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# The State of South Carolina

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March 24, 1989

The Honorable James E. Bryan, Jr.
Senator, District No. 9
501 Gressette Building
Columbia, South Carolina 29202

Dear Senator Bryan:

You have asked whether the General Assembly may now rescind its earlier petition to Congress for the call of a constitutional convention to amend the federal constitution by providing for a balanced budget. 1/ While there exists legal authority to the contrary, it is our opinion that such a petition may be rescinded or withdrawn prior to two-thirds of the states calling for a constitutional convention.

At the outset, it is necessary to preface our response with several introductory remarks. First, the question you have raised involves interpretation of the federal Constitution. Article V of the United States Constitution provides the following two methods for proposing amendments:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by convention in three fourths thereof, as the one or other made of ratification may be proposed by the Congress....

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1/ Such petition was adopted in 1978 in the form of S-1024.

Thus, it is the language of this provision of federal law, the intent of its framers and the interpretation by the federal courts which is controlling. While it is always true that an opinion of the Attorney General is advisory only and may simply comment upon the law as it presently exists, it is especially important to emphasize this fact here where the question you raise is a federal one and will thus have to be resolved ultimately by the United States Supreme Court. See, 16 Am.Jur.2d, Constitutional Law, § 19.

Secondly, we know of little or no case law addressing your precise question. Certainly, the issue has not yet been resolved by the United States Supreme Court. Other federal courts have also yet to attempt to resolve the issue you have raised.

Third, if faced with the question of whether a state may withdraw its petition, the courts may conclude that the issue is best resolved in the political arena, such as by Congress, rather than in a judicial forum. See, Coleman v. Miller, 307 U.S. 433 (1939), holding that the time frame for states ratifying a constitutional amendment is a political question to be decided by Congress, not the courts. Indeed, one state Attorney General has concluded that "the [C]ourt would most likely decline to consider the question of whether Congress may constitutionally recognize withdrawal of state petitions." Op. Atty. Gen. (Iowa), February 28, 1984, p. 4.

Fourth, it is worth noting that resolution of your question should not depend upon whether a constitutional convention called by the States is characterized as too "dangerous" or poses a "threat" to other constitutional liberties. Obviously, the framers of the federal Constitution did not believe this to be the case because no limitation (other than the same two-thirds requirement placed upon the Congressional method) is mentioned in Article V.

Instead, it is apparent that the framers inserted the convention method of amendment as a check upon the federal Congress, by insuring that the people themselves, through their state legislatures, could seek amendment to the Constitution. One delegate to the federal Convention, George Mason of Virginia, noted in proposing the convention method as an alternative, that previous proposals allow only Congress to set the amendment machinery in motion. He warned:

> [a]s the proposing of amendment is in both the modes to depend in the first immediately and the second ultimately on Congress, no amendments of the proper kind would ever be obtained by the people if the government should become oppressive.

Further, in the Federalist No. 43, James Madison wrote that Article V "equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or the other." Clearly then, the framers regarded the constitutional convention as a viable method of amendment. Whether or not it is today viewed as a method too "dangerous" is not for this Office to decide and such a characterization is not dispositive of the legal question of whether a state may now withdraw its petition to convene a constitutional convention.

Having stated these introductory caveats, it appears that most of the authorities who have commented on the question of withdrawal, resolve the issue in favor of a state having the right to withdraw its petition to call a convention. A number of Attorneys General in other states have so opined. See, Op. Atty. Gen. (Iowa), February 28, 1984; Op. Atty. Gen. (Florida), April 22, 1985; Op. Atty. Gen., (Md.), Op. No. 83-006 (January 31, 1983); Op. Atty. Gen. (Nevada), February 13, 1987; Op. Atty. Gen. (Louisiana), No. 86-326 (June 6, 1986).

