



THE PROPOSED AMENDMENTS

Amendments to the U.S. Constitution proposed at a convention of libertarian, progressive, and conservative professors and scholars on August 29 and 31, 2022



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TEAM LIBERTARIAN'S INTRODUCTION TO THE PROPOSED AMENDMENTS

BY ILYA SHAPIRO

When the National Constitution Center asked our three teams to come up with constitutional amendments based on commonalities among our draft constitutions, I was skeptical. There was little overlap among the major reforms we were proposing—or, as Team Liberty described it, mostly adding “and we mean it” to the Constitution we already have, particularly with respect to federalism and the separation of powers. Moreover, a lot of the proposals made by Teams Progressive and Conservative were technocratic “good government” reforms, which we eschewed in favor of just advancing our theory of government.

Having gone through the exercise, it would be utopian to suggest that we nevertheless bridged fundamental gaps in political philosophy and values to reinvent the Constitution for the modern age. But we did come to more agreements than I was expecting—largely over those “good government” issues that don’t advance either a libertarian, progressive, or conservative vision. Of course, like the lawyers we all are, we also argued over precise wording and comma placement, as well as recognizing the occasional need for either silence or strategic ambiguity.

With respect to the proposed amendments, the most significant ones were (1) Supreme Court term limits and (2) allowing for legislative vetoes of executive and regulatory actions.

The first would cap high-bench service to 18 years while fixing that body at nine members. This was not something Team Liberty contemplated because it has nothing to do with libertarian goals, but we approved it because it would likely have the benefit of increasing public confidence in the judiciary. Vacancies would no longer arise at politically timed moments and there would be no more morbid health watches over octogenarian justices. But anyone hoping that this reform would solve the roiling debates about the Court is naïve. Indeed, with each presidential term getting two SCOTUS slots and each senatorial term guaranteed to cover three confirmation battles, the Court would figure even more significantly in election campaigns.

The second allows Congress to create a legislative veto. That could do much to check what has become an imperial presidency and an administrative state that’s become a branch of government all unto itself—if a bill creating this veto can ever overcome a filibuster.

As to the other amendments, (1) eliminating the natural-born citizen requirement was the easiest point of agreement, but also the least significant change in practice; (2) it’s good that we made it a bit easier to amend the Constitution, which no doubt gives each drafting team hope that at some point in future their greater vision can prevail; and (3) I was disappointed that we didn’t make it even easier to impeach, remove, and disqualify public officials: impeachment is an inherently political judgment, so if a supermajority of the Senate thinks that someone is “unfit for office” (however each senator wants to define that), it should be enough.

So where do we go from here? In this time of high political polarization and low societal trust, I’m pessimistic that any amendment could survive Article V’s high bar. But that doesn’t mean that this exercise was pointless. The NCC is doing yeoman’s work in advancing civic education, so my hope is that our little exercise contributes to showing our fellow countrymen and -women that it’s possible to empower the better angels of our nature.



TEAM PROGRESSIVE'S INTRODUCTION TO THE PROPOSED AMENDMENTS

BY CAROLINE FREDRICKSON

The Progressive Team came to the convention with high hopes for some consensus on proposed amendments to the Constitution. It was gratifying to see the possibility for agreement across the political and ideological spectrum on some practical and important reforms but also to see the recognition from the other teams that the Constitution is not perfect and could and has been improved over time.

We agreed on several changes, including (1) Supreme Court term limits, (2) making it easier to amend the Constitution, (3) reforming the impeachment process, (4) allowing for legislative vetoes of executive and regulatory actions, and (5) ending the natural born citizen requirement for the presidency.

TERM LIMITS FOR THE SUPREME COURT

The amendment creates staggered 18-year terms, with two appointments per president, and a nine-member Court. To achieve the goal of limited terms, we recognized that the confirmation process also needed to be addressed. Without changes to the possibility of endless delay and obstruction in the Senate, presidents would be thwarted in their ability to appoint justices. To make this work, we agreed that appointments would be automatic should the Senate not act within three months to approve or disapprove. We also agreed to apply this approach to nominations for executive offices.

