COMMENTARY

The Proposed Constitutional Convention

By ARTHUR J. GOLDBERG*

The Constitution of the United States is a document of inspiration. It is our legend and hope, the union of our minds and spirits; it is our defense and our protector, our teacher and our continuous example in the quest for liberty, equality, dignity and opportunity for all people of this great nation. It is an instrument of practical and viable government and a declaration of faith—faith in the spirit of liberty and freedom.

On September 17, 1983, Americans celebrated "Constitution Day" generally unaware of the profound threat to our Constitution posed by recent state actions that would necessitate the convening of a constitutional convention. Thirty-two state legislatures have petitioned Congress to call such a constitutional convention, in order to enact a balanced budget amendment.[1] Only two more states are needed to set this country on what I perceive to be a dangerous course.

Under Article V of the Constitution, there are two procedures for amending the Constitution.[2] The traditional method since the begin-

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1. In May 1983, Missouri became the 32nd state to approve a petition calling for a convention to draft a balanced budget amendment. Kershner, *California Could be the State to Assure Amendment Victory*, San Francisco Chron., Dec. 5, 1983, at 13, col. 2. The states that have not yet approved such a petition are: California, Connecticut, Hawaii, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. *Id.* at 10, cols. 3 & 4.

For a discussion on the merits of a balanced budget amendment, compare Rodino, *The Proposed Balanced Budget/Tax Limitation Amendment: No Balance, No Limits*, 10 HASTINGS CONST. L.Q. 785 (1983), with Dreier & Stubblebine, *The Balanced Budget/Tax Limitation Amendment*, 10 HASTINGS CONST. L.Q. 809 (1983). This Commentary will focus on the impropriety of calling for a constitutional convention to amend our constitution.

2. U.S. CONST. art. V provides in pertinent part that "[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitu-

ning of the Republic is for Congress, by a two-thirds vote of both Houses, to submit an amendment to the states for ratification. The second method requires two-thirds (thirty-four) of the states to petition Congress for a constitutional convention. This route has never been employed in our history. It is an uncharted and volatile course shrouded in legal, political, and procedural difficulties.

One of the most serious problems inherent in a constitutional convention is the potential for a "runaway convention." Article V of the Constitution does not limit the agenda of such a convention to specific amendments proposed by the states in their petitions to Congress.[3] There is nothing in Article V that prevents a convention from making wholesale changes to our Constitution and Bill of Rights. Moreover, the absence of any mechanism ensuring representative selection of delegates could put a "runaway convention" in the hands of single-issue groups where self-interest may be contrary to our national well-being.

A constitutional convention also might lead to sharp confrontations between Congress and the states. For example, Congress might frustrate the states by treating some state convention applications as invalid, by insisting on particular parliamentary rules for a convention, or by mandating a restricted convention agenda. Similarly, if a convention were to "runaway," Congress might decline to forward to the states for ratification those proposed amendments not within the convention's original mandate.

Ultimately, the courts would be called upon to decide these matters. Such a result could lead to unprecedented problems. If disgruntled convention delegates, members of Congress, state legislators, and concerned citizens decided to sue, a convention would mire the federal and state governments in a debilitating web of lawsuits. Could governments thus preoccupied with a convention resulting in a constitutional confrontation meet the pressing needs of individual citizens and of the country as a whole?

Another serious problem is that the courts may decide not to rule on the political issues inherent in the convening procedures and actions of a convention. While questions involving political considerations have been resolved by the Supreme Court in some instances,[4] the Court

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tion, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."

3. *See id.*

4. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). *Baker* involved a complaint containing allegations that a state statute effected an apportionment which deprived plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment. Despite the plainly political nature of the case, the Court held that the com-

has emphasized that not all such questions are appropriate for judicial determination.[5] If convention issues present nonjusticiable "political questions," the convention would take place outside our system of checks and balances, thereby increasing the dangers of a "runaway convention."

