May 14, 2016
Mr. Thomas H. Neale
Specialist in American National Government
Congressional Research Service

Re: CRS Report R44435, "The Article V Convention to Propose Constitutional Amendments: Current Developments" (March 29, 2016)

Dear Mr. Neale,

I read your CRS Report R44435 "The Article V Convention to Propose Constitutional Amendments: Current Developments" (March 29, 2016) with great interest as our organization Friends of the Article V Convention (FOAVC) is referenced in it several times. We appreciate and are honored that you are using our resources as a reference material.

However upon closer examination of your report we have discovered several omissions, errors of facts or corrections which we feel require attention. We would like to present these to you at this time. In the summary page of your report you state that your report "will be updated as warranted by events." As the information and corrections we will provide is (1) contained within the FOAVC reports you have already cited in your report and (2) is all based on public record, specifically photographic copies of pages of the Congressional Record or other similar federal public record, we earnestly hope you will incorporate this information in an updated edition of your report at your earliest convenience. For your reference we will provide our comments in report order that is, as they appear in your report and reference the comment with the page number of your present report.

Before beginning our comments however we would like bring to your attention that we have recently revised our application list you refer to in your report by attempting to "lineup" applications so that House and Senate records match. The difficulty in doing this is that the House does not publish the actual text of the submitted applications while the Senate does. This makes direct comparison impossible. Hence, a certain amount of estimation is required to match applications. The result has been that our list has been consolidated such that applications that were listed as separate applications are now aligned with each other so that House and Senate applications now appear together. This has resulted in a lower overall figure of submitted applications. While the record of actual application notations in the Congressional Record remains near the 750 mark, the combining of applications (assuming we have estimated correctly) now stands as reported below. While in some cases this may have required some use of estimation which may introduce error into our list nevertheless we believe this new presentation gives the reader a more accurate and complete picture of the application record than was available before.

We believe, however, that our list is viable and, to the best possible extent given the limitations of the current public record, accurate. Of course, as always, FOAVC is ready to immediately correct any errors which may appear in its record provided the person notifying us of this error provides reference of public record enabling us to verify that report. That said, the count of

applications by the states currently stands at 49 states, with 574 submitted applications on record with Congress as of May 7, 2016.

We have made one other significant change to our website. Previously we employed the use of a php format system in our site but have found it to be cumbersome and unreliable. Therefore we have converted our site to the more versatile, familiar and reliable html format. This has resulted in new addresses for our web pages. Our new address for our applications page is: http://www.foavc.org/01page/Amendments/index.htm. While we intend to continue our old amendments page link given in your report we would appreciate it if you would, in any future references, please begin to use our new reference address as the location of our applications page.

Beginning with your summary page: You state that from the period of 1980 until 2000 there was a period of "comparative inaction" in applications by the states for an Article V Convention. The public record shows between 1789 and 1899 approximately 23 applications were submitted by the states. However we believe this number to be low as there are several records of state applications that do not have a corresponding notation in the Congressional Record. FOAVC policy on publication of applications is that no application will be published unless it is a federal record meaning that unless it published in the Congressional Record or its ancestry journals, we will not publish it. The reason for this policy is that we wish to show those applications received by Congress which would cause a convention call. Obviously if Congress has not received the application, it cannot "count" toward causing a convention call. However we believe the reason for this low count is due to poor recordkeeping procedures on the part of Congress (which still exist to this day) resulting in applications either being misplaced or ignored and not to any clerical error on the part of the states such as not actually transmitting the application to Congress.

Eliminating these 23 applications the remaining 551 applications shown on our list were submitted between 1899 and present, a total of 117 years. Simple division shows this means the states have submitted an average of 4.7 applications a year since 1899. Between the years 1980 and 2000 a total of 63 applications were submitted. Again simple division shows the average submissions per year to be 3.1 applications a year. While this is slightly less than the overall average we do not believe that it can be described as "20 years of comparative inaction." The past decade (2006-2016) of public record shows the states have submitted 52 applications, or an average of 5.2 applications a year. The fact is, states have submitted applications throughout the entire history of our nation at a fairly steady rate with no real period of "inaction." Indeed, if all applications submitted between 1980 and 2000 and those of 2006 and 2016 are statistically compressed into the same time period (a decade) the states submitted an average of 6.3 applications a year during the 1980-2000 period far exceeding the present decade's production of 5.2 applications a year.

