GEORGETOWN LAW

April 10, 2023

Honorable James Gray
Chairman
Committee on Election Law and Municipal Affairs
New Hampshire Senate
Concord, NH 03301

Re: *H.B. 392*

Dear Chairman Gray and Committee Members:

I write to urge you to vote against H.B. 392, relating procedures for delegates to a possible federal Article V convention. Contrary to the testimony presented to the Committee last week, this legislation would do nothing to mitigate the dangers of an Article V convention. To the contrary, H.B. 392 would be wholly unworkable and ineffectual. I also am concerned that some of the testimony the Committee heard last week gave the misimpression that legislation of this kind is uncontroversial by conflating it with very different proposals. In fact, many state legislatures have rejected bills similar to H.B. 392. I urge you to do the same.

An Article V Convention Would Put Our Basic Liberties at Grave Risk

Nothing in Article V, or anywhere else in the Constitution, puts any limits on what a convention could do except that it may not deny states equal representation in the Senate. If anyone tells you that other limitations exist, I would encourage you to ask them to point you to something in Constitution that supports those safeguards. There is nothing.

Two witnesses at last week's hearing insisted that an Article V convention would be "limited" in what it could consider. Mr. Quinn made a reference to "conventions … to … adopt a new constitution" and insist that such a convention "is not what this is about". Mr. Fieldman referred to "the Article V limited convention process". Nothing in Article V says anything about limiting a convention. Article V does speak of "a Convention for proposing Amendments", but it says nothing about limiting the scope of those amendments. Legislatures commonly amend legislation by "striking all after the enacting clause and inserting the following:". The 1787 Philadelphia Convention that replaced the Articles of Confederation with our current Constitution did not take that approach, but it could have: it did retain some parts of the Articles and in that sense could be termed an "amendment". The Constitution of the Confederate States of America incorporated large parts of the U.S. Constitution, yet its differences – which could be termed "amendments" – fundamentally changed the nature of the entire document.

It would be foolhardy in the extreme to assume that a consensus in values will protect the liberties in the current Constitution that we hold dear. Because our nation is so sharply divided, and because our current politics are characterized by a remarkable degree of ruthlessness, this danger is present whatever one's particular political perspective might be.

600 New Jersey Avenue, NW Washington, DC 20001-2075
PHONE 202-661-6656 das62@law.georgetown.edu

To senators that feel strongly about gun rights, I ask how confident you are in what would come out of an Article V convention if some horrific school shooting occurs during the convention? Skepticism about the Second Amendment is by no means limited to liberals. The congressionally-chartered National Constitution Center commissioned an alternative "Conservative Constitution", which would provide that "states, and the United States in places subject to its general regulatory authority, may enact and enforce reasonable regulations on the bearing of arms, and the keeping of arms by persons determined, with due process, to be dangerous to themselves or others."[1] One of its authors, Princeton Professor Robert P. George, is on the Legal Board of Reference of the Convention of States Project, one of the major advocates of an Article V convention.[2]

To senators who share Wolf-PAC's concerns about the corrupting influence of money in politics, I ask how confident you are that moneyed special interest groups will not twist an Article V convention to do their bidding? As weak as our campaign finance and public corruption laws are now, many of them would not apply at all to an Article V convention. Given how much special interests will spend to influence a single provision in a single annual appropriations bill, can we have any real doubt that they would run riot over an Article V convention? Wolf-PAC's proposed "cure" is even worse than the disease. I also would note that we are wildly unlikely to have an Article V convention called for campaign finance reform: in nine years of trying, Wolf-PAC persuaded only five states to pass its application – the most recent in 2016 – and now is down to three states with the rescissions of Illinois and New Jersey.

The Supposed "Safeguards" Asserted by Witnesses Do Not Exist

Referring to an Article V convention, Mr. Fieldman referred to "numerous safeguards in place over it with the checks and balances built into the system that relate to the courts, the Congress, the states themselves, as well as the delegates". None of these purported safeguards may be relied upon.

The Supreme Court has held repeatedly that the process of amending the U.S. Constitution is a political question into which the courts may not intrude.[3] The current Supreme Court seems highly unlikely to disregard this precedent and attempt to manage how an Article V convention proceeds.

The Article V convention process is specifically designed to prevent congressional involvement. Indeed, Mr. Quinn and Mr. Fieldman both say the regard Congress as an implacable opponent of their respective proposals and are seeking an Article V convention precisely to deny Congress any role in the process. Nothing in Article V enables Congress to intervene to correct or disband a runaway convention.

