CONVENTION OF STATES

What if Congress Refuses to Call an Article V Convention?

Some have suggested that Congress might simply refuse to call an Article V Convention of the States, even if it receives 34 applications from state legislatures for a convention. While we agree that Congress is generally disinclined to relinquish its own power (which is precisely why an Article V Convention is necessary), it is a settled matter of constitutional law that Congress *must* call the Convention upon receipt of the requisite 34 applications on the same subject matter.[1]

We know from the records of the 1787 Constitutional Convention that George Mason insisted that the new Constitution provide state legislatures a power co-equal to that of Congress to propose amendments, and that the Convention delegates unanimously agreed with him. The Founding Fathers thus used mandatory language in describing Congress' duty to call a Convention under Article V, ensuring that the states would have a means of obtaining amendments they deemed necessary to provide an effective check on federal power.

Article V reads, in pertinent part, "The Congress . . . on the Application of the Legislatures of two thirds of the several States, **shall** call a Convention for proposing Amendments…" (emphasis added). The use of the word "shall" in this provision confers upon Congress a duty that is, from a legal perspective, both "mandatory" and "ministerial." In other words, Congress *must* call the Convention if 34 states apply for one on the same subject matter, regardless of whether it agrees that a Convention is necessary or appropriate. Because the duty is a "ministerial" one and is executive in nature, courts can and will enforce it, if necessary, by issuing either a writ of mandamus or a declaratory judgment.[2]

Alexander Hamilton made it abundantly clear that Congress cannot block an Article V Convention of the States when he wrote, in Federalist 85:

> [T]he national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged* "on the

[1] *See generally*, Robert G. Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 TENN. L. REV. 693, 733-738 (2011) (citing additional authorities).
[2] *Roberts v. United States*, 176 U.S. 221, 230 (1900); *see also Powell v. McCormick*, 395 U.S. 486 (1969) (issuing a declaratory judgment to reinstate an improperly evicted member of Congress); *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting state's claim that its legislature and governor were not bound by a federal court's injunction).

> application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments which *shall be valid*, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the states, or by conventions in three fourths thereof." The words of this article are peremptory. The Congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body.

Hamilton then concludes, a few sentences later, that "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."

This is precisely what we must do, by urging our state legislatures to pass applications for an Article V Convention of the States to propose amendments that will limit the power of the federal government.