

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HM 381 Article V Convention of the States

SPONSOR(S): Metz and others

TIED BILLS: **IDEN./SIM. BILLS:** SM 476

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local & Federal Affairs Committee	15 Y, 2 N	Dougherty	Rojas
2) Ethics & Elections Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

HM 381 serves as an application to Congress, pursuant to Article V of the Constitution of the United States, to call an Article V Convention of the states for the limited purpose of proposing three specific constitutional amendments. These include imposing fiscal restraints on the federal government, limiting the power and jurisdiction of the federal government, and limiting terms office for federal officials and members of Congress.

Legislative memorials are not subject to the Governor's veto power and are not presented to the Governor for review. Memorials have no force of law—they are mechanisms for formally petitioning the U.S. Congress to act on a particular subject.

This memorial does not have a fiscal impact.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Methods of Amending the U.S. Constitution

Article V of the Constitution authorizes two methods for amending the Constitution: by Congress or by a constitutional convention.

Congressional Amendments

A constitutional amendment may be proposed by a two-thirds majority of both chambers in the form of a joint resolution. After Congress proposes an amendment, the Archivist of the United States is responsible for administering the ratification process under the provisions of 1 U.S.C. 106b. Since the President does not have a constitutional role in the amendment process, the joint resolution does not go to the White House for signature or approval. The Office of the Federal Register (OFR) assembles an information package for the states which includes copies of the joint resolution and the statutory procedure for ratification under 1 U.S.C. 106b. The Archivist submits the proposed amendment to the states for their consideration by sending a letter of notification and the OFR informational material to each Governor. The Governors then formally submit the amendment to their state legislatures.

When a state ratifies a proposed amendment, it sends the state action to the Archivist. A proposed amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states (38). The OFR verifies the 38 ratification documents and drafts a formal proclamation for the Archivist to certify that the amendment is valid and has become part of the Constitution. This certification is published in the Federal Register and U.S. Statutes at Large and serves as official notice that the amendment process has been completed.

Since 1789, Congress has proposed 33 amendments by this method, 27 of which have been adopted.

Constitutional Convention Amendments

An amendment may be proposed by a constitutional convention called for by two-thirds of the state legislatures (34). If 34 states apply, Congress must call an Article V Convention to consider and propose amendments. These proposed amendments must also be ratified by three-fourths of the states (38). This method has never been implemented; therefore, there is no precedent for the exact process and application requirements. Some of the issues concerning this process include procedures within the state legislatures; the scope and conditions of applications for a convention; steps in submitting applications to Congress; and the role of the state governors in the process.

The records of the Philadelphia Convention of 1787 demonstrate that the founders intended to balance Congress's amendatory power by providing the convention method to empower the people to propose amendments. Article V identifies these methods as equal and requires the same ratification for all proposed amendments.

Although never used in full, this method has been a useful tool to provoke congressional action. The most successful incidence of using the threat of a constitutional convention to induce change was the movement for the direct election of Senators, which prodded Congress to propose the 17th Amendment.

Spending Behavior of the Federal Government

The forecasted federal spending for fiscal year 2014 is \$3.778 trillion. Mandatory spending will account for more than 60 percent (\$2.3 trillion), supporting programs such as Social Security (\$860 billion), Medicare (\$524 billion), Medicaid (\$304 billion), income support,¹ military retirement, and other congressionally established programs.² Also included in fiscal year 2014's mandatory spending is the \$223 billion interest payment on the \$17 trillion national debt.³

The remaining \$1.48 trillion of the year's expenses will go towards discretionary spending as negotiated between Congress and the President. The Bipartisan Budget Act approves \$1.012 trillion in discretionary spending, including \$520.5 billion for Defense.⁴ President Obama's budget proposal appropriates \$1.242 trillion to run the rest of the federal government, including \$618 billion for military expenditure.⁵

Before the recession in 2007, the Executive Office of Management and Budget (OMB) maintained federal spending at levels below 20 percent of GDP each year. Therefore, spending only grew as fast as the economy (about 3 percent per year). However, spending has been at higher levels since the recession, peaking at 24.3 percent of GDP in fiscal year 2012. Fiscal year 2014 spending is budgeted slightly lower at 22.4 percent of GDP. As the economy improves, the OMB forecasts that spending will drop to 21.2 percent of GDP by fiscal year 2018.⁶

Spending has increased since 2007 due to anti-recession stimulus spending; defense spending for Operation Enduring Freedom, Operation Iraqi Freedom, and Operation New Dawn; increased Social Security spending due to changing demographics; and more entitlement program spending as poverty rose.