One may hope that the delegates will behave appropriately, but that hope is a thin reed on which to bet our constitutional rights and liberties. If voters choose the delegates (currently the law only in Rhode Island), one may expect an avalanche of special interest spending in support of their favored candidates. Existing campaign finance laws generally are not written to cover delegates to an Article V convention because none was anticipated when those laws were written. In the great majority of states where legislatures, with or without gubernatorial involvement, appear to have selection powers under state law, one may again expect aggressive special interest spending to lobby for their chosen candidates. Because such appointments would not constitute legislation, lobbying disclosure laws may not apply. And, of course, if Congress decides to appoint delegates itself, special interests are already all-too-familiar with how to spend money to obtain results. In addition, just as past legislators' failure to anticipate an Article V convention may have caused them to write lobbying restrictions that do not apply

[1] https://constitutioncenter.org/news-debate/special-projects/constitution-drafting-project/the-conservative-constitution/introduction-to-the-conservative-constitution.
[2] https://conventionofstates.com/endorsements.
[3] *See, e.g.*, Coleman v. Miller, 307 U.S. 433 (1939); Leser v. Garnett, 258 U.S. 130, 137 (1922).

to attempts to influence who becomes a delegate, they also may not apply to lobbying the delegates once they are chosen.

One might hope that the states would provide some backstop to a runaway convention, but that is far from assured. Article V imposes no deadline on the ratification of amendments: the Twenty-Seventh Amendment was ratified more than two centuries after Congress proposed it to the states. Once a convention proposed a new constitution or package of amendments, they would be hanging over the nation, waiting for its proponents to win a "wave" election and get over the top on ratifications.

Even this process may not, in fact, be followed. The Philadelphia Convention of 1787 blatantly disregarded the ratification procedures in the Articles of Confederation. Article XIII of the Articles of Confederation required Congress and every state legislature to ratify any amendments; the Philadelphia Convention, however, provided that its new Constitution would take effect if two-thirds of the states ratified it. (Article VI, paragraph 2, of the Articles of Confederation also prohibited any side agreements among the states.) If an Article V convention decides to follow the 1787 convention's precedent, it could either lower the threshold for ratification of a new constitution or could designate another process completely, such as a national referendum, for ratification. With special interest groups flooding the airwaves with advertisements promoting their new convention, voices of caution would likely be drowned out.

H.B. 392 Would Be Ineffectual at Remedying Those Dangers

Representative Jodi Newell asserted that he bill, H.B. 392, is "the solution to the fear and uncertainty that sways us from using what is a constitutional right." Unfortunately, she is far too optimistic. In an Article V convention, power would reside in all delegates, not just those from New Hampshire. It follows, then, that no legislation this Legislature could pass would meaningfully reduce the dangers of such a convention.

Even if the peril was somehow limited to the actions of New Hampshire's delegates, H.B. 392 would not meaningfully reduce that peril. The assumption underlying the legislation is that a convention will move slowly, with many intermediate votes in which unfaithful delegates would reveal themselves. That pattern is extremely unlikely, and the enactment of H.B. 392 and similar proposals in other states would make it even more unlikely. The common practice in negotiating complex and controversial legislation is to wrap it all up into a single package passed by a single vote at the end. Negotiators operate on the principle that "nothing is agreed until everything is agreed." This is how Congress passes year-end appropriations bills, year-in and year-out. This is how Congress passed the major coronavirus relief bills in 2000. Sweeping legislation such as the Affordable Care Act, the 2017 tax cuts, and President Biden's two "reconciliation" bills went through some procedural votes but only single final votes on packages crafted behind closed doors.

There is every reason for an Article V convention to act the same way, particularly if delegates risk being replaced if it holds multiple substantive votes. Several existing amendments to the U.S. Constitution combine multiple disparate purposes, including the Fifth (grand juries, double jeopardy, self-incrimination, due process of law, and takings of private property for public use); the Sixth (speedy and public trials, juries, venue for trial, access to charges, confrontation of adverse witnesses, compulsory process, and right to counsel); the Eighth (bail, fines, cruel and unusual punishment); and particularly the Fourteenth (birthright citizenship, privileges and immunities, due process, equal protection, right to vote, apportionment of representatives, disqualification of former confederates from public office, U.S. public debt, confederate debts, slaveholders' claims, and Congress's legislative power). Nothing in Article V prevents a convention from writing an entirely new constitution, but even if it opts to work from the existing version, it can bundle together as many provisions as it likes.

If the convention adjourns immediately upon voting to approve a new constitution, or a package of amendments, recalling delegates would be meaningless because their service will already have ended. In theory, delegates could later be punished for voting for the convention's final act, but this would be unlikely. If prosecutors approved of the delegates' actions or found them reasonable, no charges would be brought. Proving beyond a reasonable doubt that the delegates intended to violate their oaths would be exceedingly difficult. And few judges would be inclined to impose more than a slap on the wrist for such delegates – fines that could be offset many times over by "gifts" from special interest groups that favored the constitutional changes.

