



## **America's Last Chance: An Article V General Convention**

January 1, 2019

### **Executive Summary**

The separation of powers, the secret to America's governing success, is on life support. Checks and balances, the glue that holds our country together, have eroded. WE THE PEOPLE are being replaced by 68 square miles, in Washington DC, of centralized special interests with governing power now in the grip of career politicians, unelected bureaucrats, and judges. Congress is increasingly cynical and unwilling to legislate. States, with over half of their annual budgets coming to them in the form of highly politicized federal grants, have become sub-units of the federal government. America, as we know it, is in trouble.

Our Founders understood the history of great societies, knew this would happen, and planned for it. Their plan, found in Article V of the United States Constitution, gives the states the power to impose reforms on the federal government without having to resort to war, revolution, secession, or nullification. It is the only constitutional, legal path to restore government to WE THE PEOPLE. **How do we do it?**

State legislators across the nation know the answer. They have submitted hundreds of applications to Congress to make the call for an Article V Convention and have been ignored. They are poised, they are nonpartisan in their desire to meet in Convention to consider solutions, they are experienced, and they love America. **Why haven't the states met in Convention?**

This white paper provides the answers to these questions and the politically-safe, time-sensitive solution that will empower our state legislators to take their rightful constitutional role in restoring parity in governing between the federal government and the states on behalf of WE THE PEOPLE.

### **Introduction**

#### **Do the states want to meet in Convention? The answer is a resounding yes!**

State legislators have been unequivocal in their desire to meet in convention to discuss our nation's problems and propose amendments to address them: they began submitting Article V applications in 1789 and have submitted 437 since then. Two hundred seventy-eight applications from 42 states remain in force; and only one state, Hawaii, has yet to pass an Article V application. Over three dozen applications have been submitted by both Republican- and Democrat-controlled legislatures since 2010. Yet we still haven't had a Convention. **Why?**

Conventional wisdom holds that despite the continuous flow of Article V applications from the states to Congress throughout American history, there have never been enough applications addressing the same subject to reach the constitutionally-mandated two-thirds threshold needed for Congress to call the Convention. In 1993, however, former Department of Justice Attorney and St. Thomas University Professor of Law Michael Stokes Paulsen conducted an aggregation study and found valid, active applications for an Article V General Convention from 45 states, 11 more than the 34 required for the Convention to be called. Paulsen presented his findings to Congress and was ignored.

Or was he? Although Congress failed in its responsibility to call the Convention, a flurry of Article V activity ensued in the wake of the Paulsen aggregation. Naysayers began to spread fear, uncertainty, and doubt about the safety and legitimacy of the states meeting in convention. This opposition has come primarily from those who benefit from the status quo and those who have fallen prey to their scare tactics, rather than knowledgeable, principled objectors.<sup>1</sup> States began rescinding their applications, with enough eventually doing so to bring the count below the 34 applications required to call the convention.

To quell “runaway convention” fears, Article V advocacy organizations began to form around various renditions of a “limited convention,” at which only certain amendments, as stipulated in the applications aggregated to trigger the call, could be discussed and sent to the states for ratification.

It was only after Congress began receiving pressure from these advocacy organizations—nearly a quarter-century after having been approached by Paulsen—that it instituted a system in 2016 to track Article V applications.<sup>2</sup> Congress’ reluctance to appropriately discharge its duties surrounding Article V is further documented in a series of Congressional Research Service reports<sup>3</sup> that hypothesize an active role in the proceedings of a convention the very purpose of which is to bypass Congress, and question whether Congress bears any obligation to even call the Convention.

**After several years of lobbying, the Article V movement has been unsuccessful. ACF has the solution.**

State legislators are now being lobbied by both professional lobbyists and grassroots activists arguing for an array of Article V amendments. Most, because of their subject matter, messaging, or both, have been perceived as too partisan, politically risky, or benefitting too few people to merit legislators’ limited time and attention. Consequently, no single effort has amassed enough applications to call the Convention.

Based on comprehensive research, a thorough application aggregation analysis,<sup>4</sup> and the principals’ experience in the Article V movement, ACF has concluded an Article V Convention is achievable within the next two to four years using existing applications that can aggregate for a *General Convention*, one at which state legislators exercise their constitutional authority to set the agenda at the Convention rather than having it dictated ahead of time by language in the applications. ACF will work primarily with state legislative leaders to help them overcome the current inertia.

## **The ACF Model**

The ACF model is built upon a comprehensive survey of political realities, constitutional scholarship, and legal opinion. While a thorough understanding of these matters is critical to properly lay this foundation, an in-depth exploration of the history and terminology of Article V is outside the scope of this paper. More information is available at ACF’s website, [www.amconfdn.org](http://www.amconfdn.org).