Team Progressive had advocated for term limits but not to fix the size of the Court at nine. In view of the significance of term limits, however—as well as the fact that we have made it easier to amend the Constitution, which means we could revisit the size later—we agreed to this amendment. We believe that 18-year terms and regular appointments of justices would make the process of nomination and confirmation of Supreme Court justices less fraught and polarized.

MAKING IT EASIER TO AMEND THE CONSTITUTION

Another very important amendment changes Article V of the Constitution and makes it easier to amend the Constitution. The amendment lowers the threshold for amendments from the current two-thirds of Congress and three-quarters of the states to three-fifths of Congress and two-thirds of the states. Team Progressive pushed to include the provision allowing a ratification process by states representing three-quarters of the population as well to ensure that amendments that are broadly popular cannot be blocked by states representing a small minority of the population.

The amendment also would make it possible to amend the Senate's composition in the future. The current Constitution makes equal state suffrage in the Senate unamendable and thus gives greater political power to small and rural states. In our Constitution, we had changed the composition of the Senate whereby it would continue to ensure representation of every state, but larger states would have an incremental increase in the size of their delegation.



The teams agreed that any amendment changing equal suffrage in the Senate would require three-fourths of both houses of Congress and three-quarters of the states. While this is not what we had called for in the Progressive Constitution, nonetheless, it would ensure that the size and configuration of the Senate would in fact be amendable in the future and was a fair compromise to the end of making the Constitution easier to amend.

IMPEACHMENT

In this amendment, we agreed to raise the standard for impeachment in the House but lower it for conviction in the Senate. Our impression is that it is too easy to initiate such a process but, even when an impeachment might be well-merited, it is nearly impossible for the Senate to convict, making the constitutional safeguard unusable. The amendment would set a three-fifths majority in both Houses. We also clarify that, in the six months after leaving office, a former officer can be impeached and that the bar against future officeholding applies to the presidency and vice presidency. Importantly, we also made it clear that impeachment applies to a serious abuse of the public trust. An additional provision provides Congress with the power to remove judges who are unable to perform their duties.

LEGISLATIVE VETO

We also agreed to create a two-house legislative veto for Congress. This amendment closely followed the provision included in the Progressive Constitution to provide Congress the choice of whether to provide for a legislative veto through individual pieces of legislation.

ELIMINATION OF THE NATURAL-BORN CITIZEN REQUIREMENT

We had no real disagreements here because all three Constitutions had done away with the requirement for natural-born citizenship for the presidency. We substituted a requirement of a period of residency and citizenship for a sufficient period.



TEAM CONSERVATIVE'S INTRODUCTION TO THE PROPOSED AMENDMENTS

BY ILAN WURMAN

NATURAL-BORN CITIZENSHIP REQUIREMENT

The first proposed amendment was the easiest to adopt because all three teams had removed the natural-born citizenship requirement for president in their respective constitutions for the National Constitution Center's earlier drafting project. The teams agreed that a rule limiting the presidency to persons physically born within the jurisdiction of the United States was arcane. So long as an individual has been in the United States, and a citizen, for a sufficient period, there was no reason to preclude election to the presidency on the grounds of foreign birth.

LEGISLATIVE VETO

It was also relatively easy for the teams to agree to the second proposed amendment, authorizing Congress to write into law two-house "legislative veto" provisions, which were ruled unconstitutional under the present Constitution in *INS v. Chadha*. The teams all agreed that a legislative veto was generally consistent with the separation of powers in a world where the executive department engages in significant rulemaking activities. A legislative veto provision allows Congress to retain a role in what is effectively executive policymaking. The initial debate was over whether the proposed amendment should contain the legislative veto of its own force, or whether Congress should be given the choice to implement one. The teams ultimately agreed that giving Congress the choice was superior to having no such provision at all. It was also more modest than fixing the veto in the Constitution. Under the provision as written, however, nothing would prevent Congress from enacting a freestanding statute like the Congressional Review Act that implements a legislative veto generally.

