



WHY THE FOUNDING FATHERS WOULD CALL

W ANOTHER *Constitutional Convention* NOW

HAT THE FRAMERS DID IN PHILADELPHIA in 1787 was in response to the situation they confronted. Government under the Articles of Confederation was incredibly weak, indecisive, and totally ineffective both in the formulation and execution of policies.

Another factor in the minds of the men of 1787 was tyranny, not the tyranny of George III, which had dominated their thoughts in 1776, but the tyranny of the state legislatures. Liberated from the control of the royal governors, and without an independent restraining judiciary, there was virtually no control. Those responsible in Philadelphia were determined to create an executive independent of legislative tyranny.

Illustrations by Brant Day

MALCOLM R. WILKEY

A third reason for creating a strong executive and the separation of powers among the three branches was the fear that an all-powerful legislature would employ patronage for corrupt purposes. Some state legislatures were obviously corrupt, but more undisputed was the fact, visible for many, many years, that England itself was highly corrupt. The Framers in 1787 feared that an all-powerful legislature would insist on placing its henchmen in administrative posts, and, based on the English model, deliberately create jobs for their "place men."

So the objective was to make the executive both powerful and pure, and the device employed was a separation of powers, which provided one more check on the all-powerful legislature by an independent judiciary. Yet by 1879 Woodrow Wilson was writing "there could be no more despotic authority wielded under the forms of free government than our national Congress now exercises. It is a despotism which uses its power with all the caprice, all the scorn for subtle policy, all the wild unrestraint which marked the methods of other tyrants as hateful to freedom."¹

Today we no longer worry about tyranny of either George III or the state or federal legislature; our overpowering concern is for the undisputed ineffectiveness of Washington governmental structure after 200 years. In a way history has now come full circle. For in 1787 the dominating consideration was that which had summoned them there, the undisputed ineffectiveness of the Articles of Confederation.

Concepts OF THE 1787 Constitution

Let us recall the concepts of the 1787 Constitution that replaced the Articles—first, the concept of the man who would be president. Everyone agreed that this would be Washington, the peerless leader, without political ambition, a man above the fray. The president was conceived of as a man who would represent the whole country, the whole country geographically, and the whole country in all its interests, since he would be outside and above faction. It was never contemplated that the president would be the party leader, for there were no political parties in existence or contemplated.

The concept of the men who would be legislators was that of community leaders, with a basic occupation or profession, thereby belonging to and openly representing "a faction." To this basic concept must be added the interplay of other factors: (1) the distance from the national capital to the legislators' homes, (2) the delay and difficulty of 18th-century communications, and (3) the limited role of the federal government compared to that of the states. All of this meant that the new national legislators would serve a short period in the Congress, at a personal sacrifice in nearly every instance, and then return to their basic profession or occupation with others of the same type replacing them.

All these factors that influenced the 1787 concept of the Congress have now completely changed, as many scholars have frequently noted. But, they rarely ask, did anyone seated by the chimney fire in 1787 even dream of television? The impact of television alone invalidates every assumption of the Framers as to the role of the national legislature and the character and election method of its members.

The Framers' concept of the role of the states was that unquestionably they would continue to be preeminently important. The federal government was strictly a government of limited powers. If there is anything the *Federalist Papers* made clear, it was that.

Perhaps most important for us is that the Framers' concept of defense and foreign relations was attuned to the 18th century. That world of the Framers has been overwhelmed by technology. Our Constitution was drafted by candlelight. In communication and transport, the fastest was by sailing ship, the most fearsome weapon, a broadside by a ship of the line. Today we think of nuclear-tipped intercontinental ballistic missiles, and bombs smuggled by terrorists to kill thousands.

The Framers knew only the dynastic wars of Europe, with petty objectives and petty forces. In the Framers' lifetime they saw the change to the nation-in-arms of the French Revolution. In our 20th century, we have moved from rivalry between nations or dynasties, which was World War I, to the war of ideologies, which was World War II, to another phase of the struggle between ideologies, which was the Cold War. Now perhaps we have moved to a conflict between cultures, between the Christian West of the Renaissance and Reformation versus Islam, Hinduism, Buddhism, etc., of the East.

