Written by **Joe Wolverton, II, J.D.** on April 9, 2014

Is Congress About to Call for a Con-Con?

Despite recent setbacks in several states, the movement to call for a constitutional convention (a so-called "convention of states") has found a congressional ally.

On April 1, Representative Duncan Hunter (R-Calif.) called for an inquiry into whether the requisite number of state legislatures have submitting qualifying petitions to satisfy the mandates of Article V.

Article V of the Constitution reads in relevant part: "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."

According to the information Duncan is relying on, Michigan's call for a convention might have pushed the issue across the 34-state threshold.

"It is my belief that the House should lead an effort to ascertain whether 34 states have voted affirmatively," Mr. Hunter said in a letter to House Speaker John A. Boehner, as reported by the *Washington Times*.

The letter continues:

> A balanced budget amendment is long overdue and remains an effective tool to address runaway spending and deficits. With the recent decision by Michigan lawmakers, it is important that the House — and those of us who support a balanced budget amendment — determine whether the necessary number of states have acted and the appropriate role of Congress should this be the case.

Putting aside for a moment the critical question of whether 34 states have in fact applied for a constitutional convention (and, please, don't waste time arguing that a convention to change the Constitution is not a constitutional convention), in reporting on Hunter's call for a congressional finding, the *Washington Times* overlooks a key aspect of the procedure provided by Article V. Not coincidentally, the various proponents of an Article V convention make similar subtractions.

In explaining the method for approving any amendments proposed at a constitutional convention, the *Washington Times* writes, "the amendments must be ratified by three-fourths of the states." But that does not necessarily mean state legislatures, as many are led to believe. In actuality, Article V allows that any amendments approved by a constitutional convention "shall be valid to all intents and 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."

Read carefully — as any constitutionalists certainly should — Article V provides for a workaround should state legislatures prove reluctant to ratify any amendment preferred by the delegates to the con-con.

This method was actually employed in ratifying the 21st Amendment, the amendment that repealed the nationwide prohibition on the sale of alcohol enforced as part of the 18th Amendment.

Many Americans opposed Prohibition, giving rise to a movement for its repeal. There was a problem, though. Americans in favor of Prohibition united and organized grassroots groups nationwide to lobby state legislatures to refuse to ratify any attempt to end the liquor ban.

After the ratification of the Constitution and prior to consideration of the 21st Amendment, proposed amendments were presented only to state lawmakers for approval. Recognizing that there were enough state legislators opposed to repealing Prohibition, congressional advocates of repeal (and the wealthy donors that supported their campaigns) chose instead to send the amendment to state conventions called for the specific purpose of considering the amendment, as provided in Article V.

The gambit was successful and 36 state conventions ultimately ratified the repeal of the 18th Amendment and on December 15, 1933, Prohibition officially ended.

One can only imagine that should Congress sense that state legislators would be reluctant to ratify this or that amendment preferred by special interests, a similar sidestep could occur and state conventions could be empaneled to give the proposals the go-ahead.

In Representative Duncan's letter, the specific amendment he mentions is a balanced budget amendment.

Setting aside the very real risk this Republic would run in holding a second constitutional convention, our own recent history demonstrates that Congress would be about as likely to adhere to limits on their power set forth in new amendments as they are in the rest of the Constitution.

Would the BBA restore fiscal sanity in Washington? It would not, for several reasons: A budget can be balanced by raising taxes as well as lowering spending; the amendment's "emergency" provision (yes, virtually all BBA proposals include one) could be used to circumvent the stated purpose of the amendment; and the Washington spendaholics could use basic accounting gimmickry, including off-budget spending (as they do now), to "balance" the budget on paper but not in reality. Regarding the latter, recall that when Bill Clinton was president, the federal government achieved a "balanced budget" on paper, while the national debt continued to climb.

Furthermore, there is no historical proof that a balanced budget amendment would drive Congress back to within its constitutional corral. Even the most conservative estimates indicate that about 80 percent of expenditures approved by Congress violate the U.S. Constitution. That fact wouldn't change by adding an amendment to the Constitution.

Whether these bills spend our national treasure on unconstitutional and undeclared foreign wars, billions sent overseas in the form of foreign aid, expanding the so-called entitlement programs, or redistributing wealth via corporate and individual welfare schemes, none of these outlays is authorized by the Constitution.

And don't forget, a committed, concerned, and constitutionally aware citizenry can balance our budget more quickly than any balanced budget amendment and without the danger of letting the wolves of special interests and their political puppets into the constitutional hen house.

I've exposed the many unconstitutional aspects of one of the more popular BBA Article V convention proposals. The bottom line is this: It's hardly constitutional to give the president power to impound federal funds and it's hardly an example of austerity to allow Congress to spend money on any program so long as they only exceed the previous budget by 5 percent! That's not the rigid adherence to the Constitution that conservatives should accept, even from voices inside our own movement.

I have written much on the subject of an Article V constitutional convention and I suggest that readers familiarize themselves with the very real and as yet unanswered criticisms of those proposals (links to many of the articles can be found here). There is one last comment to make, however, particular to the Duncan letter.

In his message to Speaker Boehner, Duncan suggests that Michigan's call for a convention may have been the magical 34th.

Although it is apparently true that 34 states have applied for a constitutional convention, 12 of those states have rescinded their applications. That means that there are only 22 active applications for a convention. (The John Birch Society, which opposes calling a constitutional convention, has compiled a list of the state applications and rescissions. To see the list, click here.)

Should Duncan, or any other congressman, suggest that the rescinded petitions should not count against the total once the threshold has been crossed, that would amount to little more than congressional veto of 12 state legislatures, a usurpation not at all consistent with constitutional principles of federalism.

Finally, if Congress chooses to ignore the 12 state legislatures that have recalled their petitions for a con-con, then any convention ultimately held would be authorized by a minority — 22 — of the states, thus adding yet another constitutional violation on top of the others already made in the name of "fixing" the Constitution.

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