Beginning on page 1 of your report you cite the progress of several political movements and their attempts to cause their amendment proposals to be proposed via the convention process. It is obvious your report believes applications must be on the same "subject" (or topic of the application) in order for the applications to "count." **Simply put the public record does not support this interpretation of how applications are to be "counted" in order for Congress**

to be obligated to call a convention. Research by FOAVC on this issue has been extensive and exhaustive. **We can find no public record in the federal government which supports the premise that applications must be on the same amendment subject in order for Congress to be required to call. Indeed the public record refutes this contention**.

Thus, we believe Congress cannot simply call "a" convention but is obligated to call all conventions required under the terms of Article V—"on the application of two-thirds of the several state legislatures [Congress] shall call a convention for proposing amendments." Thus for each set of applications, Congress must call "a convention for proposing amendments." The alternative would be to establish the precedent that Congress can avoid its peremptory duty to call a convention when the states have applied in accordance with the Constitution and instead only call a convention if and when it chooses to—if at all. Article V does not state, "If the states apply ten times over, Congress shall call a convention."

The public record, from the records of the 1787 convention, through statements made by the Founders while in Congress, through Supreme Court rulings, through statements made by Congress itself, and in concessions made by federal officials in federal lawsuits, not to mention the most recent compilation process now proceeding in the House of Representatives **all** refer to a simple numeric count of applications of the number of applying states as the basis for any convention call. Detailed quotes from all these references would fill several pages of this commentary and will not occur. As this issue is extensively discussed on our web site we urge you examine that public record and reconsider your position on how applications are "counted" by Congress for a convention call. We have published a new webpage discussing the "same subject" convention at http://www.foavc.org/StateApplications/Same_Subject_Convention.htm and believe it presents important information which should be incorporated in future reports by CRS.

Fundamentally, while we appreciate CRS referencing our material, we believe while CRS has accurately stated our positions on issues, it has consistently failed to report "why" we have reached our conclusions. We believe this is a vital piece of information that should be presented in CRS reports given that our conclusions are based on public record. While we do not expect extensive detailed comments in your reports, we believe the general "gist" of our reasons can be incorporated in a brief one or two sentence footnote.

To provide you some references supporting our position of numeric count we refer you to United States v Sprague, 282 US 716 (1931) in which the court stated that Article V was plain in meaning and that no "rules of construction, interpolation or addition" were permitted. Thus, as Article V does not specify applications must be on the same amendment subject in order to "count" it cannot be accepted as the basis of a count of state applications by Congress. We also refer you to www.foavc.org/reference/1930.pdf in which the Senate stated an application count was based on a numeric count of applying states. Finally we refer you to a reference on our applications page which you may have overlooked. As we state:

"Any question regarding the intent of the applications or the original interpretation of the obligation of Congress to call an **A**rticle **V C**onvention can be easily settled by simply reading the 1789 application from the state of Virginia**:** **General Annals of Congress 1 (J. Gales Ed.) Pg 00257-258 Yr 1789** , **Pg 00259-00259** , and **Pg 00261-00262** The

application clearly calls for proposing amendments (emphasis underlined in green) and the discussion by the members of Congress following the submission of the application afterwards is clear. Congress must call an **A**rticle **V** **C**onvention; it has no authority to even debate the issue and the basis of the call is a two-thirds application by the states."

The term "number of states" is referenced repeatedly by the men who actually either wrote Article V or participated in its ratification. Nowhere in this discussion is "same subject" discussed or even referenced. Clearly, if it were the means whereby a "count" was to occur, it is logical to assume it would have been mentioned by those men who wrote Article V.