In 1787 and in 1993 the overpowering responsibility of all government was and is to make *decisions*. The Framers wrestled with the questions: By whom? By what institutions? In what structural framework? and then crafted a structure to make decisions in domestic as well as foreign and military affairs in the time allowed in 1787.

After a brief look at the motivations and concepts of the Framers, let us look at their objectives and structure in 1787.

Objectives AND Structure

Granting that the fundamental *objectives* of the Framers in 1787 would still be the same today—to design a representative government of, for, and by the people—would the Framers now design the *structure* of that government in all respects as we have today?

To say that the Framers would repeat the structural design in all details in anticipation of the 21st century as they did for the 19th is to charge that they would have learned nothing from 200 years of experience and to assert that the world has changed little since the 18th century.

In 1787 there were only a few crucial tasks that required a national government. What the Framers thought these were can be gathered by looking at the list of powers and prohibitions (Article I, Sections 8, 9 and 10, and in Article II, Sections 2 and 3 of the Constitution). These powers granted to the national government deal mainly with foreign relations, national defense, and regulation of foreign and domestic commerce.

In addition to the *enumeration* of powers, we should look carefully at the *distribution* of the powers. That distribution was consistent with the dominant republican political theory and the technology then.

None of the Framers could have foreseen—any more than John Locke or Montesquieu—the necessary enormous infrastructure and defense capability of the modern state in the nuclear age. Eisenhower got through Congress and launched a nationwide superhighway building program in less than a year; but the debate over whether the federal government had the power to build a national road lasted from Jefferson through Jackson. A president today must decide in minutes whether to respond to a nuclear attack; Jackson fought the Battle of New Orleans with the entire country ignorant of the fact that the Treaty of Ghent had been signed several weeks before.

We will fritter away—or destroy overnight—what the Framers gave us unless we confront our current problems with the same imagination, practicality, courage, and selflessness they displayed in 1787.

FEW *Structural Changes*

Moving forward from 1787, contrary to what most of the Framers anticipated, amendments to the Constitution have brought almost *no* structural change. Scholars usually say that only the 17th and 22nd Amendments wrought structural changes. I would add the 12th.

The 12th Amendment was caused by the tie vote in the 1800 presidential election between Jefferson and Burr. It has had an impact far beyond that which it is usually accorded. First, the 12th Amendment made inevitable the rise of political parties. Second, it transformed the office of the president and the character of the men who would occupy it. After 1804 the president and vice-president would no longer be the two highest men in respect of their fellow citizens (like George Washington, above the fray). But the president and vice president would be of the same political beliefs and supported by the same group, i.e., political party. The presidents after that had a dual role: leader of the nation and leader of the party, as Woodrow Wilson pointed out.

The 17th Amendment changed the senators' constituency from the legislature to the people of the state. Now it is worth noting that the 17th Amendment originated in Congress only after enough state legislatures had voted to call a constitutional convention—the only time that has happened. Congress got the message and drafted its own

amendment. Has it not had an impact? Can you imagine what senatorial campaigns—especially the use or non-use of television—would be like if senators were still elected by state legislatures?

The 22nd Amendment imposed term limits on any office for the first time. In many ways the two-term limitation was a partisan reaction in 1947 to the success of Franklin Roosevelt. Yet it was also a recognition that professional politicians can be *too* successful in getting elected. The term limit on the president introduced a structural disequilibrium between the president and Congress. The president must now confront professional politicians in Congress who have greater staying power—and comparative unaccountability.

There has been no other structural change to the amendment process. Why? Many think it is because the people who would be affected by change, who would have their powers altered, are precisely those who originate constitutional amendments (Congress).

During my last five lectures, I discussed the remedies that are available and the direction that those remedies would take us.

I mentioned the problems of gridlock, perpetual incumbency, and total nonaccountability. And then I went to the possible remedies—strengthening the Congress, strengthening the president, enacting measures to eliminate gridlock between the two ends of Pennsylvania Avenue, strengthening the political parties, strengthening the judiciary, strengthening the states, and strengthening the people. I also discussed how these remedies would fit into a coherent whole, pointing us toward a system of professional politicians continuing in office with visible political accountability (similar to England's parliamentary system). Or the remedies could point us in a different direction toward a legislature of amateur politicians who had achieved distinction and demonstrated talent in other affairs relevant to government administration. The comparison between those two remedies is something I would hope could be made in a constitutional convention.