Balanced budget amendment

A balanced budget amendment is a constitutional prohibition on a government's spending exceeding its income. Most states have adopted balanced budget provisions, but the federal government has not. Such an amendment would make it unconstitutional for the federal government to run annual budget deficits and may solve the persistent problem of deficits and increasing debt.

Most amendment proposals include additional restrictive elements to be imposed on the federal government beyond maintaining a balanced budget. Some common examples include the following:

- a requirement that the President submit a balanced budget to the Congress;
- provisions that allow some flexibility in times of war or economic recession provided that a congressional supermajority support the waiver;
- a provision requiring a supermajority vote of both houses to raise the debt ceiling;
- a cap on total spending unless waived by a supermajority of both houses;
- a limit on the total level of revenues unless waived by a supermajority of both houses;
- a provision to prevent the courts from enforcing the amendment through tax increases;
- a provision assigning congressional responsibility to enforce the amendment through legislation.⁷

¹ Food Stamps, Unemployment Compensation, Child Nutrition, Child Tax Credits, Supplemental Security for the blind and disabled, and Student Loans

² The amount for Mandatory programs is increasing thanks to the huge number of Baby Boomers who are reaching retirement age. The two major senior programs, Social Security and Medicare, went from 28% of the budget in FY 1988 to 37% of the budget in FY 2014. By FY 2023, the OMB projects that these two programs alone will rise to 40% of total spending.

³ By 2023, interest payments on the national debt are expected to quadruple to \$763 billion, making it the third largest budget item, after Social Security (\$1.424 trillion) and Medicare (\$867 billion). See Office of Management and Budget, FY 2014 Budget, Table S-5, available at http://useconomy.about.com/library/FY2014_budget.pdf

⁴ See Office of Management and Budget, FY 2014 Budget, Table S-5, available at http://useconomy.about.com/library/FY2014_budget.pdf and <http://politicalticker.blogs.cnn.com/2013/12/10/the-budget-deal-in-plain-english/>.

⁵ Office of Management and Budget, FY 2014 Budget, Table S-5, available at http://useconomy.about.com/library/FY2014_budget.pdf.

⁶ See http://useconomy.about.com/od/fiscalpolicy/p/Budget_Spending.htm

⁷ See <http://pgpf.org/Issues/Fiscal-Outlook/2012/06/062112-Balanced-Budget-Explainer>.

Proponents argue that as the legislative and executive branches are unwilling or unable to address the debt crisis through normal legislative procedures, only a constitutional constraint will be strong enough to lessen lawmakers' fiscally irresponsible over-spending. A constitutional requirement would impose needed accountability for fiscal policy. A 2005 national survey quantifying public support for possible constitutional amendments found that 76 percent of respondents favored a balanced budget amendment.⁸

Opponents argue that such an amendment could limit the ability of future policymakers to use fiscal policy to counteract recessions or respond to national emergencies. They view lack of political will as the cause of our fiscal imbalances and so a procedural change will not adequately resolve the issue. Furthermore, they fear that the political pressure could lead to budget gimmicks that meet only the letter, not the spirit, of the law.

A balanced budget amendment converges on the federal government's financial bottom line, which is the result of complex accounting rules covering the multi-faceted legislative process and priorities. Policy differences and lack of political consensus often contribute to fiscal irresponsibility, overspending, and increasing debt. Although a constitutional balanced budget amendment may rein in our national deficits and debt, it cannot resolve the underlying political disparities that caused them.

Line item veto

A line-item veto is the executive power to remove specific provisions from a bill without vetoing the entire bill. Nearly all state governors have this authority, but the U.S. President does not. In an effort to control pork barrel spending, Congress attempted to grant the President line-item veto power with the Line Item Veto Act of 1996. However, the Supreme Court found it to be a unilateral amendment violative of the Presentment Clause and overruled it as unconstitutional in 1998.⁹ Therefore, without a significant self-reversal by the Court, the only way to grant the Present line-item veto power is through a constitutional amendment.

