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Legal Sidebar

The Twenty-Seventh Amendment and Congressional Compensation Part 3: Debates over the Constitution's Ratification

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This Legal Sidebar post is the third in a six-part series that discusses the Twenty-Seventh Amendment to the Constitution, which prevents laws that modify Members of Congress's compensation from taking effect until after an intervening congressional election. During the 117th Congress, the Sergeant at Arms fined three Members of the House of Representatives for entering the House Chamber without wearing masks during the COVID-19 pandemic. The Members declined to wear masks to protest a House resolution and policy requiring them to do so. Because the fines were deducted from their salaries without an intervening House election, the Members challenged the mask policy in federal court as a violation of the Twenty-Seventh Amendment. In *Massie v. Pelosi*, a D.C. federal district court judge dismissed the Members' complaint, determining that the mask policy was consistent with the Twenty-Seventh Amendment because the disciplinary fines did not modify the Members' annual salaries designated in the Ethics Reform Act of 1989. (In August 2022, a federal judge dismissed a similar challenge to fines for violating rules on security screening.)

As a result of these federal district court decisions, which have been appealed to the U.S. Court of Appeals for the D.C. Circuit, Congress may be interested in the history and scope of the most recently ratified amendment to the Constitution. Additional information on this topic is published in the *Constitution Annotated: Analysis and Interpretation of the U.S. Constitution*.

Debates in the State Ratifying Conventions

The original Constitution, which took effect in 1789, did not prevent federal laws that increased or decreased Members of Congress's salaries from becoming operative before the next congressional election. This became a source of tension during debates in many of the state ratifying conventions. In particular, Anti-Federalists, who opposed the Constitution's ratification because of concerns that the national government would become too powerful relative to the states and threaten individual rights, expressed the view that Members of Congress should not set their own pay. For example, at the Virginia ratifying convention in June 1788, Patrick Henry, an Anti-Federalist and staunch opponent of ratifying the Constitution, objected to allowing Members of Congress to determine their compensation "by themselves,

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without limitation or restraint." He stated that Members "may therefore indulge themselves in the fullest extent" by making their compensation "as high as they please." Henry argued that having the state legislatures fix Members' compensation would impose some measure of restraint on the national legislature.

James Madison, who played a key role in drafting the Constitution and served as a delegate to the Federal Convention, defended the Congressional Compensation Clause at the Virginia ratifying convention. Madison contended that allowing state legislatures to determine congressional pay would make the national government too dependent on the state governments. Madison noted that, historically, state legislatures had not abused the privilege of setting their own compensation. He also argued that Members of Congress who engaged in such practices would incur the "general detestation" of their constituents.

When ratifying the Constitution, conventions in New York, North Carolina, and Virginia recommended amendments to address concerns that Members of Congress may abuse the power to modify their compensation. For example, New York delegates recommended several amendments to the Constitution when they ratified the document in July 1788. One recommended amendment would have required "[t]hat the compensation for the Senators and Representatives be ascertained by standing laws; and that no alteration of the existing rate of compensation shall operate for the benefit of the Representatives until after a subsequent election shall have been had." These recommendations informed Madison's introduction of draft amendments to the Constitution in the First Congress.

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