I've tried to assess whether it was possible to get certain reforms through Congress or not. And in summary, there is one type of reform impossible to get through Congress—any statute or amendment that alters the power structure to the disadvantage of one or both houses.

Those reforms that Congress will never pass as amendments include three out of the four measures to strengthen Congress because it alters the distribution of powers between the Congress and the president—all five of the measures to strengthen the president, all seven of the reforms to diminish gridlock between the president and Congress, and term limits or a prohibition against reelection to the same office consecutively.

This *only* leaves as reforms that, as a practical and constitutional matter, could be passed by Congress: (1) fixing Congressional salaries, (2) internal leadership reforms, and (3) strengthening political parties.

Following the

FRAMERS' ADVICE

to a NEW

CONSTITUTIONAL

Convention

*by later amendment. The Founding Fathers regarded the national government they had organized as an experiment, and they hoped that succeeding generations would correct the mistakes that time and experience revealed. Thomas Jefferson even suggested that the constitution drafting process should be repeated by each generation of Americans*²

I suggest we have a constitutional convention every 20 years as a standard matter. That would be helpful in keeping our governmental processes up to date. Don't forget that the revered Framers changed their structure of government twice in their own lifetime—first, the Articles of Confederation, and, when they saw that changes were needed to create an effective government, the Constitution of 1787.

Since our Constitution has been so amazingly successful compared to that drafted by anyone else—except the British, who never drafted one—the myth has grown that this is virtually a perfect document. The Framers recognized defects, and some were corrected while the Framers were still alive. They were corrected by constitutional amendments and by the creation of institutions, such as the political party system, which bridged some defects in the document itself.

Nothing illustrates this better than the dissatisfaction with the selection method of the president and vice-president, which resulted in the 12th Amendment. Its consequences were not only to designate clearly the choice between president and vice-president: it recognized and contributed to making party slates essential. Gone was the hope of lofty idealism and detached vision for the whole country characterizing those considered for president.

Besides the 12th, no less than *nine* amendments affect the presidency—who votes for him and who can occupy the office. Six determine who votes, through the electoral college system of course—the 14th, 15th, 19th, 23rd, 24th, and 26th amendments. Three deal with who occupies the office—the 20th, 22nd, and 25th. Looking at it another way, only seven—11th, 13th, 16th, 17th, 18th, 21st, and 27th—do not affect presidential election or succession. I'm ruling out, of course, the first ten, the Bill of Rights, which are really part of the original Constitution.

Present day dissatisfaction with the presidency focuses not on the way he is elected, but on what he is not able to do after he is elected.

Now mark this. Except the 22nd, which limits the president to two four-year terms, not one of these 27 amend-

ments have had such limited effects? Would this be a disappointment to the Framers? I think it would.

In the last Federalist paper, Alexander Hamilton urged ratification of the Constitution despite its imperfection, on the ground that its defects could be corrected

ments effects any structural change or alters the relative powers between the executive and the legislative branch.

This is highly significant, because the relative powers of the president and Congress have been exercised in such a way in the last 50 years to produce gridlock, deadlock, and total unaccountability. It is in this area where reforms are most desperately needed, and it is precisely in this area in which the constitutional amendment process has never produced any amendments whatsoever, except the 22nd.

The reasons for this are obvious: the Congress is never going to pass an amendment that will reduce in any way its prerogatives, specifically granted by the Constitution, or acquired through clever political manipulation, e.g., holding hostage a treaty or a cabinet confirmation until the individual senator gets what he wants in the way of the appointment of a U.S. District Judge. Congress has not been willing, and never will be willing, to take any constructive action (such as increasing the House term to four years) that would alter the position of the Senate and the House. So even adjustments between the two branches are impossible by an amendment process that depends on origination by Congress.

Getting down to practicalities, how would a constitutional convention be called?

Calling A

CONSTITUTIONAL

Convention

Under Article V of the Constitution, Congress would call a convention after two-thirds of the state legislatures applied (34 states). What would the convention do? It would *propose* amendments to the Constitution, *not* amend the Constitution. The amendments would become valid when ratified by three-fourths of the state legislatures or three-fourths of the states acting through conventions, which amounts to 38 states. The choice of the "mode of ratification" is as "may be proposed by Congress."

