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	8 Y, 1 N	Davison	Marino
3) Judiciary Committee	13 Y, 1 N	Aziz	Havlicak

SUMMARY ANALYSIS

Article V of the United States Constitution prescribes two methods for amending the Constitution. One method is for both houses of Congress, by two-thirds vote, to propose an amendment that becomes effective when ratified by three-fourths of the states (38 states). All 27 amendments to the Constitution were adopted through this procedure.

The other method, which has never been used, requires Congress to call a constitutional convention (Article V Convention) to propose amendments when two-thirds of the states (34 states) apply for such a convention. These proposed amendments would require approval of three-fourths of the states in order to be ratified. Although never used in full, this method has been a useful tool to provoke congressional action.

The memorial serves as an application to Congress, pursuant to Article V of the United States Constitution, to call an Article V Convention of the states for the limited purpose of proposing amendments to the United States Constitution that:

- Impose fiscal restraints on the federal government;
- Limit the power and jurisdiction of the federal government; and
- Limit terms of office for federal officials and members of Congress.

If an Article V Convention is called to consider any one of the three proposed amendments, the memorial may count toward the required number of applications from the states. Additionally, the memorial specifies that it is withdrawn if it is used to call an Article V Convention for any purpose outside the scope of these three topics. The memorial constitutes a continuing application for an Article V Convention until the legislatures of at least two-thirds of the states have made applications on one or more of the proposed amendment categories.

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 the Legislature to express its opinion to the federal government.

This memorial does not have a fiscal impact.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED MEMORIAL:

Present Situation

Methods of Amending the U.S. Constitution

Article V of the United States Constitution prescribes two methods for amending the Constitution. One method is for Congress to propose an amendment that is then ratified by the states. All 27 amendments to the Constitution were adopted through this procedure. The other method, which has never been used, is for the states to apply for a constitutional convention that proposes amendments.[1]

Congressional Amendments

Congress, by a two-thirds vote in both houses, may propose a constitutional amendment 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. s. 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 that includes copies of the joint resolution and the statutory procedure for ratification under 1 U.S.C. s. 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 a certified copy of 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 states). The OFR verifies the 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.[2] Since 1789, Congress has proposed 33 amendments by this method, 27 of which have been adopted.[3]

Constitutional Convention Amendments

A constitutional amendment may also be proposed by a constitutional convention (Article V Convention) applied for by two-thirds of the state legislatures (34 states). This method has never been used.[4] If 34 states apply, Congress must call an Article V Convention to consider and propose amendments. These proposed amendments must be ratified by three-fourths of the states (38 states). Though the specific procedures for an Article V Convention are not specified in the Constitution, Congress has historically taken on broad responsibilities in connection with a convention by administering state applications, establishing procedures to summon a convention, setting the amount of time allotted to its deliberations, determining the number and selection process of its delegates, setting internal convention procedures, and providing arrangement for the formal transmission of any proposed amendments to the states.[5]

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[1] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, pg. 6 (3rd ed. 2006).

[2] *The Constitutional Amendment Process,* U.S. National Archives and Records Administration, http://www.archives.gov/federal-register/constitution/ (last visited March 18, 2014).

[3] Thomas H. Neale, Cong. Research Serv., RL 7-7883, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* 1 (2012).

[4] *See* Sara R. Ellis et al., *Article V Constitutional Conventions: A Primer*, 78 TENN. L. REV. 663, 665 (2011)("Despite the submission of approximately 750 applications for an Article V convention, including applications by all fifty states, no constitutional convention has ever been called.").

[5] *Id*.

The records of the Philadelphia Convention of 1787 demonstrate that the founders intended to balance Congress' amendatory power by providing the Article V 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.[6]

Although never used in full, this method has been a useful tool to provoke congressional action. The most successful instance of using the threat of a constitutional convention to induce change was the movement for the direct election of senators, which helped prod Congress to propose the 17th Amendment.[7]

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).[8] Also included in fiscal year 2014's mandatory spending is the $223 billion interest payment on the $17 trillion national debt.[9]

The remaining $1.242 trillion of the year's expenses will go towards discretionary spending as negotiated between Congress and the President.[10] The Bipartisan Budget Act approves $1.012 trillion in discretionary spending, including $520.5 billion for defense.[11] President Obama's budget proposal appropriates $1.242 trillion to run the rest of the federal government, including $618 billion for military expenditure.[12]

Balanced Budget Amendment

A balanced budget amendment is a constitutional prohibition of a government's spending exceeding its income.[13] Most states have adopted balanced budget provisions, but the federal government has not.[14] Such an amendment would make it unconstitutional for the federal government to run annual budget deficits.

