



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES  
ATTORNEY GENERAL

TELEPHONE  
(208) 334-2400

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Honorable John Peavey  
Minority Caucus Chairman  
Idaho State Senate

Honorable Bert Marley  
Senator, District 27A  
Idaho State Senate  
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Senators Peavey and Marley:

You have asked the following questions regarding Idaho's call for a constitutional convention:

1. If two-thirds of the state legislatures are on record in favor of a convention, can the call be halted or rescinded?
2. Can the scope of the convention be limited to one amendment or could other matters, such as the repeal of the Second Amendment, be brought before the convention?
3. Must Idaho's call for a constitutional convention on abortion be rescinded at the same time the call for a convention for a balanced budget amendment is rescinded?

Article V of the United States Constitution reads in pertinent part as follows:

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and

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purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; . . .

Thus, Article V provides that the amendment process may be initiated upon either a two-thirds vote of Congress or upon application for a constitutional convention by two-thirds of the states. The convention method gives the states an absolute power to amend the Constitution: Congress is required to call a constitutional convention upon application by two-thirds of the states. Since 1879, the states have proposed varied issues as appropriate for an Article V convention, including: state legislative apportionment, direct election of Senators, abolishment of polygamy, revenue sharing, limiting federal taxes, and a balanced federal budget. See Praeger and Milmore, Article V Applications Submitted Since 1789: A Tabulation of Applications by States and Subjects, in American Bar Association, Special Constitutional Convention Study Committee, Amendment of the Constitution by the Constitutional Method Under Article V, at 59, 60-61 (1974).

The intent of the framers of Article V of the Constitution was to make available to the people a means of remedying abuses by the national government. A state's power to call for a constitutional convention derives from Article V. In Leser v. Garnett, 258 U.S. 130, 42 S. Ct. 217, 66 L.Ed. 505 (1922), the United States Supreme Court defined the role of a state legislature in ratifying an amendment to the United States Constitution as a "federal function derived from the Federal Constitution . . . which transcends any limitations sought to be imposed by the people of a state." Id. 258 U.S. at 136-37. By analogy, the application of a state to Congress for a constitutional convention is also a federal, and not a state, function. Thus, the answers to your questions are based solely on the validity of our state's actions under Article V of the United States Constitution.

Since no convention has ever been called or held under Article V, and because the terms of Article V are vague, issues regarding the scope and procedure appropriate to the convention call have sparked much debate and controversy among legal scholars. Of particular concern is the scope of Congress' duties in calling the convention. Our response to your inquiries is given against this backdrop.

1. If two-thirds of the state legislatures apply to Congress for a convention, can the call be halted or rescinded?

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Answer: If two-thirds of the state legislatures are "on record" in favor of a convention, and those state applications to Congress are valid under Article V, Congress is required to call for the Constitutional Convention. There is no provision in the United States Constitution to halt the convention once two-thirds of the states have made that application. If the convention call is being used for leverage on the Congress, those calling for the convention risk the real possibility that sufficient leverage will not be generated until the required two-thirds of the states have actually made the convention call and at that point the convention must be called.

2. Can the scope of the convention be limited to one amendment?

Answer: This question has not been definitively answered and there is dispute among the various commentators whether or not the convention may be limited to consideration of a single amendment. Those who argue it may not be limited base their argument in part on the fact that Article V refers in the plural to a "convention for proposing amendments." [Emphasis added.] Further, it has been argued that allowing state legislatures to define and limit the scope of the convention represents an impermissible transfer of power from the convention itself to the legislatures. See Dellinger, The Recurring Question of the "Limited Constitutional Convention," 88 Yale L.J. 1623, 1633 (1979).

In considering the issue of whether the convention may be limited, one scholar takes note of the fact that while the 1787 convention was "for the sole and express purpose of revising the Articles of Confederation," that convention ignored the limited mandate and proceeded to draft the Constitution. See, Goldberg, The Proposed Constitutional Convention, 11 Hastings Const. L.Q. 1,3 (1983). Goldberg continues, "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."

Other commentators contend that a convention could be limited in scope, based upon the subject matter contained in the state convention calls. To date, however, the question of who can limit the scope of the convention and how is entirely unresolved. If the state applications for a convention are limited, and that limit is determined invalid, the result is uncertain: It may be that the call itself is null and void; or, in the alternative, the attempted limitation may be of no effect in determining the scope of the convention. There is even disagreement amongst the commentators as to whether Congress or the Supreme Court would be the final arbitrator of these questions. Most assume that the U.S. Supreme Court would make the ultimate determination as to convention procedures, the scope

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of a convention, and so on, since litigation would undoubtedly be involved. However, it has been suggested that the Court may abstain under the "political question" doctrine, leaving the question for Congress' determination.

If a convention were called on the balanced budget amendment and it was ultimately determined that the convention could not be limited in scope, the concern you expressed in your letter about possible repeal of the Second Amendment (dealing with the right to bear arms) or modifying the "Great Compromise" which granted the small states an equal voice in the Senate, could be realized. Such a convention could ignore or reject the balanced budget amendment, while proceeding to consider these and other questions for submission to the states. Again, with no definitive legal precedent, it is hard to say what might take place.

3. Must Idaho's call for a constitutional convention on abortion be rescinded at the same time the call for a convention for a balanced budget amendment is rescinded?

Answer: This is more a practical question than a legal one. From the standpoint of consistency, -one can argue that all convention calls should be repealed, assuming that the overriding concern is that of a "runaway convention." From a practical standpoint, however, to address the concern that a convention call will be realized by the action of 34 states, resulting in an unlimited convention, only those calls approaching the 34 state mark need be repealed. It has been argued that Congress could call a convention by aggregating convention calls on several subjects. See Connely, Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?, 22 Ariz. L.R. 1011, 1020 (1980). It is generally agreed that Congress will make the initial determination as to whether the applications are valid before calling a convention and Congress could presumably read any valid application for a convention as properly included within the two-thirds requirement. However, given the reluctance of Congress to accede to the idea of a constitutional convention, it is unlikely that it would employ this interpretation.

Sincerely,

*Daniel G. Chadwick*

DANIEL G. CHADWICK  
Chief, Intergovernmental  
Affairs Division