proposal was intended to address.

There are, however, very important structural safeguards built into Article V that make a "runaway convention" extremely unlikely, if not impossible. This is so even though there is debate regarding *some* of the legal issues surrounding an Article V convention.

One question is whether the authority of the convention may be limited to a particular subject or amendment. If the answer to this question is yes, then an amendment outside the scope of the convention's authority would be ultra vires and of no legal effect. Scholars disagree as to whether an Article V convention can be limited

in this fashion, although the most recent scholarship, from Professor Rob Natelson of the Independence Institute and Professor Michael Rappaport of the University of San Diego Law School, strongly supports the conclusion that it can be limited. As I explained in a law review article a couple years ago, the text, drafting history, and purpose of Article V all militate in favor of this conclusion. *See* Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 Tenn. L. Rev. 765, 767-78 (2011).

It is important to note, however, that disagreement about this legal issue does not suggest that there is a significant risk of a runaway convention. For one thing, Congress's role in the Article V process makes this extremely unlikely. Congress has two functions with regard to the Article V convention. First, it must call the convention upon application of two-thirds of the states. Second, if the convention proposes an amendment, Congress must select the method of ratification (i.e., whether it will be by the state legislatures or by state conventions).

If Congress receives application of two-thirds of the states for a limited convention, its act in calling the convention would be an acknowledgment of the validity of those limitations. (If Congress did not believe that a limited convention was permissible, it would presumably not call the convention in the first place). Were the convention then to propose an amendment outside the scope of those limitations, Congress logically would not recognize the proposed amendment as valid and therefore would not submit it to the states for ratification.

Apart from Congress's role, moreover, there are other critical safeguards against a runaway convention. As a practical matter, it is highly unlikely that delegates from a state that sought a limited convention would be pre-disposed to ignore those limits. Moreover, as a legal matter, it is widely acknowledged that states may limit the authority of their delegates to an Article V convention, even by scholars who dispute the theory that the convention as a whole may be limited. During the Founding Era, a state would typically provide its delegates to an interstate convention with "commissions" setting forth the scope of authority delegated. Indeed, the delegates to the Philadelphia Convention received commissions from their respective states, and Madison remarked in The Federalist No. 40 that "[t]he powers of the convention ought, in strictness, to be determined by an inspection given to the members by their respective constituents."

To alleviate any concern about the enforcement of this legal obligation, many states have adopted or are currently considering enactment of "delegate limitation" or "faithful delegate" acts that would spell out the consequences if any delegate to an Article V convention were to exceed the scope of his or her authority as established by the legislature. These laws typically provide for recall and replacement of delegates who vote for consideration of out of scope amendments. Such laws are closely analogous to laws recently introduced in a number of states to guard against the possibility, however remote, that presidential electors will cast their ballots for someone other than the candidate they are pledged to support.

Adoption of a delegate limitation law is generally desirable for three reasons. First, it confirms the expectation of the legislature and the people that delegates will have limited authority. Second, it can

provide legal remedies to deter any delegate who might be inclined to exceed the scope of his or her authority. In the unlikely event that a delegate nevertheless attempted to violate these limits, it establishes a mechanism for replacement of that delegate.

Finally, enactment of such laws sends a strong signal to Congress that the states are ready and able to establish the rules and procedures for any Article V convention. By doing so, they can help avert any temptation that Congress might have to enact its own regulation of the Article V convention, which would be improper and would violate the letter and spirit of the constitutional amendment procedure established by the Framers.

These advantages, however, should not obscure the fact Article V itself contains numerous inherent safeguards against a "runaway convention." Even if a convention were to defy the odds by proposing an amendment beyond the scope of its authority and Congress were to submit this amendment to the states for ratification, it would still have no legal effect until ratified by three-quarters of the states. This would mean that at least 22 states that initially sought a limited convention would have to acquiesce in the adoption of an amendment that transgressed these limits. Even standing alone, much less in combination with the other safeguards already discussed, this fact demonstrates how futile it would be for any Article V convention to run away.

The Balanced Budget Amendment

In some sense the balanced budget movement dates from the very beginning of the Republic. Thomas Jefferson said in 1798 "I wish it were possible to obtain a single amendment to our constitution; I would be willing to depend on that alone for the reduction of the administration of our government to the genuine principles of its constitution." Jefferson explained, "I mean an additional article taking from the federal government the power of borrowing."

The modern balanced budget movement, however, really began in the late 1970s. At that time, concerns about rising federal spending and deficits sparked an effort at the state level to place fiscal constraints on the federal government. A number of states, including Pennsylvania (1979), applied for an Article V convention to propose a balanced budget amendment.

