

MEMO

TO: Senator
FROM: Marshall
DATE: January 16, 1979
RE: Constitutional Convention to Balance the Budget

Some pressure exists to call a Constitutional Convention to consider amendments to balance the budget (or some variation thereof, such as prohibiting deficit spending). At this point, we need to assess that pressure, legally and politically, and then develop an intelligent response.

A. Just how urgent is the problem?

Article V reads as follows:

"The Congress...on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments..."

1. Petitions received. The number of valid petitions received from state legislatures so far is a matter of some dispute. The National Taxpayer's Union says that 22 states have submitted petitions to Congress. CRS lists 16 for the Senate, and 15 for the House. I called the House Judiciary Committee, and they said they have 6 petitions on balanced budget, 12 on prohibiting deficit spending, and 1 on a federal debt limit. Many of these petitions, however, are invalid on their face: some were passed by only one state House, some are uncertified copies, some were not ever passed by either House. Others are in direct conflict: a few are drawn so narrowly as to insist on an up or down vote on a specifically set forth amendment. A fair reading of the materials received by the Judiciary Committee so far would, in my estimation, total no more than 12 states and more likely 10 or 11.

2. The next question, of course, is how many petitions the Congress is likely to receive over the next year to eighteen months. Intelligence is hard to come by here, but near as we can tell states seem likely to enact legislation calling for a constitutional convention to balance the budget. (See map)

(Linda is compiling the data and will have it completed by tomorrow morning.)

B. What are our possible responses?

1. Wait until the Senate receives 34 petitions.
2. Hold hearings with the aim of demonstrating the risks of calling a convention.
3. Hold hearings with the idea of setting out procedures which would reduce some of the uncertainty with calling a convention.
4. Do a staff report setting forth the issues to be addressed with calling a convention.
5. Try to coordinate a behind-the-scenes campaign to quell state legislatures from urging Congress to call a convention.
6. Scream.

Discussion

Alternatives 1, 2, and 3: Should we hold hearings on a Constitutional Convention II?

The House Judiciary Committee is taking approach #1: do nothing until Congress receives 34 petitions. Their attitude is that:

- a) setting up procedures would only encourage state legislatures to pass more petitions;
- b) any legislation in the 96th Congress would not bind the Congress in session when the 34th petition is received;
- c) the chances are good that there will never be a 34th petition, so that any legislative activity is a needless expenditure of time and precious tax dollars;
- d) if Congress ever does receive 34 petitions, it can pass a Procedures Act within 5 to 8 months.

We have an additional reason: if you intend to participate actively in a balance-the-budget debate, a set of procedures hearings would open another front altogether, drain your energies, and in some cases appear to place you in contradictory positions (opposing a convention but supporting an amendment).

Possible disadvantages with this approach:

- 1) Congress will be caught with its pants down - I tend to discount this argument. Five or eight months is not that long a time, legislatively, and it is unlikely people will come down too hard on anyone who is waiting to work out the procedures in a conscientious way. In addition, you should know that seven or eight petitions are passed with language that would void the call for a convention if Congress passed a Balance the Budget Amendment; thus, even if 34 petitions are received, Congress could still act to negate the call.
- 2) The states and the public do not appreciate the ramifications of a call for a Constitutional Convention, and our hearings could help educate them to this possibility - There is certainly something to this. However, we run a serious risk of appearing to obstruct the will of the people if we come out too strongly against a convention. Added to this risk must be the prospect that our hearings are unlikely to have a major impact on state legislatures at this point. Certainly good arguments exist against a convention; I am just not sure if we can make them in a way that has significant impact and does not hurt you politically.
- 3) We appear to be blocking the popular will - At this point, it looks as if you will hold hearings on Con Amendments to balance the budget. I really do not see how people can accuse you of obstructionism under such circumstances.
- 4) We lose much control over the situation if we wait to act until Congress receives the 34th petition - We can certainly outflank the movement by acting ahead of time. I do not think, however, that this outweighs the advantages of waiting, as set forth above. If this troubles you significantly, the Subcommittee staff could develop a report. (See below)

Thus, of alternatives 1, 2, and 3, I would say #1 is your best alternative.

Alternatives 4 & 5: What role do you wish to play in opposing the movement to call a constitutional convention?

No one in Congress is presently holding himself out as knowledgeable on these issues, and you could certainly fill that void. Doing so would not be without its political risks, but I could see you speaking out in a way that would make you appear responsible and not simply taking a stand against democracy.

The possibilities here are:

- 4) your speaking out on the problems with such a convention (or alternatively coordinating a behind-the-scenes campaign against the call);
- 5) keeping a relatively low profile but having the subcommittee staff prepare a report which reveals the complexity of a call;

Alternative #4 involves political judgments which you can best assess. The prior question in my mind is what is the practical impact of your speaking out or working against the drive. If you could have a significant impact, then one should consider the political risks; if your impact is likely to be minimal, then it seems foolish to get out in front on this one. I do think you could give courage to some conscientious state legislators, and certainly the press will be interested in presenting the other side, but frankly I think you are in a better position than I to assess the impact of your speaking out or working actively against the movement for Constitutional Convention II.

If you do prefer a wait-and-see approach on the petitions, and to concentrate your efforts on the limitation proposals referred to the Subcommittee, you may want to consider alternative #5: having the Subcommittee staff prepare a report. It would be nice to have various law professors comment on the legal issues involved and develop a Subcommittee report laying out their conclusions, but again, I would question the practical impact of such a report. It would not be out for three months at the earliest, and all we could do is raise questions for some future Congress to answer. On the other hand, some conscientious legislators and newspaper readers are likely to benefit from such a report, and we should do whatever we can to educate the public to the complexities of the situation. On balance, I think it would be wise to begin preparing a report.

C. Things to Do in the Meantime

1. Take steps to secure jurisdiction over the petitions. We should reach a clear understanding with the new Chairman that all matters relating to calls for a constitutional convention, including petitions, should be referred to our subcommittee. I do not anticipate a problem here, but to stay on top we must get on top.
2. Monitor the situation, both in the Congress and in the states. This will be more difficult and time-consuming than it sounds, but also necessary for a meaningful role.