If convention issues are reviewable by the courts, then serious enforcement problems arise. How, for example, would the Executive Branch enforce a court order that particular issues be excluded from or included in the convention's agenda?

Proponents of a convention may offer assurances that it can be limited to a single issue by saying that the state legislatures have called a convention for the "sole and express purpose" of drafting a balanced budget amendment.

In response, it must be remembered that the Convention of 1787 was called "for the sole and express purpose of revising the Articles of Confederation."[6] As we know, that convention discarded the Articles of Confederation and drafted the Constitution despite the convention's limited mandate.

History has established that the Philadelphia Convention was a success, but it cannot be denied that the convention exceeded the limits of its expressed purpose. Logic therefore compels one conclusion: Any claim that Congress could, by statute, limit a convention's agenda is pure speculation, and contrary to a historic precedent. Such "procedures legislation" might well be unconstitutional and would almost certainly be unenforceable.[7]

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plaint presented a justiciable cause of action. The Court stated that "nonjusticiability of a political question is primarily a function of the separation of powers" with the dominant considerations being " 'the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination.' " 369 U.S. at 210 (quoting Coleman v. Miller, 307 U.S. 433, 454-55 (1939)).

In *Reynolds*, the Court relied upon *Baker* in affirming a district court's reapportionment of Alabama's legislative districts. 377 U.S. at 568.

5. *See, e.g.*, *Baker*, 369 U.S. at 211-26. The Court recognized that in some instances questions dealing with foreign relations, dates of duration of hostilities, validity of legislative enactments, the status of Indian tribes, and the guaranty of a republican form of government were beyond the reach of judicial inquiry.

6. 32 JOURNALS OF THE CONTINENTAL CONGRESS 71-74 (1936) (from a Congressional resolution of February 21, 1787, based on power of amendment under the Articles of Confederation). *See* 1 J. TUCKER, THE CONSTITUTION OF THE UNITED STATES 260 (1899). *See also* THE FEDERALIST No. 40 (J. Madison).

7. *See, e.g.*, L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 47 (1942) ("Congress' control [over a called convention] would seem to be limited to fixing the date and place of elections and meeting, and to determining the mode of representation, whether by the states or by the nation.") *But cf.* A.B.A. SPECIAL CONSTITUTIONAL STUDY COMMIT-

James Madison, the father of our Constitution, recognized the perils inherent in a second constitutional convention. According to Madison, an Article V national convention would

> give greater agitation to the public mind; an election into it would be courted by the most violent partisans on both sides; it would probably consist of the most heterogeneous characters; would be the very focus of that flame which has already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumable that the deliberations of the body could be conducted in harmony, or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first convention which assembled under every propitious circumstance, I would tremble for the result of a Second.[8]

In the next few months, legislators in several crucial states will consider the wisdom of pressing for a convention. This decision should not be reached as a result of political expediency or transitory feelings, but in the context of our Constitution's history of nearly 200 years. State legislators should not act under the delusion that their petitions are mere general resolutions of sentiment with no real consequences. Assurances that a vote for a petition would never result in a convention are empty.[9]

I express the hope that state legislatures which have not yet petitioned will vote against a convention. In those states that have previously petitioned for a convention, I propose that those petitions be considered and withdrawn.

As individual citizens, we may well disagree on the merits of the particular issues that would likely be proposed as amendments to the Constitution. It is my firm belief, however, that no single issue or combination of issues is so important as to warrant jeopardizing our long established constitutional system of governance.

TEE, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V, at 11 (1974) (The A.B.A. agrees with the view that "Congress has the power to establish procedures which would limit a convention's authority to a specific subject matter where the legislatures of two-thirds of the states seek a convention limited to that subject.").

8. Letter from James Madison to George Lee Turberville (Nov. 2, 1788), *printed in* 11 PAPERS OF JAMES MADISON 331 (1978).

9. The strategy of the proponents of the balanced budget amendment apparently is to force Congress to pass such an amendment with the threat of a constitutional convention. *See* Kershner, *supra* note 1, at 10, col. 3.