## **Critical Key Terms**

For this discussion, the most important concept to understand is the difference between a *general* and *limited* convention. Additional Article V terms and information are available at <https://www.amconfdn.org/glossary>.

- **General Convention:** At a *general convention*, the agenda is determined by the commissioned delegates, acting on the instructions given to them by their respective state legislatures, at the outset of the convention. No amendment is declared off-limits in advance by language in the applications. The very first application for an Article V Convention was for a General Convention and was passed by the State of New York to press for the Bill of Rights in 1789. It remains in force to this day.

*... in the fullest confidence of obtaining a revision of the said Constitution by a General Convention ... we, the Legislature of the State of New York, do on behalf of our constituents, in the most earnest and solemn manner, make this application to the Congress, that a Convention of Deputies from the several States be called as early as possible, with full powers to take the said Constitution into their consideration, and to propose such amendments thereto, as they shall find best calculated to promote*

*our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.*<sup>5</sup>

- **Limited Convention:** A *limited convention* is commonly understood as one at which only certain amendments, as stipulated in the applications aggregated to trigger the call, may be discussed and passed to the states for ratification.

There is considerable divergence among constitutional scholars as to whether an Article V Convention may be limited in scope, and how such applications should be aggregated. Professor Robert Natelson of the Independence Institute contends that an Article V Convention may be limited, and “Congress has no choice...but to group [applications] according to subject matter.”<sup>6</sup> Former Solicitor General & Assistant Attorney General Walter E. Dellinger, on the other hand, describes the assumption that Congress can call a limited-subject convention “erroneous,” and argues that “such an application must be considered invalid.”<sup>7</sup> Advocates of illimitability note that Congress, when in session, has no limitation on amendments it may consider under the authority granted to it under Article V. They argue that since the purpose of Article V is to give the states parity with Congress, no limitations may be placed upon the states at a Convention called under Article V. They further note that Article V makes no provision for limitations to be placed on the Convention. Constitutional historian and former Department of Justice attorney Russell Caplan notes that the illimitability theory “holds the edge among constitutional scholars.”<sup>8</sup>

### **Strictest criteria approach**

The ACF strategy uses the “strictest criteria” approach. In any political, scholarly, or legal endeavor, there is a diversity of opinion. At every decision point, ACF has opted to plan for the least favorable outcome. ACF has planned for opposition from Congress and the possibility of litigation in federal court.

ACF has surveyed a number of aggregation studies. One concluded that there are already 36 valid applications for an Article V Convention, and that Congress should call the Convention immediately. ACF, using its “strictest criteria” analysis, determined only 30, of 278, applications meet the criteria for aggregation. More details about the various aggregation studies are available at ACF’s website, <https://www.amconfdn.org/new-page-2>.

### **Congressional reluctance and litigation outcomes**

While it is the requirement of Article V for Congress to call the Convention when noticed with 34 applications, based on the Congressional Research Service reports on Article V and Congress’ history, ACF believes Congress will stall or, as they did previously, ignore them. ACF’s strategy lays the foundation for a legal battle to assure the states are successful in getting to convention.

There are four possible litigation scenarios, based on three assumptions. First, the states are sufficiently motivated to hold the Convention and adequately organized and prepared to pursue litigation. As has already been established, the states are motivated. What has heretofore been absent is organization and preparation for litigation, which ACF stands ready to provide. Second, Congress will look for excuses to avoid calling the Convention, or attempt to insert itself into its proceedings in some way. Third, the interplay between the type of applications (limited vs. general) submitted by the states and the composition of the Supreme Court figures prominently in the likely outcomes.

- (1) The states file 34 or more limited applications. As has happened in the past, they are ignored, forcing the states to take action in federal court. Citing experts such as Dellinger & Caplan, Congress argues that they have no constitutional authority to call a limited convention. Whether the court hearing the case is composed of strict constructionists or jurists inclined to protect an expanded role for the federal government, **the states would most likely lose.**
- (2) The states file 34 or more limited applications. Congress calls the Convention, but as suggested in the CRS report, attempts to control it. In this scenario, the states would be forced to sue Congress for attempting to assume powers not specifically granted to it in Article V.

