

Eminent Constitutional Scholar Rob Natelson Answers Article V Questions

A tactic employed by promoters of the “runaway convention scenario” is to challenge lawmakers with a list of supposedly unanswerable questions. Several lists are used and they vary somewhat, but all appear to be based on questions published over three decades ago by Professor Lawrence Tribe of Harvard Law School, a liberal opponent of conventions for proposing amendments.

Although it is claimed the questions are unanswerable, most do, in fact, have good answers. Because state lawmakers may encounter them while considering Article V applications, those questions, supplemented by a few others, are listed below. They are organized by topic, although the questions can be presented in any order. The questions are reproduced verbatim, together with their sometimes-odd phrasing and punctuation. An answer immediately follows each question.

Questions Pertaining to Applications

Q1. How is the validity of applications from the states to be determined?

A. Initially by Congress, although congressional decisions are subject to judicial review.

Q2. How specific must the state legislatures be in asking for an amendment?

A. The legislatures may apply either for an unrestricted convention or one devoted to particular subject matter. There is no ironclad rule as to specificity, except that the more a legislature tries to dictate the specific language of the amendment (as opposed to the general topic), the more it endangers the application’s validity.

Q3. Must all the applications be in identical language?

A. No. It is enough if they identify the same problem(s) or subject(s). However, prudence suggests that state legislatures coordinate with one another.

Q4. Within what time period must the required number of applications be received?

A. Adoption of the 27th amendment—proposed over 200 years earlier—has convinced most observers that there is no time period. Because, however, some still claim that applications can go “stale,” prudence suggests that a campaign be completed within a few years. The application campaign for direct election of senators took 14 years.

Questions Pertaining to Congress

Q5. Can Congress refuse to call a convention on demand of two-thirds of the states, and if it does, can it be compelled to act by the courts?

A. Nearly all scholars have concluded that Congress may not refuse. Supreme Court precedent strongly suggests that courts can compel it to act.

Q6. Would Congress decide to submit Con Con [sic] amendments for ratification to the state legislators or to a state constitutional convention as permitted under Article V of the Constitution?

A. Article V specifies that the question is up to Congress— as is true of any amendment, whether proposed by Congress or by a convention. Incidentally, the convention that ratifies an amendment is called a “state ratifying convention,” not a “state constitutional convention.”

Questions Pertaining to Delegates and Delegate Selection

Q7. Who are the delegates, and how are they to be chosen? (Other versions of this are (1) How would Delegates be selected or elected to a Constitutional [sic] Convention? and (2) What authority would be responsible for electing the Delegates to the convention?)

A. Delegates (more properly called “commissioners”) are representatives of their respective state legislatures and are chosen as the state legislature directs.

Q8. What authority would be responsible for determining the number of delegates from each state?

A. This and related questions are determined in each state by that state’s legislature—just as is true for delegates to other conventions, such as state conventions for ratifying amendments.

Q9. Would delegates be selected based on population, number of registered voters, or along party lines?

A. See the answer to Question #8.

Q10. Would delegates be selected based on race, ethnicity or gender?

A. The Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, and the Supreme Court cases interpreting them forbid election on these grounds.

Questions Pertaining to Convention Organization and Procedure

Q11. Can the convention act by a simple majority vote, or would a two-thirds majority be required, as in Congress, for proposing an amendment? (Other versions are (1) Would proposed amendments require a two-thirds majority vote for passage? and (2) How would the number of votes required to pass [or propose] a Constitutional Amendment be determined?)

A. The convention acts by a simple majority of the represented states. The convention may, by a simple majority of the represented states, alter that voting rule.

Q12. How is a convention to be financed, and where does it meet? (Related versions of are (1) What authority would be responsible for selecting the venue for the Convention?, and (2) Where would the Convention be held?, and (3) Who will fund this Convention?)

A. A convention for proposing amendments is a conclave of state “committees,” each made up of state commissioners. It therefore is financed by the states. Congress, in the convention call, specifies the initial meeting place, but the convention may alter that meeting place.