Expansion of Federal Government Power and Jurisdiction: the Commerce Clause

The structure of the federal system protects the states by limiting the federal government to enumerated powers and reserving any non-enumerated powers for the states.¹⁰ This system views state sovereignty as inherent (subject to constitutional limits) while federal sovereignty comes from the Constitution, a compact with the people.

The Commerce Clause grants Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."¹¹ As it is an explicit grant of federal regulatory authority, this provision is considered a restriction on the states. Congress often relies on the Commerce Clause to justify regulating states' and citizens' activities. This provision has been the source of ongoing controversy regarding the balance of power between the federal government and the states, as Congress has often relied on it to justify regulating matters that seemingly do not involve interstate commerce. However, the Constitution does not define "commerce," which has led to a significant and ongoing debate as the interpretation defines the division of federal and state powers.

The Supreme Court historically expanded the applicability of the Commerce Clause by changing their interpretation of "commerce" and the tests applied to various legislative measures. In the 1819 case of *McCullock v. Maryland*, the Court held that the federal government does not need an explicit right to act, but can implement an enumerated power in any legitimate manner.¹² The Commerce Clause was examined and federal powers again broadened in the 1824 case *Gibbins v. Ogden*, when the Court

⁸ Arthur H. Taylor, Fear of an Article V Convention, 20 BYU J. PUB. L. 101, 124-31 (2006).

⁹ *Clinton v. City of New York*, 524 U.S. 417 (1998).

¹⁰ Tenth amendment.

¹¹ Article 1, Section 8, Clause 3 of the U.S. Constitution.

¹² 17 U.S. 316 (1819).

held that Congress can regulate any interstate activity if the motivation is affecting commercial intercourse between the states or any other enumerated power.¹³ Furthermore, "regulation" was determined to be any means appropriate for the desired effect. Here, that meant that power to regulate interstate commerce encompassed the power to regulate interstate navigation.

During what is known as the *Lochner* Era (1897-1937), the Supreme Court's ruled unpredictably on the commerce clause, using one of four tests selectively applied to give their desired result. This "court flopping" repeatedly changed the boundary of state power with each new case. In 1905, the Court ruled that the Commerce Clause authorized Congress to regulate a local Chicago meat market under the Sherman Anti-Trust Act.¹⁴ It held that a purely local business could become part of a continuous commerce "current" of interstate movement of goods and services. Other examples of tightening federal Commerce Clause authority include the invalidation of federal statutes regulating child labor¹⁵ and miners' wages, hours, and working conditions.¹⁶

Despite these decisions, the Commerce Clause could still effectively be used to limit the federal government's power in the early years of the New Deal. By 1932, political momentum and Franklin D. Roosevelt led to progressive legislation. Under the New Deal, congressional Commerce Clause powers ballooned into areas never before considered "commerce."¹⁷

Initially unwilling to allow Congress to expand its regulatory authority to the detriment of states' rights, the Supreme Court overturned many New Deal legislative measures.¹⁸ In response to the Court's hostility toward his legislation, President Roosevelt proposed the "Court-packing plan" in 1937, which would have expanded the size of the Supreme Court from nine to fifteen justices. Although the plan failed, the proposal is largely credited with changing the Court's view on New Deal legislation.

Beginning that same year with the landmark case *Jones & Laughlin Steel*, the Court recognized broader grounds upon which the Commerce Clause could be used to regulate state activity—most importantly, that activity was commerce if it had a "substantial economic effect" on interstate commerce or if the "cumulative effect" of one act could have an effect on such commerce.¹⁹ In *Jones & Laughlin Steel*, that included labor relations for industries whose strife might be a national concern. In 1941 the Court found a plenary power by applying the bootstrap principle of allowing congressional regulation of intrastate commerce activities if necessary in order to regulate interstate commerce.²⁰ The next year, the Court again expanded congressional regulatory powers to any activity whose aggregate would substantively affect the national market for the good involved.²¹