For the foreseeable future, strict constructionists will hold the majority in the Supreme Court, so the Court would most likely rule for the states in that Congress’ grab for authority does not comply with Article V, but

a court so composed would also likely hold that Congress has no authority to call a Limited Convention. Both the states and Congress lose, but **the states are the ultimate loser because there is no Convention.**

- (3) The states file 34 or more general applications. Congress ignores them, and the states sue in federal court. Because there is no limiting language providing Congress with a constitutional escape hatch, and because, for the foreseeable future, strict constructionists will hold the majority in the Supreme Court, the **states would most likely prevail.**
- (4) The states file 34 or more applications for a general convention. Congress calls the Convention but attempts to control it in some way. Because the majority of the Justices are strict constructionists, the court would support the General Convention and throw out Congress' demand for extra-constitutional power over the Convention and **the states would prevail.**

In light of the historical record and a careful assessment of the full range of scholarly opinions, ACF has concluded that the most effective strategy to prevent Congress from evading its responsibility to call the Convention and/or to control its proceedings is to (a) **focus its efforts and attention exclusively on applications for a General Convention,** and (b) **lay the foundation to prepare the states to be successful in litigation.**

## **The ACF Strategy**

### **What Sets ACF Apart: Comprehensive non-partisanship and a strategy that addresses both the political and legal challenges for state legislators**

ACF is the only Article V advocacy organization that has a strategy and resources to support state legislators beyond securing 34 applications. That strategy anticipates and plans for pushback from Congress and others attempting to prevent the states from exercising their authority under Article V. The ACF strategy includes the following:

- Secure the remaining applications necessary for Congress to make the call
- Support the states in notifying Congress to make the call
- Hold a pre-convention assembly to prepare legislators to effectively participate in the Convention
- Facilitate the infrastructure for the actual convention (facility, communications, documentation, etc.)
- Provide the legal and administrative support to document and analyze proceedings
- Provide a comprehensive communications plan to notify the nation of all Convention activities and outcomes
- Support the states for any ratification litigation

ACF is the only Article V advocacy organization that is working for a General Convention. ACF exists for one purpose only: to bring about this Convention and support the states through the ratification of the amendments that come out of it. ACF's only agenda is to provide state legislatures a forum in which they can exercise their constitutional prerogative to set their *own* agenda. ACF is non-partisan in both name and practice.

While ACF considers these distinctive factors critical in facilitating the states' success, the organization stands ready to collaborate with all who support facilitating an Article V General Convention in a non-partisan manner. ACF will dissolve upon completion of its mission.

### **Counting to 34: How close are we to a Convention?**

As mentioned in the previous section, in addition to surveying other scholars' work in this area, ACF has conducted an aggregation study using the "strictest criteria." ACF's criteria count those states with a valid general application, along with those that have an application that specifies a subject of special interest to the state but **does not contain limiting or exclusionary language.** Using these criteria, ACF has determined 30 states have submitted valid, active applications to Congress for an Article V General Convention. More detailed information is available at ACF's website, <https://www.amconfdn.org/new-page-2>.

### **Mobilize the states**

ACF will work with state legislatures to remove limiting language from an existing application, or pass a new application for a General Convention, in order to secure the additional applications needed to reach the 34-state

threshold required to trigger a General Convention. ACF will then coordinate a unified notification to Congress from legislative leadership in these states—including the minority as well as the majority caucus, where possible—stating that they have a valid, active application for an Article V General Convention, and that they expect Congress to discharge its constitutional responsibility to call the Convention. Consistent with its “strictest criteria” strategy, ACF will also work to prepare the Attorneys General in those states to file suit in federal court to direct Congress to make the call, should the need arise.

### **Prepare & support the states**

ACF will work with all 50 states to support legislators to effectively participate in the Convention. ACF will provide expert, non-partisan training regarding Article V topics such as delegate selection and oversight, Convention rules, amendment formulation, and the ratification process. ACF will also provide logistical support for the Convention itself, including facilities, communications, security, and media coverage. ACF will provide states with support all the way through the ratification of the amendments that are passed in the Convention.

### **Timeline: 2-4 years**

ACF’s timeline is 2-4 years. Considering legislators’ other responsibilities, including having to campaign for reelection as often as every 2 years, it is difficult to sustain long-term legislative enthusiasm for any initiative, particularly in states with term limits. Several Article V advocacy organizations experienced this as their efforts began to stall in 2018. Additionally, there are those who believe that if this convention does not take place soon, the problems it is meant to address will become irreparable.

The most significant and historic event, next to the Convention itself, will be the ACF-sponsored Article V Pre-Convention Assembly. This will be the first time in the history of our nation the leadership of our 50 state legislatures has met. This event will allow state legislators to discuss rules for the Convention, meet their fellow legislators, and prepare for the Article V Convention.

### **After the Convention: Benefits to State Legislators**

After the War for Independence, the states came together and created the federal government as a co-equal entity to handle functions that could be best provided by a national government: tasks like diplomacy and settling disputes between states. The states were never intended to be subservient to the federal government as they have become in many respects today. An Article V Convention is the constitutional vehicle to restore the states to their role as a check on federal overreach and champions of their citizens’ liberties and freedoms.