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 Congress;
- Provisions that allow some flexibility in times of war or economic recession provided that a congressional supermajority vote in favor of 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; and
- A provision assigning congressional responsibility to enforce the amendment through legislation.[15]

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[6] *Id.* at 2.
[7] *Id.* at 1.
[8] *See* Office of Management and Budget, FY 2014 Budget, Table S-5, available at http://useconomy.about.com/library/FY2014_budget.pdf (last visited March 18, 2014).
[9] By 2023, interest payments on the national debt are expected to quadruple to $763 billion. *Id.*
[10] *Id.*
[11] The Bipartisan Budget Act of 2013, Committee on the Budget, available at http://budget.house.gov/the-bipartisan-budget-act-of-2013/ (last visited March 18, 2014).
[12] Office of Management and Budget, *supra* note 8.
[13] *Balanced Budget Amendment: Pros and Cons*, Peter G. Peterson Foundation, June 21, 2012, available at http://pgpf.org/Issues/Fiscal-Outlook/2012/06/062112-Balanced-Budget-Explainer (last visited March 18, 2014).
[14] *Does the United States Need a Balanced Budget Amendment?*, U.S. News & World Report, available at http://www.usnews.com/debate-club/does-the-united-states-need-a-balanced-budget-amendment (last visited March 18, 2014).
[15] *Balanced Budget Amendment: Pros and Cons, supra* note 13.

Line Item Veto

A line-item veto is the executive power to remove specific provisions from a bill without vetoing the entire bill.[16] Nearly all state governors have this authority, but the President does not.[17] In an effort to control spending, Congress attempted to grant the President line-item veto power with the Line Item Veto Act of 1996. However, the United States Supreme Court found it to be a unilateral amendment in violation of the Presentment Clause and overruled it as unconstitutional in 1998.[18] Therefore, without a significant self-reversal by the Court, the only way to grant the President 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.[19] This system views state sovereignty as inherent (subject to constitutional limits) while federal sovereignty comes from the Constitution.

The Commerce Clause grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[20] 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. 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.[21]

The United States Supreme Court has historically expanded the applicability of the Commerce Clause by changing its interpretation of "commerce" and the tests applied to various legislative measures. In the 1819 case of *McCulloch 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.[22] The Commerce Clause was examined and federal powers again broadened in the 1824 case *Gibbons v. Ogden*, in which the Court held that Congress can regulate any interstate activity if the motivation is affecting commercial intercourse between the states or any other enumerated power.[23] In 1905, the Court ruled that the Commerce Clause authorized Congress to regulate a local Chicago meat market under the Sherman Anti-Trust Act.[24] It held that a purely local business could become part of a continuous commerce "current" of interstate movement of goods and services.[25]

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 efforts by President Franklin D. Roosevelt led to progressive legislation. Under the New Deal legislation, congressional Commerce Clause powers expanded into areas never before considered "commerce."[26]

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[16] Louis Fisher, *How Successfully Can the States' Item Veto Be Transferred to the President?,* 75 GEO. L.J. 159, 159 (1986).
[17] *Id.* at 178.
[18] *Clinton v. City of New York*, 524 U.S. 417 (1998).
[19] U.S. CONST. amend. X.
[20] U.S. CONST. art. I, § 8.
[21] *Commerce Clause,* Cornell University Law School Legal Information Institute, available at http://www.law.cornell.edu/wex/commerce_clause (last visited March 19, 2014).
[22] 17 U.S. 316 (1819).
[23] *Commerce Clause, supra* note 21 (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824)).
[24] *Id.* (citing *Swift & Company v. United States,* 196 U.S. 375 (1905)).
[25] *Id.*
[26] These included the regulation of in-state industrial production, worker hours, and wages. *Commerce Clause, supra* note 21.

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.[27] 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.[28]

Beginning in 1937 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 an activity is commerce if it has a "substantial economic effect" on interstate commerce or if the "cumulative effect" of one act could have an effect on such commerce.[29] In *Jones & Laughlin Steel*, that included labor relations for industries whose strife might be a national concern.[30]

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.[31] In a separate case, it also ruled that the federal civil rights legislation could regulate a family-owned restaurant with local customers because the restaurant served food that had previously crossed state lines.[32]

It wasn't until 1995 that the Supreme Court revisited limits on the Commerce Clause. 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.[33] 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.[34] These cases show 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' stated reason for federal regulation.[35]

Congressional Term Limits

The United States Constitution governs congressional membership.[36] It specifies that members of the United States House of Representatives serve two-year terms and members of the United States. Senate serve six-year terms.[37] The Constitution does not limit the number of terms or total years a member of Congress may serve.[38] Thus, the only limit on the length of congressional membership is the possibility of not being reelected.