By 1964, the Court allowed Congress to determine if legislation's effect on interstate commerce was sufficient enough to justify their regulation of it. The Court applied the weakest of its tests - looking only for a rational basis to conclude that a regulated activity affected interstate commerce. The Commerce Clause was used to pass the Civil Rights Act of 1964 so that the federal government could charge non-state actors with Equal Protection violations, previously impossible due to the Fourteenth Amendment's limited application to state actors. The same year, the Supreme Court found that Congress had regulatory authority over a business serving mostly interstate travelers.²² It also ruled that the federal civil rights legislation could regulate a family-owned restaurant with local customers because, the restaurant served food which had previously crossed state lines.²³

¹³ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁴ *Swift & Company v. United States*, 196 U.S. 375 (1905).

¹⁵ *Hammer v. Dagenhart*, 247 U.S. 251, 269, 276–77 (1918).

¹⁶ *Carter v. Carter Coal Co.*, 298 U.S. 238, 309–10 (1936).

¹⁷ These included the regulation of in-state industrial production, worker hours, and wages.

¹⁸ It found that the National Industrial Recovery Act was unconstitutional as applied to a poultry seller who bought and sold chicken only within the state of New York. *Schechter Poultry Corp. v. US*, 295 U.S. 495 (1935). The Court also found the Bituminous Coal Conservation Act unconstitutional. *Carter v. Carter Coal Corp.*, 298 U.S. 238 (1936).

¹⁹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

²⁰ *United States v. Darby*, 312 U.S. 100 (1941).

²¹ *Wickard v. Filburn*, 317 U.S. 111 (1942).

²² *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

²³ *Katzenbach v. McClung*, 379 U.S. 274 (1964).

It wasn't until 1995 that the Supreme Court rediscovered limits on the Commerce Clause. Realizing that a line must be drawn to give meaning to the enumeration of federal powers, the Court found that congressional regulatory powers only apply to the channels of commerce, the instrumentalities of commerce, and action that substantially affects interstate commerce.²⁴ Federal regulatory authority was further circumscribed in 2000 when the Court held that the Commerce Clause could not be relied upon to make domestic violence a federal crime.²⁵ The *Lopez* and *Morrison* jurisprudence shows that the Court is still willing to broadly interpret the Commerce Clause, but if it does not find activity substantial enough to constitute interstate commerce it will not accept Congress's stated reason for federal regulation.

Congressional Term Limits

The United States Constitution governs congressional membership.²⁶ It specifies that members of the U.S. House of Representatives serve two-year terms and members of the U.S. Senate serve six-year terms.²⁷ The Constitution does not limit the number of terms or years a member of Congress may serve.²⁸ The only check or limit on the length of congressional membership is the possibility of not being reelected.²⁹

Supporters of congressional term limits find this check inadequate. They argue that given the ease at which incumbents are often reelected, members of Congress can become too insulated and isolated from the interests of their constituents.³⁰ In particular, these supporters claim that so called "career politicians" tend to become too consumed with the perks of their jobs and too indebted to lobbyists and special interests that they lose sight of their duty as representatives.

Conversely, opponents to congressional term limits argue that the ability to vote a member of Congress out of office is a sufficient check on their performance as lawmakers.³¹ Opponents argue further that term limits would produce a more novice congressional membership and would not reduce the power of lobbyists and special interests.³² Some argue that term limits would increase the power of special interests.³³

Background on the Term Limit Debate

This debate stems back to the late 18th Century;³⁴ however, it took many years to develop into its present form. Until the 1900s, support for term limits was essentially deemed irrelevant because it was uncommon for members of Congress to serve for more than a few terms.³⁵ As time progressed through the 20th Century and reelection rates for congressional incumbents began to increase,³⁶ the push for

²⁴ *Lopez v. United States*, 514 U.S. 549 (1995). The defendant was charged with violating the federal Gun Free School Zones Act of 1990 by bringing a handgun onto school grounds. The government claimed regulatory authority over firearms in local schools under the Commerce Clause, arguing that a firearm on campus would lead to violent crime and therefore affect general economic conditions.

²⁵ *Morrison v. United States*, 529 U.S. 598 (2000).