How did the Framers create this method of amendment? Originally, in the Virginia Plan and in the thoughts of others, the states *only* should initiate amendments. This yielded to the argument advanced by Hamilton that Congress would be the first to recognize the need for any amendments. George Mason opposed this on the cogent ground that "it would be improper to require the consent of the national legislature, because they may abuse their power and refuse their consent on that very account. The opportunity for such an abuse may be the very fault of the Constitution calling for amendment."³ What Mason feared is exactly what has happened. Putting the amendment process at the mercy of Congress, the very body whose powers may need to be changed, may have been Alexander Hamilton's greatest mistake, the decision with the most far-reaching consequences for his country.

The Confederate Constitution provided an easier amendment route and, most significantly, left Congress out of the initiating process. Another difference, the ratification by two-



thirds was a lower margin than the three-fourths requirement of our Constitution. If any three states wanted a constitutional convention to consider amendments, they got one, whether the Congress agreed or not. Voting by states in the convention, which was true at Philadelphia in 1787, meant that nothing would be proposed by the convention unless six states of the eleven were for it, and nothing would be finally ratified as a change to the Constitution unless eight states of the eleven wanted it. Change would thus occur only if there was an overwhelming consensus that it was wise, but the initiation of consideration could be made by a minority of the states. The Confederate Constitution is worthy of study and reflection. Americans who had 72 years experience with the 1787 document drafted it—the only instance in 206 years since Philadelphia that the whole constitutional design has been reviewed. Besides an easier amendment process, the delegates opted for a president with a six-year nonrenewable term and a line-item veto. But they left unchanged that magic language vesting “The executive power in a President” intact.

In over 200 years there has been no constitutional convention called by the states. Those with entrenched interests in the power structure have found it easier to control and suppress reforms through Congress, either squelching proposals or controlling the drafting, as with the 17th Amendment.

Ostensible Those entrenched interests fear change
OBJECTIONS and advance all kinds of ostensible objections to a constitutional convention. They advance a whole string of procedural questions. Article V, like most of the Constitution, is drafted in general terms and may need to be fleshed out by legislation. Nearly all these procedural questions can be answered by reference to what the delegates did in 1787 or what the Congress and the state legislatures now do procedurally.

Some objections are troublesome. What would be the role of the courts? Can Congress be *compelled* to call a constitutional convention if two-thirds of the states request it? Confronted with the 17th Amendment, Congress evaded that by proposing its own draft of the

change in the constituency electing senators. What if there is a controversy between the convention and Congress? Can the courts settle it?

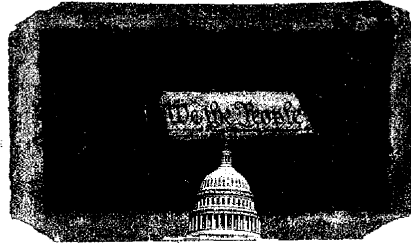
Perhaps most important, how would the delegates be chosen? How many per state? Would they be by political party nominees as we choose regular elected officials? Would current office holders be eligible to be delegates to the constitutional convention?

Also, would the voting be by state, as it was in 1787? Would it be by individual as it now is in Congress—except the significant exception of when the House chooses a president?

The biggest objection by opponents of a convention has been the bugaboo of a “runaway constitutional convention.” This idea, erroneously it turns out, goes back to the alleged “instructions” given to the delegates of 1787. The Congress under the confederation resolve of February 1787 had no legally binding effect, because, in the words of Julius Goebbel, the first-volume author of the History of the Supreme Court of the United States, “It was in the enabling legislation of the states that the source of the delegates’ authority lay.”⁴ Eight state legislatures had already called for the meeting in Philadelphia when the Congress of the confederation passed its resolve, which was really preparatory in nature. Quoting Goebbel, “The state legislative instruments, . . . with a single exception were cast in general terms and did not impart specific instruction.”⁵ Therefore, the Framers had no binding instructions on the scope of their action. Today, Article V now governs the amending process, but without specific detail.

