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"COMPENSATION AMENDMENT" TO THE UNITED STATES CONSTITUTION

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Abstract: The Constitution of the United States stands out against the background of European constitutions for several reasons. First of all, it is one of the shortest constitutions considering the number of articles. Secondly, it belongs to the rigid constitutions which are hard to amend. Thirdly, any constitutional amendments are not introduced into the constitution, but are placed in the form of numbered amendments. Fourthly, since the adoption of the constitution in 1789, only 27 amendments were introduced. The last one was waiting for the entry into force for 203 years. The last amendment concerns the ban on changes in the congressman compensation during the term-of-office. Considering its historical context, the "compensation amendment" provides the most interesting insights into the American constitutional amendment process.

Keywords: amendment, compensation, United States Constitution

INTRODUCTION

Money and power are the two strongest aphrodisiacs that rule the world and people, and challenge the contemporary democratic states. The level of compensation and the scope of powers of the authority are decided by the parliament. The compensation of parliament members varies and basically depends on the decisions of parliamentarians. What draws particular attention is the fact that in the United States, (contrary to the European states), the salary of the representatives of the nation is regulated constitutionally. The constitutional provision does not

concern the amount of compensation, but it excludes the possibility of changing it during the parliamentary term. This is a rare and, therefore, unique situation, as the constitutions of European states do not contain provisions relating to the salary of the parliament members. Another difference between the American and European systems regards the prohibition to combine the functions of persons exercising legislative and executive power. In the USA, the principle of *incompatibilitas* explicitly refers to members of parliament and government, while, for example, in the United Kingdom a member of the government is required to a be member of the parliament. The U.S. Constitution is rigid and belongs to the group of constitutions whose amendment procedure is a specifically difficult one. So far, 27 amendments have been introduced to the U.S. Constitution.

The aim of the paper is to discuss the specificity of the U.S. Constitution, amendment procedure and most of all to describe the latest constitutional amendment. The uniqueness of the twenty-seventh amendment lies mostly in the fact that it is the last amendment to be adopted and one of the first ones to be proposed. The unprecedented period of over 200 years between the original proposal as well as the final ratification is due to the complex and twisted history of the amendment. As such it is worth a deeper legal and historic analysis.

The paper consists of six sections. The first section describes the specificity of the U.S. Constitution. The second part is devoted to the amendment procedure. In the third section the role of the Supreme Court in the amendment procedure is examined. The fourth part elaborates the twenty-seventh amendment. The fifth section describes the U.S. Congressmen compensation. The last part includes the closing remarks.

THE U.S. CONSTITUTION

The main body of the U.S. Constitution consists of seven articles. It is the shortest written constitutional text in the world [Lytle 2007]. As a result, it continues to be the field of continuous legal challenges in terms of its interpretation and understanding of the depths of ideas leading to the eventually adopted general provisions.

The concept of the federal state designed in the Constitution was born during the Philadelphia Convention in 1787 when the compromise between the federalists and anti-federalists was reached in order to provide for the new political shape of the Union. The Founding Fathers drafted the articles of the new Constitution creating the federal government that received the powers transferred upon it by the independent states with direct action toward individuals, not only the states as it was perceived in the formerly binding Articles of Confederation [Cohen, Varat 1997].

The Constitution established three branches of the government – the legislative branch (granted to Congress in Article I of the Constitution), the executive

branch (granted to the President of the United States in Article II of the Constitution) and the judicial branch (granted to the Supreme Court and other federal courts established by Congress by virtue of Article III of the Constitution).

The remaining articles were dedicated to various issues. In Article IV, the further relations among the states were specified based on the "full faith and credit" and "privileges and immunities" clauses. The same article provided for the procedure of acceptance of new states into the Union and guaranteed the republican form of government. Article V shortly described the procedure for the constitutional amendments. Article VI concerned three problems: it discussed the validation of the debts entered into before the adoption of the Constitution, it established the "supremacy clause" granting the priority of federal law over state laws and included the instructions for the oath of affirmation to be binding upon all state and federal public officers. Finally, Article VII regulated the ratification procedure for the Constitution.