However your most prevalent error in your report is that throughout your report you state that no set of applications for "same subject" (particularly the balanced budget amendment) have ever reached the two thirds mark required by the Constitution. **Public record proves this statement entirely incorrect.** As stated we have made several improvements to our site. One of these has been to parse our list of applications into relevant information so that it presents a more accurate picture of the effect of the 500+ applications from the states submitted over our nation's history.

To that end we have compiled the applications into sets of applications called tiers. These tiers consist of one application, one state, that upon completion of the tier (based on the number of states required to cause a convention call) constitutionally cause a convention call. Thus the tiers show the actual constitutional requirement of when any convention is to be called by Congress. Except in the case of one House application, all shown applications are Senate applications. Thus the actual text of the applications can be examined. We believe this is the first time in United States history anyone has actually parsed the list of applications so as to present exactly when a convention call(s) are due based on the text of the Constitution which requires a convention call "on the application to two thirds of the several state legislatures."

We have also created a list of "same subject" applications or applications that are grouped by subject matter. As you are aware, FOAVC does not believe "same subject" to have any constitutional validity but this list presents an interesting fact: **Four different amendment issues have received sufficient applications to cause a convention call.** This information was published on our site on March 6, 2016. It is not included in your March 29, 2016 report. However we realize your reports are not compiled overnight and we assume a reference check to our site for the purposes of this report (given the old address of our application page) occurred prior to March 6 thus explaining why this material was not included.

We request this information, obviously being most relevant to the issue of an Article V Convention call, be included in any future CRS reports. **The fact the states have achieved the required two thirds mark established by the Constitution cannot, and under the terms of United States law (18 USC 1001), be hidden from the American public. We remind you that while the FOAVC list is a "private" list its information is federal public record.** The link showing ten conventions are presently required to be called by Congress is located at: http://www.foavc.org/StateApplications/Numeric.htm.and is based on the proper numeric count of applications. The improper list of "same subject" applications can be found at: http://www.foavc.org/StateApplications/Amendment_Subject.htm and shows four conventions are presently required if same subject were the correct manner for counting applications. These

compilations of "same subject" applications therefore clearly show your figures of the number of submitted applications on same amendment subjects to be totally inaccurate.

For example, you cite the often referred to "32 applications" used by the John Birch Society in its anti-convention campaign to defeat a balanced budget on page 1 of your report. At the least the fact the source of your information comes from a declared opponent to a convention should have raised red flags. On page 5 of your report you cite 27 applying states for a balanced budget. In regards to this later statement, the public record shows the states had submitted the required 34 applications by 1979 and, including a West Virginia application not yet filed in Congress but known to have been submitted, the count of applying states on a balanced budget amendment application now stands at 40 applying states. We request you update your report to reflect the correct information regarding which amendment subjects have achieved the necessary two thirds applications for their particular subject and when this occurred together, of course, with presenting when the proper numeric count of applications caused required convention calls.

This request to present "same subject" does not constitute a change in position by FOAVC. It merely reflects its desire the full and complete information regarding the state applications be published by the CRS. Thus if you are going to refer to our overall list of applications we ask you also refer to what analysis of that information (by us but equally available to anyone wishing to spend the time to break the information down) presents.

On page 2-3 of your report you discuss "rescissions" of applications. We have also published a webpage regarding this false and bogus JBS premise. **Again we point out that there is no evidence in public record whatsoever that supports the premise that any state can instruct Congress to remove an application, which upon submission becomes a federal public record, from the public record thus accomplishing the task of "rescinding" the application. Indeed the practice is so foreign in law there isn't even a dictionary definition defining such constitutional power on the part of the states. Further, as the practice is a form of "nullification" of federal record, the numerous Supreme Court rulings prohibit such practice.**

We point out in our webpage that under federal criminal law it is illegal for any member of Congress (or anyone in government for that matter) to "tamper" or "remove" any public record (including submitted state applications) from the public record. Therefore until an exception to federal law is made allowing for removal of state applications based on establishing states have the constitutional authority to instruct Congress as to the disposition and disposal of federal public records, present federal criminal law precludes "rescissions" of applications from the federal public record. Our link is: http://www.foavc.org/StateApplications/Rescissions.htm. We request your report be updated to reflect these facts of public law and record particularly in raising the question of whether or under what circumstances Congress could actually perform the "requested" action sought by the states vis-à-vis the federal public record.