²⁶ U.S. Const. art. I, § 2, cl. 2; U.S. Const. art. I, § 3, cl. 3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See, id.*

³⁰ <http://www.termlimits.com/>; <http://termlimits.org/>; <http://www.cnn.com/2010/POLITICS/07/19/term.limits/index.html>

³¹ <http://www.cnn.com/2010/POLITICS/07/19/term.limits/index.html>; *See also*

http://www.cleveland.com/opinion/index.ssf/2012/07/the_case_against_legislative_t.html

³² *Id.*

³³ *Id.*

³⁴ The Framers debated the issue before drafting the final version of the U.S. Constitution as there were term limits for delegates to the Continental Congress under the Articles of Confederation.

³⁵ H0083z.FAS.DOCX March 15, 2012, citing Tiffanie Kovacevich, *Constitutionality of Term Limits: Can States Limit the Terms of Members of Congress?*, 23 Pac. L.J. 1677, 1680 (1992).

³⁶ For data on re-election rates since 1964, see <http://www.opensecrets.org/bigpicture/reelect.php>.

term limits also grew but never with much success.³⁷ Proponents of term limits did not gain any significant or measurable support until the early 1990s when 23 states, including Florida, passed laws imposing term limits on their respective federal legislators.³⁸ However, the Supreme Court rendered these efforts void in the 1995 case of *U.S. Term Limits, Inc. v. Thornton* by holding the following:

- 1) state-imposed candidacy limitations on federal legislative office violates the U.S. Constitution's "qualifications clauses;" and
- 2) term limits on federal legislators may only be imposed by amendment to the Constitution.³⁹

Accordingly, since the *Thornton* decision, proponents for term limits have focused their lobbying efforts on amending the Constitution. To successfully amend the U.S. Constitution both houses of Congress must approve a proposal for amendment by a two-thirds majority (67 votes in the Senate and 290 votes in the House of Representatives).⁴⁰ Then, three-fourths (38 count) of the states have to ratify the proposal.⁴¹ Since 1995, congressional members have filed about 70 bills proposing an amendment to limit their terms, but none have been successful.⁴²

Effect of Proposed Changes

HM 381 serves as an application to Congress pursuant to Article V of the U.S. Constitution to call an Article V Convention of the states for the limited purpose of proposing three specific amendments to the U.S. Constitution - namely, the imposition of fiscal restraints, a limit on federal power and jurisdiction, and congressional term limits.

The memorial does not specify what restraints or limits should be imposed, as those details would be left to the convention of the states. Instead, HM 381 only serves as a constitutionally required application to Congress to call such a convention to propose amendments related to these specified topics. As this procedure for amending the Constitution has never been exercised and many procedural questions still remain, this memorial also provides for the severability of the proposed amendment categories. In this manner, the memorial intends to be tallied toward the required two-thirds of the states calling for a particular topic for all three topics. Additionally, the memorial provides for its own withdrawal should it be used to call a Convention that achieves any purpose outside the scope of these three topics.

Copies of the memorial will be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida delegation to the United States Congress.

Legislative memorials are not subject to the Governor's veto power and are not presented to the Governor for review. Memorials have no force of law—they are mechanisms for formally petitioning the U.S. Congress to act on a particular subject. This memorial does not have a fiscal impact.

B. SECTION DIRECTORY:

Not applicable.

³⁷ For example, discussion of congressional term limits came about during the debate before the 1951 ratification of the 22nd amendment, which imposed a two-term limit on the office of the President. Former Senator O'Daniel, a Democrat from Texas, sought a proposal for congressional term limits, but he only received one vote.

³⁸ U.S. Congressional Research Service. Term Limits for Members of Congress: State Activity (No. 96-152 GOV; Nov. 22, 1996) by Sula P. Richardson. Available at: <http://digital.library.unt.edu/ark:/67531/metacrs582/m1/>; accessed January 14, 2014. States that passed some form of congressional term limits include the following: AK, AR, AZ, CA, CO, FL, ID, ME, MA, MI, MO, MT, NE, NH, NV, ND, OH, OK, OR, SD, UT, WA, WY.

³⁹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 881 (1995).

⁴⁰ U.S. Const., art V.

⁴¹ *Id.*

⁴² See the online library of Congress at www.thomas.gov.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A