Even in the wildly unlikely event that the delegates were severely punished, the damage would already be done: nothing in Article V gives states any control over delegates to a convention, much less any authority to nullify their votes retroactively. Indeed, nothing in Article V gives state legislatures the power to appoint delegates at all: as the Congressional Research Service has noted, "Congress has historically laid claim to broad responsibilities in connection with a convention, including … selection process of its delegates".[4]

Proponents Misleadingly Refer to Very Different Procedures as Precedents

An Article V convention would have unprecedented power and hence would represent an unprecedented danger to our nation. Not surprisingly, those urging that we take this extraordinary gamble go to great lengths to compare an Article V convention to normal parts of our political life. None of these analogies bear even the most cursory scrutiny.

Mr. Quinn tried to normalize an Article V convention by pointing out that New Hampshire sends commissioners each year to the National Conference of Commissioners on Uniform State Laws. The National Conference, of course, has no power to change our system of government or impair our basic rights. Indeed, nothing the Conference writes has any legal effect unless and until it is enacted for a particular state by that state's legislature.

Mr. Quinn also referred to New Hampshire's proud tradition of holding state constitutional conventions. Senators may wish to consider whether the tenor of New Hampshire politics is fairly representative of those of other states or of the nation as a whole, which would set the tone for an Article V convention. More to the point, these conventions' ability to undermine basic rights and liberties was limited by the presence of the U.S. Constitution and its Bill of Rights. If an ill-advised state constitutional convention were to repeal or water-down Article 19 of the New Hampshire Bill of Rights, which limits searches and seizures, the Fourth Amendment to the U.S. Constitution would remain as a backstop. Because of the Supremacy Clause, no such backstop exists should an Article V convention determine that the federal government needs more intrusive powers.

Mr. Fieldman cleverly referred to "conventions under the U.S. Constitution", perhaps giving the impression that an Article V convention of the kind he seeks is not unprecedented. What he was referring to, however, was the *state* conventions called to *ratify* the Twenty-First Amendment (ending prohibition). These conventions, of course, were fundamentally different: they posed no threat to our system of government as they could only approve or reject a particular proposed amendment sent to them by two-thirds majorities in both chambers of Congress. The Article V convention he proposes, by contrast, would have a wide-open agenda and could rewrite or remove any protections in the U.S. Constitution except the requirement of equal representation in the Senate.

[4] THOMAS H. NEALE, CONG. RESEARCH SERV., THE ARTICLE V CONVENTION FOR PROPOSING CONSTITUTIONAL AMENDMENTS: HISTORICAL PERSPECTIVES FOR CONGRESS 1 (CRS R43592 Oct. 22, 2012).

Mr. Fieldman also sought to analogize H.B. 392 with something (he did not say what) that the U.S. Supreme Court unanimously upheld in 2020. Presumably he is referring to *Chiafalo v. Washington*, which upheld states' authority to fine presidential electors who vote for someone other than the candidate they were chosen to support. A case involving the election of presidents has little to do with an Article V convention amending the Constitution. First, the Constitution provides that states select presidential electors; it says nothing of the kind about delegates to an Article V convention. Presidential electors are therefore state officials in some senses; delegates to an Article V convention are not. Second, determining whether presidential electors were true to their commitments is entirely straightforward: if they do not vote for the specific designated individual, they have been faithless. By contrast, judgment calls are inevitably involved in assessing whether a delegate has acted consistently with the wishes of a state's legislature. For example, if a convention is called "to limit the power and jurisdiction of the federal government", as one of the major pro-convention groups proposes,[5] would delegates be faithful to their charges if they voted to repeal the Second Amendment, thereby eliminating the federal government's jurisdiction to block state gun control laws? Third, as noted above, delegates could reasonably expect that the prospects of punishment are quite remote. Finally, the appeal of being a faithless presidential elector is to become a footnote in history; the appeal of voting for a sweeping revision of the U.S. Constitution is to *make* history. As we have seen in recent years, many people of various political persuasions are willing to take great personal risks to achieve political ends they believe are important.

Some of the other reassuring references in the witnesses' testimony were too vague to pin down. Given the remoteness of their vague analogies that can be fact-checked, I respectfully submit that caution is in order. If senators are interested in whether this or that public official or organization supports H.B. 392, I would urge them to contact that official or organization to determine what proposal, in fact, they actually supported. By definition, legislation considered in the U.S. Congress will have a different scope and different effect than that in the New Hampshire General Court.

I also note that the overclaiming that convention proponents are doing on behalf of H.B. 392 during Committee consideration can be expected to continue should the legislation be enacted. This could give Members of this and other state legislative bodies a false sense of security in launching on the most dangerous gamble with our nation's liberties since at least the Civil War.

In sum, I would respectfully urge the Committee to reject H.B. 392 and any similar legislation. It will fail to accomplish any of its purported objectives but would normalize the inherently dangerous process of an Article V convention by suggesting that it can be, in Mr. Fieldman's words, "handled in a way that is safe". I appreciate your consideration of these comments.

Sincerely yours,

David A. Super

David A. Super
Carmack Waterhouse Professor of Law and Economics

[5] https://conventionofstates.com/files/model-convention-of-states-application.