For example, the Iowa Attorney General noted that while no cases had resolved the issue, "the overwhelming body of scholarly authority and established historical precedent", supported the conclusion that a state may withdraw a petition asking Congress to call a constitutional convention. We quote extensively from the Iowa Attorney General's opinion:

> One of the distinguished academic commentators who explored the question was Professor Arthur E. Bonfield. Bonfield, The Dirksen Amendment and the Article V Convention Process, 66 Mich. L. Rev. 949 (1968). Professor Bonfield wrote that any argument that a State could not effectively withdraw a petition was "entirely erroneous and untenable." 66 Mich. L. Rev. at 966. According to Bonfield, an approach which prohibited withdrawal "would base the presence of a sufficient number of applications solely upon a mechanical process of addition and ignore the extent to which each application reflects the existence of the requisite contemporaneous agreement." Id. Since a withdrawal resolution would indicate lack of present intent to call a convention, Bonfield argued that it should be allowed. Id.

In addition, Bonfield noted that unlike ratification, a petition for a Constitutional Convention is not the final act of a sovereign body indicating agreement with a stated political principle. As a result, Bonfield argued that a mere petition to Congress did not share the dignity or finality of a ratification which might justify the latter's irrevocable nature. Id., at 967.

Bonfield's view is buttressed by the support of nearly every constitutional scholar that has considered the issue. Widely respected authorities of varying political persuasions, including Professor Van Alstyne of Duke, Professor Gunther of Stanford, and Professor Bickel of Yale, and Senator Sam Ervin, a former chief justice of a State Supreme Court, have all argued forcefully that petitions for a Constitutional Convention may be rescinded by the States. See Hearings on S.3, S.520, and S.1710 Before the Sumcomm. on the Constitution of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 69-165 (1979), at 297-98 (views of Prof. Van Alstyne), at 308 (views of Prof. Gunther); Hearings on S.2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong. 1st Sess. at 64 (views of Prof. Bickel); Ervin, Proposed Legislation to Implement the Convention Method of Amending the Constitution, 66 Mich. L. Rev. 875, 889-90 (1968).

Historical precedent, though admittedly limited, tends to support the view of the scholars. In the early 1960's, the Senate Judiciary Committee refused to act on a claim that thirty-four States had petitioned Congress to call a convention to limit federal income tax, at least in part because twelve States had withdrawn their petitions. See Graham, The Role of the States in Proposing Constitutional Amendments, 49 A.B.A.J. 1175, 1177 (1963). While historical experience alone generally is not determinative on constitutional questions, the undesirability of disturbing past practice is at least a factor to be considered in deciding sensitive questions surrounding the amendment process.

The Attorney General of Maryland has analyzed the issue similarly. The Maryland Attorney General concluded that a withdrawal of a petition for a constitutional convention is distinguishable from withdrawal of ratification of a constitutional amendment which he believed could not be rescinded. But see, Idaho v. Freeman, 529 F.Supp. 1107 (D. Idaho 1981), vacated as moot, 459 U.S. 809 (1982), discussed below. The Maryland Attorney General concluded as follows:

> Because the General Assembly's withdrawal of a petition for a constitutional convention is not restricted by Article V, normal rules of legislative procedure apply. One of the most basic of these rules is that one legislature may not bind its successors by its legislative acts. See Fisher v. State, 204 Md. 307, 315 (1954); Montgomery County v. Bigelow, 196 Md. 413, 423 (1950). Thus, the General Assembly is free to withdraw a previous petition for a constitutional convention. Our conclusion is concurred in by virtually every constitutional scholar who has addressed this point. [footnote omitted]
>
> The position that a state may withdraw a petition to Congress is also supported by state and Congressional practice. Since 1940, eighteen state legislatures have withdrawn petitions concerning six different calls for a constitutional convention. ABA Report, at Appendix B. [footnote omitted] Further, the Senate of the United States, by twice unanimously passing legislation that would provide for petition withdrawals, has recognized the constitutionality of permitting states to withdraw constitutional convention petitions. See. S. 1272, 93rd Cong., 1st Sess., 119 Cong. Rec. 22731-37 (1973); S. 215, 92nd Cong., 1st Sess., 117 Cong. Rec. 36804-06 (1971). See also Graham, the Role of the States in Proposing Constitutional Amendments, 49 A.B.A.J. 1175, 1177 (1963) (claim that the requisite thirty-four states had petitioned Congress to call a constitutional convention to limit federal income taxes was rejected by Senate Judiciary Committee staff, in part because twelve of those states had withdrawn their petitions).