It was important to clarify that the presence of a legislative veto provision in a statute should in no way impact a court's determination regarding whether the initial law containing the legislative veto violated the nondelegation doctrine. In other words, even with the availability of the veto, it still could be the case that the law "delegates" too much policymaking power such that the law has unconstitutionally delegated *the* legislative power vested in Congress. We wanted our provision to have no impact on this contemporary debate. We also did not want the failure to veto an executive act to affect judicial review of the validity of that act. That is, a failure to veto should in no way indicate that Congress in fact agrees with the executive act, or that a court should defer to the executive act, or that the executive act is consistent with the statute pursuant to which the executive was acting.

Finally, it was also important to avoid the impression that Congress was enacting ex post facto laws. We did not want Congress to veto the outcomes of individual adjudications. Thus, the veto as exercised in *INS v. Chadha* itself would still be unconstitutional under the proposed provision. But we also did not want to limit the veto to rulemaking. Congress could also veto other non-adjudicatory executive acts, such as the decision to allocate money to build a border wall or imposing a military draft by executive decree.



IMPEACHMENT

The aim of the impeachment amendment was to make it more difficult to *initiate* impeachments, but easier to *convict*. Currently, impeachments may commence with only a majority vote, making it too easy to start a partisan impeachment. But the two-thirds threshold for conviction makes impeachment all but an impossible threat against a genuinely malfeasant president. The teams easily agreed to increase the vote threshold to initiate an impeachment to three-fifths, and to decrease the conviction threshold to three-fifths.

The amendment also adds that former officers may be impeached up to six months after leaving office, and it clarifies that the disqualification from future officeholding includes the office of presidency and vice presidency. It also clarifies that when the Vice President is impeached, the Chief Justice shall preside—otherwise the Constitution as it currently exists suggests that perhaps the Vice President, as president of the Senate, could preside over his or her own impeachment. The amendment also clarifies that the House or Senate may subpoena documents and witnesses in order to obtain evidence of possible impeachment-worthy offenses. To do so, however, the House must first initiate an impeachment “inquiry” with slightly more than a majority vote, thereby guaranteeing some amount of bipartisan buy-in.

The most contentious debate was over the impeachment standard itself. The proposed amendment’s standard—“for serious crimes, or for serious abuse of the public trust”—from Team Conservative’s perspective, merely clarifies the existing “high crimes and misdemeanors” standard. That is, an officer need not engage in actual *crimes* to be impeached. But mere policy disagreements do not amount to a *serious* abuse of the public trust. There was a debate over whether the standard should be more lax, for example omitting the word “serious,” or including “incapacity” or “inability” to perform the duties of the office. Ultimately, sufficient agreement was reached on keeping the word “serious” and omitting “incapacity” and “inability.” In the proposed amendment to the judiciary article, Congress is given the power to provide for removal within the judicial branch of judges who are unable to perform their duties. When considered in relation to the Twenty-Fifth Amendment and Congress’s ability to expel its own members, each branch is thus given the power to police its own members in regard to incapacity or inability. From team conservative’s perspective, this was a crucial structural feature rooted in the view that each branch is in the best position to ensure its own integrity, reputation, and prerogatives. Giving Congress a power on a mere three-fifths vote to remove a president for “incapacity” or for mere “inability” was thought to give Congress too much control over the independent presidency.

APPOINTMENTS AND CONFIRMATIONS

The next proposed amendment reforms the appointment and confirmation process and would replace the Appointments Clause of the present Constitution. It reduces the treaty ratification threshold to three fifths; currently, the two-thirds standard makes it too hard to ratify treaties, resulting in an excess of nonbinding “executive agreements” that can change from administration to administration.

