

April 24, 2018

Members of the Colorado House & Senate State, Veterans and Military Affairs Committees:

I understand that the Colorado legislature is currently considering legislation (House Joint Resolution 18-1015 and Senate Joint Memorial 18-005) that seeks to address the problem of money in politics by proposing that Colorado ask Congress to call a convention to propose new amendments to the U.S. Constitution. I share these proponents' interest in meaningful campaign finance reform, but I write to express my concerns about this way of going about it.

As you know, Article V of the Constitution identifies two methods of enacting constitutional amendments. First, Congress may – by a two-thirds vote in each chamber – propose a specific amendment, and the Constitution is amended if at least three-fourths (38) of the states then ratify that amendment. Alternatively, if at least two-thirds (34) of the states ask Congress to form a constitutional convention to propose and consider amendments, then Congress must call such a convention.

But nothing in the Constitution limits such a convention to the issue or issues for which it was called. In other words, anything and everything could be on the table, including fundamental constitutional rights. Nor are there any guarantees about who would participate or under what rules. Indeed, for these reasons, no constitutional convention has been called since the first in 1787.

First, a convention could write its own rules. Because the Constitution provides no guidance whatsoever on the ground rules for a constitutional convention, fundamental questions (like how the delegates would be chosen, how many delegates each state would have, and whether a supermajority vote would be required to approve amendments) would be left wide open to political pressures and deal-making. To offer just one illustration, if those participating in the convention decided that every state will have one vote in the convention and that the convention can approve amendments by a simple majority vote, then the 26 least populous states – which contain less than 18 percent of the nation's people – could approve an amendment for ratification.

In such a highly contentious political environment, moreover, delegates could cut deals resulting in amendments covering multiple topics. Although most (but not all) constitutional amendments have addressed only a single issue, nothing in Article V requires this. Provisions considered radical or damaging by many could be combined with very popular proposals in a single amendment, making their approval more likely.

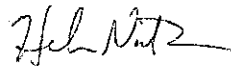
Second, the Constitution does not give anyone outside of the convention any authority to check or regulate it. The Constitution confines Congress's role in this process simply to calling the convention and specifying how states will ratify any resulting amendments; it does not empower Congress to disband a convention that strays from its original mandate. The Supreme Court, in turn, has declared that the process of amending the Constitution is a "political question" into

which federal courts may not intervene. There is thus no way to predict what constitutional amendments the delegates to a convention might adopt.

Finally, a convention could set its own agenda, possibly influenced by powerful interest groups. In short, once a convention is called, everything in our Constitution could become vulnerable. Powerful interest groups would most likely see a constitutional convention as an opportunity to enact major policy change, and they are particularly well-equipped to influence the process and press to alter the agenda. As former U.S. Supreme Court Chief Justice Warren Burger wrote, a "Constitutional Convention today would be a free-for-all for special interest groups." It is precisely because of money's pernicious influence that Colorado should not call for an Article V constitutional convention for the purposes laid out in HJR 1015 or SJM 005, or any other purpose.

My testimony here draws from my work as a law professor and lawyer who has written about, taught, and litigated constitutional issues for many years (I also made these points in an op-ed co-authored with Georgetown University law professor David Super recently published by the Denver Post). Please note that I am writing only to express my own views and I do not purport to represent my employer's views in any way.

Sincerely,



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