

CONGRESSIONAL PAY LIMITATION

TWENTY-SEVENTH AMENDMENT

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

REGULATING CONGRESSIONAL PAY

Referred to the state legislatures at the same time as those proposals that eventually became the Bill of Rights, the congressional pay amendment had long been assumed to be dead.¹ This provision had its genesis, as did several others of the first amendments, in the petitions of the States ratifying the Constitution.² It, however, was ratified by only six States (out of the eleven needed), and it was rejected by five States. Aside from the idiosyncratic action of the Ohio legislature in 1873, which ratified the proposal in protest of a controversial pay increase adopted by Congress, the pay limitation provision lay dormant until the 1980s. Then, an aide to a Texas legislator discovered the proposal and began a crusade that culminated some ten years later in its proclaimed ratification.³

Now that the provision is apparently a part of the Constitution,⁴ it will likely play a minor role. What it commands was already statutorily prescribed, and, at most, it may have implications for automatic cost-of-living increases in pay for Members of Congress.⁵

¹ Indeed, in *Dillon v. Gloss*, 256 U.S. 368, 375 (1921), the Court, albeit in dictum, observed that, unless the inference was drawn that ratification must occur within some reasonable time of proposal, “four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable.” (Emphasis supplied).

² A comprehensive, scholarly treatment of the background, development, failure, and subsequent success of this amendment is Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORD. L. REV.* 497 (1992). A briefer account is *The Congressional Pay Amendment*, 16 *Ops. of the Office of Legal Counsel*, U.S. Dept. of Justice 102, App. at 127–136 (1992) (prelim. pr.).

³ The ratification issues are considered *supra* in the discussion of Article V.

⁴ In the only case to date brought under the Amendment, the parties did not raise the question of the validity of its ratification; the court refused to consider the issue raised by an *amicus*. *Boehner v. Anderson*, 809 F.Supp. 138, 139 (D.D.C. 1992). It is not at all clear the issue is justiciable.

⁵ See *supra*, p. 126.