The biggest reform was to the Supreme Court. It reaches a compromise: in exchange for fixing the number of justices at nine, it creates eighteen-year, staggered term limits for the justices. This was the most modest compromise available and the only one that achieved sufficient agreement from the three teams. It is by no



means the best option according to any of the teams. But all the teams were able to agree that this reform would be *better* than the current Constitution. And that's the point of the compromise.

In order to implement staggered term limits, however, it was necessary to reform the confirmation process, too. If the Senate could simply sit on a nomination for two years, then the advantage of staggered term limits would be defeated. The idea is that each presidential administration gets to appoint two justices to the Supreme Court, which would reduce the temperature of confirmation battles. But the Senate should still have a *say* in the process.

The solution was simple: make all nominees automatically appointed within three months, unless the Senate sooner disapproves. (The Senate may at any time prior to the three months also vote on the nominee to approve.) Under this proposal, in other words, the Senate would not have had to approve Merrick Garland, but he would have at least gotten a vote. The political cost of continuously disapproving a president's nominees would be enormous. But giving the Senate the ability to negative nominees will also have a salutary effect on the president's choices. The teams also implemented this proposal for executive offices, confirmations to which currently take up too much Senate time. Both Donald Trump and Joe Biden deserved to have their Cabinets firmly and swiftly in place.

AMENDMENTS

Finally, all the teams agreed that the Constitution should be somewhat—but not too much—easier to amend. Although James Madison argued that stability in a constitutional regime would over time create “veneration” for the constitution, it is also possible that too much stability as a result of a difficult amendment process would create disrespect for the Constitution because it might be perceived to be too old and outdated. At least some Americans perceive this to be true about the U.S. Constitution. The amendment's proposed solution was to reduce the threshold for amendments from the current two-thirds of Congress and three-quarters of the states to three-fifths of Congress and two-thirds of the states.

The most controversial addition that was nevertheless agreed to was the inclusion of a ratification process by states representing three-quarters of the population. According to the latest census, a ratification pursuant to this provision would require the agreement of the thirty most populous states, which are not predictably liberal or conservative.

The amendment also would make it *possible* to amend the Senate's composition in the future. The current Constitution makes equal state suffrage in the Senate unamendable. Although the libertarians and conservatives generally support federalism and this important political and structural safeguard of federalism, it was thought that having *any* part of the Constitution completely “unamendable” was simply too undemocratic. The teams settled on the proposal that any amendment changing equal suffrage in the Senate should first obtain the agreement of three-quarters of both houses of Congress and three-quarters of the states qua states.



THE PROPOSED AMENDMENTS

AMENDMENT XXVIII: PRESIDENTIAL ELIGIBILITY

No person shall be eligible to the office of President, except a person who shall have attained the age of thirty five years, and been a citizen, resident in the United States, for fourteen years.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXIX: LEGISLATIVE VETO

Congress may by law provide for a veto, by majority votes in each of the Houses of Congress, of actions taken by the executive department, except actions adjudicating the applicability of a statute or regulation to a person. A failure by Congress to act pursuant to such a law shall not affect any judicial determination as to whether any law, or any actions of the executive department, are valid or enforceable.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.



AMENDMENT XXX: IMPEACHMENT

The following amendment shall supersede Article I, § 3, para. 6, Article I, § 3, para. 7, and Article II, § 4 of the present Constitution:

