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Article 5 and Executive Leadership: Predicting Calls for Amendments

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Abstract

This paper examines the president's involvement in the constitutional amendment process. Article V of the Constitution ascribes no formal role in the amendment process to the president, leaving the initiative for proposing and ratifying amendments to Congress and the state legislatures. However, despite this omission, the president has been a frequent participant in the amendment process, with almost every president since Thomas Jefferson calling for an amendment to the Constitution. This paper seeks to develop and testing a model to predict under which conditions presidents will participate in the amendment process using data from Eisenhower's administration to the present.

1. Introduction

More so than any other recent election, the 2004 election was heavily influenced by amendment politics. President George W. Bush's vocal support for a constitutional amendment to ban same-sex marriage, coupled with his support for ballot measures banning such unions in 11 states across the nation, raised questions of constitutional change to the fore of public consciousness. Bush had signaled his intention to make same-sex marriage an issue early in his reelection campaign. In February 2004, at a White House press conference, he declared that: "If we are to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America."¹ Bush argued that he was driven to action by the November decision of the Supreme Judicial Court of Massachusetts which declared that the state could not deny marriage to same-sex couples² and actions by San Francisco's mayor, Gavin Newsom, who began issuing marriage licenses to same-sex couples in response to the decision. Declaring that "activist courts have left the people with one recourse", Bush stressed the need for an amendment in order to overcome the deficiencies of the Defense of Marriage Act. Bush acknowledged that calling for an amendment to the Constitution might seem like a drastic solution, but stated that the seriousness of the problem demanded such a step. "An amendment to the Constitution is never to be undertaken lightly. The amendment process has addressed many serious matters of national concern. And the preservation of marriage rises to this level of

¹ George W. Bush, White House Press Office, February 24, 2004.

² *Goodridge v. Department of Public Health*, 798 N.E. 2d 941.

b. *The Role of the President*

Amidst all the debate over Article V one issue that was never discussed was the possibility of presidential involvement in the amendment process. Neither in the Constitutional Convention nor in the state ratifying conventions was the president ever mentioned in conjunction with Article V. No delegate ever suggested that the president be given the power to propose amendments, nor did any delegate ever argue that the president's approval was needed to amend the Constitution. Further, no state constitution at the time gave the governor a role in the amendment process.²⁸ While some scholars have argued that the Framers did not intend to exclude the president from taking part in amending the Constitution, there is no evidence in the speeches or writings of the time that such a task for the president was ever imagined.²⁹

In many respects, we might find the absence of the president from the amendment process surprising. The presidency is the only branch of government that does not play a part in amending the Constitution. Congress, as discussed above, has the power to propose amendments and is also responsible for calling a constitutional convention if requested by the states. The Supreme Court has a dual role in the amendment process. First, after an amendment is ratified it falls to the courts to interpret that amendment, as they would any other part of the Constitution. Secondly, the Court has been called on to interpret Article V itself. The Court has occasionally ruled on the constitutionality of the ratification processes employed by various states.³⁰ Less frequently, it has been asked to

²⁸ James Wilford Garner. 1907. "Amendment of State Constitutions." *American Political Science Review* 1(2): 213-47.

²⁹ See for example Tillman (2005) and Black (1972).

³⁰ See for example, *Hawke v. Smith* (No. 1), 253 U.S. 221 (1920), *The National Prohibition Cases*, *Dillon v. Gloss*, and *United States v. Sprague*.

judge the constitutionality of the actions of the president and Congress in light of Article V.³¹ In one such case, *Hollingsworth v. Virginia* (1798), the Court formally established the precedent that the president was not to be involved in Article V proceedings.

In *Hollingsworth v. Virginia* (1798), the Court was asked to rule on whether or not the president must approve an amendment before it can be sent to the states for ratification. The case involved a dispute between the Indiana Company and the state of Virginia over 1,800,000 acres of land in present-day West Virginia.³² The Virginia State Legislature had invalidated a deed to the land held by the Indiana Company and had set up a land office to distribute the land as it saw fit. The plaintiffs, stockholders of the Indiana Company, were unable to sue the state of Virginia due to the recently passed Eleventh Amendment, which granted states immunity in cases involving citizens of another state or a foreign nation. Rather than abandon their claim, the plaintiffs decided to challenge the constitutionality of the Eleventh Amendment's ratification. They claimed that the Eleventh Amendment was invalid because it had "not bee proposed in the form prescribed by the Constitution."³³ Namely, it had not been submitted to the president for his signature as is required of all legislation before it can have the force of law. Because of this oversight, the plaintiffs contended, the Eleventh Amendment violated the Presentment Clause (Article 1, Section 7, Clause 2) of the Constitution which states that, "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be Presented to the President of the United States." However, as the Indiana Company argued, it is not just bills that are required to be presented to the

³¹ Coleman v. Miller (1938).

³² For an in-depth description of the facts of the case see Tillman (2005).

³³ *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).