Background on the Term Limit Debate

[27] 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. *Id.* (citing *Schechter Poultry Corp. v. United States*, 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)).
[28] *Id.*
[29] *Id.* (citing *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937)).
[30] *NLRB*, 301 U.S. at 31-32.
[31] *Commerce Clause*, *supra* note 21 (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)).
[32] *Id.* (citing *Katzenbach v. McClung*, 379 U.S. 274 (1964)).
[33] *Id.* (citing *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.
[34] *Id.* (citing *Morrison v. United States*, 529 U.S. 598 (2000)).
[35] *Id*.
[36] U.S. CONST. art. I, § 2; U.S. CONST. art. I, § 3.
[37] *Id.*
[38] *Id.*

The debate traces back to the late 18th Century;[39] 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.[40] As time progressed through the 20th Century and reelection rates for congressional incumbents began to increase,[41] the push for term limits also grew but never with much success.[42] Proponents of term limits did not gain any significant or measurable support until the early 1990s, when twenty-three states, including Florida, passed laws imposing term limits on their respective federal legislators.[43] These efforts were eventually rendered void, however, with the 1995 Supreme Court case *U.S. Term Limits, Inc. v. Thornton.*[44] In that case, the Court held the following:

1) State-imposed candidacy limitations on federal legislative office violate the United States Constitution's "qualifications clauses;" and
2) Term limits on federal legislators may only be imposed by an amendment to the United States Constitution.[45]

Since 1995, congressional members have filed over seventy bills proposing an amendment to limit their terms, but none have been successful.[46]

Effect of Proposed Memorial

The memorial 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 amendments to the United States Constitution that:

- Impose fiscal restraints on the federal government;
- Limit the power and jurisdiction of the federal government; and
- Impose congressional term limits.

The memorial does not specify what restraints or limits should be imposed. Instead, the memorial only serves as a constitutionally required application to Congress to call an Article V Convention to propose amendments related to these specified topics. This procedure for amending the Constitution has never been exercised and many procedural questions remain. The memorial also provides for the severability of the proposed amendment categories. Therefore, if an Article V Convention is called to consider any one of the three proposed amendment categories, the memorial may count toward the required number of applications from the states. The memorial constitutes a continuing application for an Article V convention until the legislatures of at least two-thirds of the states have made applications on one or more of the proposed amendment categories.

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[39] The Framers debated the issue before drafting the final version of the United States Constitution as there were term limits for delegates to the Continental Congress under the Articles of Confederation. *See* Dwayne A. Vance, *State-Imposed Congressional Term Limits: What Would the Framers of the Constitution Say?* 1994 B.Y.U. L. REV. 429 (1994)(For example, Hamilton and Madison opposed term limits; Jefferson supported term limits.).

[40] Tiffanie Kovacevich, *Constitutionality of Term Limits: Can States Limit the Terms of Members of Congress?*, 23 PAC. L.J. 1677, 1680 (1992).

[41] For data on re-election rates since 1964, see http://www.opensecrets.org/bigpicture/reelect.php (last visited March 28, 2014).

[42] 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.

[43] Sula P. Richardson, U.S. Congressional Research Service. *Term Limits for Members of Congress*: *State Activity* (June 4, 1998), available at http://digital.library.unt.edu/ark:/67531/metacrs582/m1/1/high_res_d/96-152_1998Jun04.pdf (finding the following states have passed some form of congressional term limits: AK, AR, AZ, CA, CO, FL, ID, ME, MA, MI, MO, MT, NE, NH, NV, ND, OH, OK, OR, SD, UT, WA, WY)(last visited on March 28, 2014).

[44] 514 U.S. 779 (1995).

[45] *Id.*

[46] *See, e.g.*, H.R.J. Res. 108, 113th Cong. (2014); H.R.J. Res. 93, 112th Cong. (2011); H.R.J. Res. 67, 111th Cong. (2010); H.R.J. Res. 24, 110th Cong. (2007); H.R.J. Res. 11, 109th Cong. (2005); H.R.J. Res. 81, 108th Cong. (2003); H.R.J. Res. 58, 107th Cong. (2001); H.R.J. Res. 18, 106th Cong. (1999); H.R.J. Res. 2, 105th Cong. (1997); H.R.J. Res. 91, 104th Cong. (1995).

Additionally, the memorial specifies that it is withdrawn if it is used to call an Article V Convention or used in support of conducting an Article V Convention for any purpose outside the scope of these three topics.

Lastly, the memorial specifies that 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 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 the Legislature to express its opinion to the federal government.

B. SECTION DIRECTORY:

Not applicable.

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:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.