- § 1. The President and Vice President, the judges of the supreme and inferior courts, and all civil officers of the United States shall be subject to impeachment for serious criminal acts, or for serious abuse of the public trust. Impeachments may occur up to six months, and convictions may occur up to one year, of the person leaving office.
- § 2. Upon conviction, any person currently holding office shall be removed, and any such person, or any convicted person who no longer holds office, shall be subject to disqualification to hold any elective or appointed office under the United States, or under any of the States, and the person convicted shall be liable and subject to indictment, trial, judgment, and punishment, according to law.
- § 3. The House of Representatives may impeach by a vote of three fifths of the members present, and shall set forth specific grounds in written articles of impeachment, which shall be conveyed to the Senate immediately upon adoption.
- § 4. The Senate shall have the power to try all impeachments, and shall convict on the votes of three fifths of the members present. The Senate may convict only on one or more of the articles of impeachment. When sitting for that purpose, the Senate shall be on oath or affirmation. When the President or Vice President of the United States is tried, the Chief Justice shall preside.
- § 5. The House, upon passage of a resolution initiating an impeachment inquiry by a majority of the members of the House of Representatives plus five percent, and the Senate, upon passage of articles of impeachment, or a committee of the House or Senate thereafter authorized by the House or Senate, respectively, shall have power to summon witnesses and call for papers, subject to privileges grounded in this Constitution. Any refusal to comply with such summons may be prosecuted in a court of the United States as prescribed by law, and a legal officer designated by the House shall have standing to bring such prosecution without involvement by the executive branch.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXXI: APPOINTMENTS

This amendment shall supersede Article II, § 2, para. 2 and Article III, § 1 of the present Constitution:

- § 1. The President shall have power, by and with the advice and consent of the Senate, to make treaties, provided that three fifths of the Senators present concur; and shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the supreme and inferior courts, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments. Nominations shall be deemed to have received the advice and consent of the Senate unless disapproved by majority vote within three months of the nomination; but any Senator shall have the right to bring any nomination to the floor for debate and vote prior to that time. Any nomination made within the last three months of the President's term shall lapse at the end of that term, unless sooner approved by the Senate.
- § 2. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges of the inferior courts shall hold their offices during good behavior. Congress may by law provide for a process within the judicial department for the suspension from duty of inferior court judges on grounds of disability. Both the judges of the supreme and inferior courts shall, at stated times, receive for their services a compensation, the real value of which shall not be diminished during their continuance in office.

There shall be nine judges of the supreme court, who shall hold their offices for staggered terms of eighteen years, such that every two years there shall be a vacancy. In the event of a vacancy resulting from death, resignation, impeachment, or other inability to perform the duties of the office, a new judge shall be appointed for the duration of the term only. After a term of office has expired, the judge whose term has expired may elect to sit on an inferior court during good behavior, which court is to be determined by the Chief Justice or as Congress shall direct.

Amendment XXXI continued >

§ 3. After this article is ratified, the senior-most judge currently serving on the supreme court, calculated by time served on the court, shall retire by the next presidential inauguration. The President after said inauguration shall nominate a successor. Every two years thereafter for sixteen years, the most senior remaining judge shall retire by January 20, whose successor shall be nominated by the sitting President after that date. In the event of a vacancy resulting from the death, resignation, or impeachment of a judge of the supreme court sitting as of the time this article is adopted, a new judge shall be appointed for the duration of the term that would have otherwise elapsed according to this section.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.



AMENDMENT XXXII: FUTURE AMENDMENTS

The following amendment shall supersede Article V of the present Constitution:

- § 1. The Congress, by three-fifths vote of both Houses may, or on the application of the Legislatures of a majority of the several States or by States representing two thirds of the population according to the latest national census shall, propose amendments to this Constitution, which shall be valid as part of this Constitution if ratified, within seven years of being submitted, by the legislatures or ratifying conventions of two thirds of the several States, or of States representing three fourths of the population according to the latest national census, in accordance with the constitutional processes of each State.
- § 2. Upon the application of the legislatures of two thirds of the States or of States representing three fourths of the population according to the latest national census, there shall be a general convention authorized to propose revisions to the Constitution, to be conducted in accordance with procedures enacted by Congress, which revisions shall be valid as part of this Constitution if ratified in like manner as amendments.
- § 3. No State, without its consent, shall be deprived of its equal suffrage in the Senate, absent an amendment to the Constitution proposed by three fourths of both Houses and ratified by three fourths of the several States in accordance with the constitutional processes of each State.
- § 4. While an amendment, having been proposed, is pending ratification in the States, a State may revoke its previous ratification at any time before the requisite number of States has ratified the amendment.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the present Constitution, within seven years from the date of the submission hereof to the States by the Congress.