Moreover, the lower court decision in Idaho v. Freeman, supra, appears to support the conclusion that withdrawal of the petition for calling a convention is permitted. In Freeman, the District Court concluded that prior to ratification of an amendment by three-fourths of the states, a state could legally withdraw its ratification of that amendment. The Court reasoned:

> Considering that an amendment cannot become part of the Constitution until a proper consensus of the people has been reached and it is the exclusive role of the states to determine what the local sentiment is, it logically follows that the subsequent act of rescission would promote the democratic ideal by giving a truer picture of the people's will as of the time three-fourths of the states have acted in affirming the amendment. To allow a situation where either the first act of a state is irrevocable or where a rejection can be changed by a ratification, but not permit rescission, would permit an amendment to be ratified by a technicality--where clearly one is not intended--and not because there is really a considered consensus supporting the amendment which is the avowed purpose of the amendment procedure. Furthermore, an irrevocable ratification prior to the time that three-fourths have acted would completely disassociate the democratic notion of a considered consensus from the ratification procedure and create the very real possibility that an amendment could become part of the Constitution when the people have not been unified in their consent.

529 F. Supp. at 1148-1149. The same reasoning would apply to the case of a call by the states for a convention. And since ratification would appear to be a far more "final" act than a petition for convening a convention, the reasoning in Freeman, should, a fortiori, determine that a state's application for a constitutional convention may also be withdrawn.

There is, however, a contrary point of view, best expressed in the Comment, Packard, "Rescinding Memorialization Resolutions", 30 Chicago-Kent Law Review 339 (1952). In that article, the commentator argued that both methods of proposing a constitutional amendment, by Congress or the states, must be given equal treatment. Since it is well recognized, argued Packard, that Congress could not withdraw an amendment once submitted to the states, the same reasoning should apply to a state once it had petitioned Congress to call a constitutional convention.

> Considering the demonstrated equality between the two methods of procuring a constitutional amendment, it is not illogical to apply the same reasoning to state action intended to rescind an application made by a state legislature for the calling of a convention to consider and propose amendments.

Supra. Packard cited for this authority Orfield, The Amending of the Federal Constitution (University of Michigan Press, Ann Arbor, Michigan, 1942) p. 52.

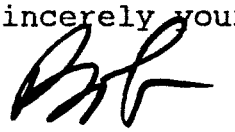
The commentator, Packard, also argued that because a state could not withdraw its ratification, see, Wise v. Chandler, 270 Ky. 1, 108 S.W.2d 1024 (1937), Coleman v. Miller, 146 Kan. 390, 71 P.2d 518 (1937), neither could it withdraw a petition for convening a constitutional convention. These cases recognized that Article V functions by either Congress or state legislatures were not legislative in nature but were derived solely from the federal Constitution. Therefore,

> [w]hen a state adopts an original resolution memorializing Congress [to call a constitutional convention] ... it is not exercising a sovereign power exclusively its own, nor merely legislating simply on behalf of its own people, but is engaging in a "federal" function. That fact places such activity within the exclusive domain of federal jurisdiction and completely removes the same from the pale of the state province and beyond the power of state withdrawal. The truth of this is manifest since the function of a state legislature in memorializing Congress to call a convention for the purpose of proposing an amendment, is derived wholly from the federal constitution. It is no different, in source, than the function of Congress in proposing an amendment, or the function of a state legislature voting to ratify the same. Since the latter functions have been judicially identified as "federal functions" totally without state realm, the conclusion would appear inescapable that the purported rescinding resolutions are of no effect whatever.

Nevertheless, while there exists some support for the position that a state petition may not be withdrawn, it appears that the great weight of opinion supports the position that such a petition

may be rescinded. The majority of current constitutional commentators and treatise writers endorse this view, as do all of the state Attorneys General who have considered the question. Therefore, it is our opinion that such a petition may be withdrawn at any time prior to two-thirds of the states calling for a constitutional convention. Again, however, we caution that the question you have raised is a matter which must ultimately be resolved by the United States Supreme Court or by the United States Congress. And, of course, the issue of whether or not such petition for convening a constitutional convention should be withdrawn as contrasted with whether it could legally be withdrawn is a policy matter solely within the province of the General Assembly as a representative of the people of South Carolina.

Sincerely yours,



Robert D. Cook
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