There is a whole list of horrors conjured up by opponents to a constitutional convention. Abolish the Bill of Rights or portions thereof. Reverse several Supreme Court

decisions. Forbid abortion or legalize abortion. Allow prayer in the schools. Forbid guns or legalize guns for self-defense. An iron-clad balanced budget required, or one with lots of loopholes. Compel revenue sharing with the states. Nearly all these are *social policies* that do *not* belong in the Constitution one way or another. Some might be the subject of a statute, if the consensus could be mustered. All are highly controversial, which is why no consensus has formed to pass them.



WE WILL *fritter away*—
 or *destroy* OVERNIGHT—
 WHAT *the Framers*
gave us UNLESS WE
 CONFRONT *our current*
problems WITH THE
 SAME *imagination,*
practicality, COURAGE,
 AND *selflessness*
they displayed IN 1787.

Being highly controversial, how many of these proposed reforms would emerge from a constitutional convention with an agreed text by a delegate or state majority? If any emerged, how many would be adopted by 38 separate state legislatures or conventions? Remember, a constitutional convention can only "propose" amendments under Article V. And, Congress could stall on choosing the method of ratification and never send an amendment to the states.

Proposed STATUTES TO
GOVERN A *Constitutional*
Convention

Whatever the legitimacy of concerns about a runaway constitutional convention, over the years several proposed statutes to govern such a convention have been introduced. The principal ones were by Senator Sam Ervin and Senator Jesse Helms. Each received strong support in the Senate, though the House acted on neither. These statutes spell out the administrative details, the place, funding, and noncontroversial solutions to the details left unexpressed in Article V.

Some of the statutes' answers could be questioned, although the answers given are not unreasonable. First, the convention would be electoral college size, two senators from each state plus the same number as current House members. Second, voting would be by delegate, not by states as in 1787. Third, a majority of delegates would be necessary to propose an amendment, i.e., the same number as to elect a president.

Four provisos to guard against unwelcome subjects rest on shakier ground. First, the statutes require an oath of each delegate not to vote for any amendment on any subject not listed in the concurrent resolution by Congress calling the convention. Second, they forbid the convention from considering any other topic than that specified on the agenda by Congress. Third, they permit the Congress to refuse to submit any proposed amendment to the states that violates the listed agenda. Fourth, they rule out judicial review, leaving all disputes about the convention's actions to Congress. That's self-protection in a big way.

Congress clearly has more authority than the Continental Congress to call and limit a constitutional convention, because now we would be operating under Article V of the Constitution, which says Congress "shall call a convention for proposing amendments." The Continental Congress had no such specific authority because it remained in the separate states.

Such a statute would still be on shaky ground in so limiting a constitutional convention. Note carefully: the wording of Article V *does not require* a convention to be called to consider a *specific* amendment. Look at the parallel language:

"The Congress shall propose amendments to the constitution, or, shall call a convention for proposing amendments."

"The Congress" and "a convention" are treated as alternate bodies for the same purpose, i.e., proposing amendments. Congress can propose any amendment it pleases, why could not "a convention"? Furthermore, amendments coming out of either body are to be treated in the same way: "Amendments which in either case shall be valid when ratified by the legislatures of three-fourths of the several states or by convention in three-fourths thereof."

Efforts to call a constitutional convention have always been associated with a specific proposal. I have never understood this to be *required* by the Constitution, merely a safe political strategy. Yet, this does not seem to have been discussed and analyzed for our future actions.

The question arises as to whether a present Congress can by statute bind a future Congress. The practical answer is found in the experience under the "fast track" procedure on international trade, i.e., it's not binding but it's a useful guide about what procedures ensure political prudence.

Because OF THESE *multiple* woes,
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So, congressional efforts to limit a constitutional convention agenda may be futile, but Congress may have the *ultimate power* to refuse to submit amendments to the states. Doing so would violate the will of the people and its obligation under the Constitution. Could the Supreme Court effectively challenge Congress's dereliction of duty?

I believe that anything coming out of a constitutional convention, whether an original agenda or not, would require such consensus behind it and would be such a reasonable proposal that Congress would have no practical choice but to submit it to the states. This might be true particularly if the popular measure dealt with Congress's own power.