Finally we would like to point out that the public record shows that whether you are discussing "same subject" or numeric count, the states achieved the required two thirds mark requiring Congress to call conventions **before any so-called rescission was submitted. Thus, if so-called rescissions are constitutionally effective then your report should reflect that it would be**

incumbent to accept the premise that even after the required two thirds submission is achieved states retain the right to "veto" the language of Article V and thus rescind the peremptory requirement of a convention call by Congress.

Also on page 2 of your report you discuss what a "valid" application is such that you describe several different versions of an application—general, same subject, specific subject. The fact is that as the convention is the body constitutionally assigned to "discuss" and "dispose" of the subject content of the applications, (a fact not made clear in your report) the content of the applications are irrelevant. Whether a "general" convention consisting of numerous amendments being proposed, a "single subject" convention consisting of one subject being proposed is, according to the text of the Constitution, strictly up to the convention to determine (just as it is with Congress in its power to propose amendments). Thus, as stated by Congress and the courts the only thing that concerns Congress is the number of applying states, not the content of the applications. We would appreciate it if you clarify this point in your report as your present presentation leads to the conclusion Congress can "decide" whether or not to call a convention based on the subject matter of applications, which, according to the Constitution, are the constitutional property of the convention, not Congress. If it were otherwise, then it would be Congress proposing the amendment, not the convention. As described in our already presented reference material provided "there is no vote, debate or committee" permitted regarding a convention call. These words were spoken by James Madison, who wrote Article V. We must assume he was well aware of what he intended those words to mean when he wrote them.

As to the remaining portion of your report, we reserve any comments leaving any responses to that information to those concerned. However, your reference cited on page 8 of the report to our FAQ section should be updated to: http://foavc.org/01page/Articles/FAQ.htm. We would appreciate in the future that all links to our site made in CRS reports, particularly if not checked since March, 2016 be verified for accuracy. Unlike our application page which is being updated and continued, the addresses of all other pages have been changed to reflect our new format and the old pages dropped.

We believe the comments regarding opponents to an Article V Convention shown on page 14 of your report should include the fact that none of the statements you cite can be verified as true. For example, the statement by the Eagle Forum that a convention(s) could "jeopardize our most basic liberties enshrined in the Constitution and the Bill of Right." [Footnote omitted]. Accuracy demands that the public record of applications be cited by your report such that it is an indisputable fact that no application ever submitted by any state has requested the rescission, removal or elimination of a single right enshrined in our Constitution. Moreover the public record shows states have, in fact, sought to increase the rights of the people by introduction of additional rights currently not in the Constitution.

We suggest, given the facts of public record, it should be noted in your report all of this political opposition occurred long after the states had reached the required two thirds mark called for in the Constitution. We suggest you allow the reader to draw his own conclusions past this point.

In regards to your concluding observations, page 15 you suggest that some "legacy" applications "may be open to challenge." This appears to suggest some kind of court challenge, most likely a

Supreme Court ruling on the matter of "valid" applications." We would like to point out in Coleman v Miller, 307 U.S. 433 (1939) the Supreme Court removed itself from such a possibility and your report should reflect this fact. The court stated: "Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon the exclusive power by this Court… Neither State nor Federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority." (307 U.S. 433 at 459,460).

In combination with this court declaration and statements in Congress by James Madison of no "debate, vote or committee" we believe, at the least, your report should reflect the historic and legal issues surrounding such a challenge and therefore urge you include in your reports in the future "why" such a challenge is unlikely.

Finally we believe that within the very near future events will occur in the Article V Convention movement which will necessitate the publication of a new CRS report. We ask the above corrections and information we have provided be incorporated in that report and any future reports CRS publishes.

Sincerely,

Bill Walker
FOAVC Co-Founder