In 1982, two-thirds of the U.S. Senate voted to propose a BBA, but the measure failed to pass the House. After that, President Reagan, who strongly supported a BBA, actively encouraged Article V applications by the states as the only way to impose fiscal discipline on the federal government. As he later explained in a 1994 letter to Lew Uhler, a leader in the balanced budget movement, "[w]e can't depend on Congress to discipline itself, as House and Senate leaders have once again demonstrated in rejecting a balanced budget amendment." Reagan went on to observe "it is clear we must rely on the states to force Congress to act on our amendment. Fortunately, our Nation's Founders gave us the means to amend the Constitution through action of state legislatures. . . ."

The number of applying states climbed to 32 during the 1980s, just two shy of the number required to call a convention. In 1992, however, two states, Ohio and Michigan, were unable to pass the applications that would have crossed the two-thirds threshold. These setbacks, as well as temporary improvements in the federal fiscal situation, took the steam out of the BBA movement. Over the following years, opponents of the Article V convention were able to persuade a number of state legislatures, based primarily on the "runaway convention" argument I addressed earlier, to rescind their applications. By the 2000s there were only 16 BBA applications still active.

In the last five years, however, as the nation's fiscal condition has worsened and the unsustainability of its entitlement structure become increasingly apparent, the balanced budget movement has regained its momentum. Since 2010, 11 state legislatures (Florida, Alabama, New Hampshire, Ohio, Georgia, Michigan, Tennessee, Louisiana, South Dakota, Utah and North Dakota) have passed BBA applications. Eight of these applications occurred in the last year and a half. Importantly, the two states which failed to pass an application in 1992, Ohio and Michigan, have now done so.

The required number of states could be reached by obtaining BBA resolutions in 7 of these 8 states: Idaho, Arizona, Oklahoma, West Virginia, Wyoming, South Carolina, Wisconsin and Virginia. Each of these states is controlled by a fiscally conservative majority in both houses and in six of them (Arizona, Oklahoma, West Virginia, Wyoming, South Carolina, and Wisconsin) the BBA resolution has passed one house in the last year.

Counting Applications

The 27 currently active BBA applications were adopted over a period of several decades, and they do not all contain identical language. It is generally accepted, however, that applications need not be identical to aggregate, so long as they address the same general subject matter or issue. For example, in a 1993 report, the U.S. House Judiciary Committee concluded that "[t]he applications need not be exact copies of each other. On the contrary, most commentators suggest that Congress should be generous in its interpretation . . . . Applying too strict a standard could be viewed as an attempt to prevent the States from exercising their option under Article V."

Thoughtful commentators note that Congress must engage in a good faith attempt to ascertain the intent of the state legislatures as revealed in the text of each application and the surrounding circumstances. Thus, a 1987 report of the Justice Department's Office of Legal Policy concludes that the Constitution requires Congress to call a convention when the states have reached a "consensus" reflected by "two-thirds of the states calling for a convention on the same subject at the same time." The report goes on to identify the subjects that "have come close to receiving enough applications to warrant a convention call," including the "thirty-two states [that] have applied for a convention to propose an amendment to balance the budget of the national government."

Some will no doubt argue that some of the BBA applications are too old and have grown stale over time. There is no time limit on applications for an Article V convention, but Congress could take into account the age of applications in determining whether there is an

existing consensus with regard to holding a convention on a particular subject. In the context of the balanced budget amendment, which has been the subject of nearly continuous attention over the past 40 years, Congress will most likely view those states which have chosen to join the list of BBA states and declined to rescind as remaining in favor of holding a BBA convention.

It is encouraging that the U.S. House of Representatives, at the beginning of this Congress, established for the first time a process for identifying, publishing and in effect conducting a preliminary count of applications. The Chairman of the House Judiciary Committee, who is by rule charged with carrying out this responsibility, recently stated his view that there are currently 27 applications for a balanced budget amendment convention.

Conclusion

I greatly appreciate this Committee's interest in the important subject. As my testimony has demonstrated, the Framers intended state legislatures to play a key role in maintaining the balance between federal and state power within our constitutional system. By vigorously exercising your powers under Article V you can help to restore that balance and fulfill Hamilton's promise that the state legislatures will "erect barriers against the encroachments of the national authority."

Thank you again for the opportunity to testify today.

Michael Stern is the Director of Point of Order, a website dedicated to congressional legal issues, and he writes and works on a variety of matters related to Congress, the state legislatures and the legislative process. These include serving as a member of the Balanced Budget Amendment Task Force, which seeks to obtain a federal balanced budget amendment proposed by a convention under Article V. He previously served as Senior Counsel to the U.S. House of Representatives, the Deputy Staff Director for Investigations for the Senate Committee on Homeland Security and Governmental Affairs, and Special Counsel to the House Permanent Select Committee on Intelligence. Michael is a graduate of Haverford College and the University of Chicago Law School, and he clerked for the Honorable Charles Clark, Chief Judge of the U.S. Court of Appeals for the Fifth Circuit, in Jackson, Mississippi.