How to PROCEED

Which way to proceed to a constitutional convention? I would suggest these steps: First, Congress should pass a bill regulating the procedure of the constitutional convention. Some legislation would be necessary to deal with housekeeping details, and other provisos might give some reassurance to people who have unwarranted fears of the results of the convention. Second, after passing a bill regulating procedure, a commission outside Congress should be appointed to study and propose reforms. We have had unofficial groups like the Committee on the Constitutional System, various think tanks have studied proposed reforms, but we have had no official commission representing balanced and diverse points of view to make recommendations that might serve as the basis of the amendments themselves. Frequently, the advisory commission route has been followed in changing state constitutions, but not always successfully.

Would a constitutional convention operate in secret (as did the Framers in 1787) or openly (as plenary meetings of each House of Congress)? Many scholars believe the success in framing the Constitution was due to the oath of absolute secrecy during deliberations, which was faithfully observed. Not until the publication of the Madison notes some 50 years later did we really learn what had gone on in the convention, the positions individuals took, and the resolutions that were tentatively taken and then reversed on further deliberation. For example, they reversed themselves seven times on the presidency, the term of office, the method of election, and whether there was to be successive elections or not.

Even now, Congress does its real work in committees, not on the open floor of the House or Senate. And committee meetings, where the real work is done, are frequently closed.

Many scholars say that a constitutional convention could not be held except in the open. Alexander Heard remarked: "Now, in contrast to 1787 our political values, popular expectations, and often legal stipulations require exposed deliberations and a consequent popular influence on constitutional adjustments." Would this work?

What type of people would come forward as delegates? This would be a singular historic event, the century's most important political happening. We would hope that men and women of broad vision, the wisest and most respected in our land, would be chosen by the states to represent them. We would hope that not many current political office holders, with their short-range agenda, would be chosen, but that those who had served with distinction and retired from high office would be available. We now have *five living* former presidents. Talented newcomers to politics should be enlisted. Today, there are people who would never consider running for Congress who would want to serve as constitutional convention delegates. One who has said just that is Milton Freedman.

The American public has been way out in front of Congress in desiring reform. In a 1984 article Austin Ranney surveyed 11 proposed constitutional amendments that had been offered in Congress. Substantial majorities of

the American people supported nine of the eleven. A majority rejected only one proposal (outlawing abortions), and they were evenly divided on the single six-year presidential term. Those enjoying widespread public support included the presidential line-item veto (which I have stressed as essential in gaining control of the budget), limiting terms of senators and representatives, direct election of presidents, and a national initiative for legislation. You will note that these four have a direct and probably deleterious impact on congressional power. So, in spite of majorities ranging between 70 and 80 percent, Congress has never given serious consideration to any of these. Others gaining widespread popular support have included regional presidential primaries, a national presidential primary, a balanced budget, and school prayers. The first three of these also could affect congressional power by enhancing the president's power. In other words, seven of the nine enjoying widespread public support affect Congress adversely. None of the nine has gotten anywhere in our national legislature.

Is it possible, given our present situation in government, which almost everyone deplors, that we could have a constitutional convention that would correct at least some of these obvious deficiencies? I think so, although when the time and events will make it possible, I cannot predict. Certainly the longer the situation continues, the worse it will get.

Because of these multiple woes, which almost everyone who studies the situation agrees are horrendous, we are in danger of losing our national confidence, our faith in democracy itself. A good indication of this is the increasing abstention for the exercise of democracy's most basic action, voting. Another indication is the hope attached to third-party phenomena like Ross Perot. This loss of faith in our democratic institutions is perhaps the best reason why deep constitutional reform is terribly necessary.

Members of Congress are part of the problem, but they are also the victims of the way our institutions have now warped. Instead of sneering at them or the president, as citizens we ought to be considering reforms to make these elected officials accountable, responsive, and effective. Instead of permitting the Congress and the president to abdicate so much of policy making to the courts, we ought to be devising methods to compel them to perform their constitutional duties.

NOTES

1 Woodrow Wilson, *Cabinet Government in the United States*, "The International Review," August 1879, Reprinted in *Reforming American Government*, *supra*, p. 134.

2 "A Statement of the Problem," by James L. Sundquist and others of the committee for the constitutional system, in *Reforming American Government*, *supra*, p. 68.

3 Max Farrand, *The Framing of the Constitution*, Vol. 1, p. 203, Yale (1913).

4 Julius Goebbel, Jr., *History of the Supreme Court of the United States*, Vol. I, p. 201 (1971).

5 *Ibid.*, p. 202.