Q13. May the convention propose more than one amendment?

A. Yes—but only if they are all within the agenda of the convention, as prescribed by the applying states.

Q14. Is there a time limit on the proceedings, or can the convention act as a continuing body?

A. There is no fixed time limit—the convention can meet until it decides whether to propose amendments and which ones to propose. But a convention is, by definition, not a continuing body. It has no authority beyond deciding whether to propose amendments within the subject matter prescribed in the applications. Once that is performed, it must adjourn. Additionally, states may recall and/or replace their commissioners at any time.

Q15. What authority would be responsible for organizing the convention, such as committee selection, committee chairs and members, etc.? (A related question is, How would the Chair of the Convention be selected or elected?)

A. Organizational details such as these are fixed in rules adopted by the convention itself, in accordance with nearly universal American Convention procedures. Conventions universally elect their own permanent officers.

Q16. How would the number of delegates serving on any committee be selected and limited?

A. See answer to Question 15.

Q17. What authority will establish the Rules of the Convention, such as setting a quorum, how to proceed if a state wishes to withdraw its delegation, etc.?

A. See answer to Question 15.

Q18. Would non-Delegates be permitted inside the convention hall? (A related version is, Will demonstrators be allowed and/or controlled outside the convention hall?)

A. Inside the convention hall, convention rules control. The outside environment is subject to the same rules governing the space outside any public body, convention, or legislature.

Q19. What would happen if the Con Con [sic] decided to write its own rules so that two-thirds of the states need not be present to get amendments passed?

A. Nothing requires the convention to follow a two-thirds adoption or quorum rule for proposing an amendment. Adoption and quorum rules are set by each convention in accordance with universal practice. As for the ratification procedure: According to both the constitutional text and the U.S. Supreme Court, the convention receives all its power from the Constitution. So it cannot alter the rules in the Constitution that specify the ratification procedure. See also the preceding answers.

Q20. Could a state delegation be recalled by its legislature and its call for a convention be rescinded during the convention?

A. The legislature may recall its commissioners. The rest of the question inaccurately assumes the states “call” the convention; actually, the states apply and Congress calls. It is unlikely a state could withdraw its application after two thirds of the states have acted on it. However, if a state disagrees with the amendment language that is crafted during the convention, it can instruct its commissioners to oppose it, and can vote against it during the ratification process.

A Question Pertaining to the Courts

Q21. Can controversies between Congress and the convention over its powers be decided by the courts?

A. Controversies over the scope of the convention’s powers may be decided by the courts. However, the states, not Congress, fix the scope of such powers. The most likely area of controversy between Congress and the convention would be if the convention suggests an amendment that Congress believes is outside the convention’s agenda as defined in the state applications. If (as is proper) Congress then refused to prescribe a “Mode of Ratification” for the suggested amendment, the courts could resolve the dispute.

Questions Based on Historical Claims Made About James Madison and the 1787 Convention

Q22. Didn’t James Madison express uncertainty about the composition of an Article V convention, and wasn’t he “horrified” at the prospect of one?

A. Quite the contrary. Madison later promoted the convention idea as a reasonable way to resolve constitutional disputes. It is true that during the Constitutional Convention debate he initially expressed uncertainty as to how amendments conventions were to be constituted. But he must have been satisfied with the answer he received, since he dropped his objections. It is also true that he was “horrified” by a 1789 New York proposal for an unlimited convention to rewrite the entire constitution with over 30 amendments. Who wouldn’t be? However, Madison repeatedly asserted that his objection was directed only at that particular proposal at that particular time.

Q23. Isn’t it true that the 1787 Constitutional Convention was a “runaway”—that Congress convened it under the Articles of Confederation only to propose amendments to the Articles, but it ended up drafting an entirely new Constitution?

A. The truth is quite to the contrary: Most commissioners had full authority to recommend a new Constitution.

Source: Proposing Constitutional Amendments By A Convention of the States