State legislators can realize the following tangible benefits from the Convention:

- Eliminate unfunded mandates and one-size-fits-all “solutions” dictated by unelected federal bureaucrats: state legislators can be empowered to respond to their own constituents instead of dutifully executing programs and having the majority of their budgets under the control of Washington.<sup>9</sup>
- End the forced subsidy of policy and program decisions made by their counterparts in other states.<sup>10</sup>
- Prevent Washington from using federal block grants to extort compliance in areas where it clearly has no constitutional jurisdiction.
- The states can be unleashed as fifty “laboratories of democracy,” learning from one another what works and what doesn’t, free to adapt to local conditions, and able to respond to changes on the ground much more quickly and effectively than the federal government can.
- Americans across the political spectrum are dissatisfied with Congress. Local control is a **winning issue with voters**, especially millennials. In overwhelming numbers, young voters want the poor cared for, consumers protected, and the environment kept clean. But in even larger numbers, they agree that the federal government is inefficient, wasteful, and untrustworthy.<sup>11</sup>

### **Summary**

- State legislators of both parties have demonstrated that they want to use the authority granted to them in Article

V to address their concerns and those of their constituents.

- Congress has shirked its constitutional responsibility to call a Convention; and the fear, uncertainty, and doubt spread by naysayers has successfully divided support for a Convention with limited-subject applications.
- Limited-subject applications are highly vulnerable to politicization and litigation.
- A General Convention is the fastest and safest legal and political path to a Convention.
- The states have already submitted to Congress, using ACF's strict criteria, 30 of the 34 applications needed to call a General Convention.
- ACF will assist states to secure the remaining needed applications, mobilize the states to notify Congress, file suit in federal court if needed, equip state legislators to effectively participate in the Convention, engage the media, and support the states up to and through the ratification of amendments.
- A General Convention is a safe, nonpartisan approach that provides an opportunity for state legislators to unite to impose badly-needed and widely-supported reforms on the federal government when Congress cannot—or will not—act.

## A Call to Action

One of the founding principles that made the United States the most successful government in history was the concept that the power of the government comes from the *consent of the governed*. Our problem is not that a handful of bad legislation has become law. Nor is it the occasional self-serving politician. Our problem is excessive power has aggregated in Washington and our federal government represents special interests more than its people.

WE THE PEOPLE: our rights, our liberties, our future...they are in **our** hands. The only peaceful and legal means to rebalance power and impose badly-needed and widely-supported reforms is through an Article V Convention. **If we do not take this opportunity to define our future, someone else will do it for us.**

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### Endnotes

<sup>1</sup> Specific naysayer objections are identified and rebutted at ACF's website, <https://www.amconfdn.org/objections>.

<sup>2</sup> The Article V Records Transparency Act of 2016 arbitrarily begins recording applications submitted beginning in 1960, and is available at <http://clerk.house.gov/legislative/memorials.aspx>.

<sup>3</sup> Links to Congressional Research Service Reports on Article V are provided at ACF's website, <https://www.amconfdn.org/article-v-library>.

<sup>4</sup> It is assumed Congress will closely examine the language of applications to determine whether they can aggregate in sufficient numbers to meet the two-thirds (or 34-state) threshold for the call of a Convention.

<sup>5</sup> Article V application by the State of New York, H.R. Jour., 1st Cong., 1st Sess. 29-30 (May 6, 1789).

<sup>6</sup> Natelson, Robert G., (2010, December), "Amending the Constitution by Convention: A more complete view of the founders' plan," The Independence Institute, IP-7-2010, p. 16. Retrieved on May 6, 2018 from <http://robnatelson.com/wp-content/uploads/2016/11/II-Paper-I-Founders-Plan-II-webversion.pdf>.

<sup>7</sup> Dellinger, Walter E. (1979), "The Recurring Question of the 'Limited' Constitutional Convention," 88 *Yale Law Journal*, 88, 1623-1640, p. 1640.

<sup>8</sup> Caplan, Russell L., (1988), *Constitutional Brinkmanship: Amending the Constitution by national convention*, (New York, NY: Oxford University Press), p. 138.

<sup>9</sup> To read testimony given by Utah Senate President Wayne Niederhauser on behalf of the Council of State Governments to the House Committee on Oversight & Government Reform's Subcommittee on Intergovernmental Affairs, please visit [https://oversight.house.gov/wp-content/uploads/2017/04/Niederhauser\\_Testimony.pdf](https://oversight.house.gov/wp-content/uploads/2017/04/Niederhauser_Testimony.pdf).

<sup>10</sup> To learn more about how state labor law policies impact workers in surrounding states, please visit <https://news.illinois.edu/view/6367/204531>.

<sup>11</sup> Read *Millennials, the Politically Unclaimed Generation* at <https://reason.com/poll/2014/07/10/reason-rupe-2014-millennial-survey#.11aq2yr:a5ca>.