Since its ratification in 1789, the U.S. Constitution has been amended twenty-seven times. The first ten amendments, known as the Bill of Rights, came into force only two years later, in 1791, as part of the compromise negotiated during the Philadelphia Convention. Bill of Rights is mostly dedicated to the rights and freedoms of the American citizens. Other amendments were passed in the course of history as responses to different problems and challenges facing the federal system designed in the Constitution. The presidential elections were, for example, subject to several constitutional amendments (Amendments XII, XXII, XXIII, XV). The voting rights were extended to various groups throughout the history (Amendments XV, XIX, XXVI). Slavery was abolished through the constitutional amendment (Amendment XIII) after the infamous Supreme Court's decision in the Dred Scott case [*Dred Scott v. Sandford*, 1857]. There is certainly a fascinating political and legal story behind every amendment introduced during the 229 years of the Constitution's existence The limited number of the amendments that came into force in comparison to the number of unsuccessfully introduced amendments (1,300 only between 1789 and 1889), confirms the difficulty of the procedure [Lynch 2001].

THE AMENDMENT PROCEDURE

The original language of Article V of the U.S. Constitution reads as follows:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress (...).

It is then clear that the proposal for the amendment may come either from the federal level (when the legislative branch finds it necessary and both – the House of Representatives and the Senate approve it with the majority of two thirds of the votes) or from the state level (when the two thirds of states call a special constitutional convention and pass the required application for the amendment), however, so far none of the adopted amendments was proposed by the state convention [Collet 2010; Rogers 2007].

Upon the Congress vote adopting the joint resolution for amendment, further administration of the procedure is handed to the Archivist of the United States. According to the United States Code,

> whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States [U.S.C.: Title 1, Chapter 2, Section 106 (b) – Amendments to Constitution].

The detailed procedure of the amendment is not included in any specific provisions and it is based on the traditions and customs adopted throughout the years [Constitutional Amendment Process].

The crucial requirement is the ratification of the proposed amendment by three fourths of the states or by the conventions called in three fourths of the states, and the method is proposed by Congress. The U.S. Supreme Court confirmed that the choice between modes of ratification lies in the sole discretion of Congress [*United States v. Sprague*, 1931]. So far, Congress has preferred the ratification by the state legislatures, with only one exception – Amendment XXI repealing the prohibition was ratified by the state convention [Cohen, Varat 1997]. The state governors receive the text of the amendment from the Archivist and submit it to their state legislatures or conventions – depending on the requirements specified by Congress. The state procedure of amendment approval is regulated in the state constitutions [*United States Constitutional Amendment Process. Legal Principles for State Legislators*, 2016]. The results of the state voting are sent back to the Archivist who collects the ratification notices and informs when the number reaches the required amount for the amendment to become binding. When the first ten amendments were processed, ratification by nine out of thirteen states was required. With time, the number of states grew and since 1959, when Hawaii became the fiftieth state of the Union, the required number raised to 38, thus making it much more difficult given the possible conflicts of interests between the states.

The final stage of the amendment procedure is the certification of the legal sufficiency of the ratification announced by the Archivist. It should be noted that only since 1917, Congress has set a time limit on the ratification process and requires the states to carry out the ratification procedures within seven years from

the moment the proposal is submitted. Previously, only some of the amendments were accompanied by the deadline for ratification. As a result of successful ratification in the required number of states, the amendment becomes an integral part of the Constitution. In the American tradition, the text of the amendment is not inserted into the main text of the Constitution, but all the amendments are listed below the main text as additional articles [Neale 2014].

Even though only twenty-seven amendments were successfully processed and ratified, there had been approximately 11,699 measures proposed to amend the U.S. Constitution between 1789 and 2016. It is a solid proof for the amendment procedure to be highly difficult and requiring a wide national consensus as for the issues to be amended.

Table 1. Measures proposed to amend the Constitution

Congress	Date	Number Proposed
1st -101st	1789–1990	10,431
102nd	1991–1992	153
103rd	1993–1994	155
104th	1995–1996	152
105th	1997–1998	118
106th	1999–2000	71
107th	2001–2002	77
108th	2003–2004	77
109th	2005–2006	72
110th	2007–2008	66
111th	2009–2010	75
112th	2011–2012	92
113th	2013–2014	84
114th	2015–2016	76

Source: https://www.senate.gov/reference/measures_proposed_to_amend_constitution.htm

The amendment procedure does not involve the executive branch. The President of the United States does not have the right to propose or veto amendments so the presidential approval is not required in the process. The President may only (and in the past did) attend the ceremony of the signing of the certification and sign the amendment as a witness [Neale 2014]. In fact, the U.S. Supreme Court decided already in 1798 that the signature of the President on a proposed amendment was not necessary for it to become "constitutionally adopted" [*Hollingsworth v. Virginia*, 1798].

The amendment procedure in Article V does not provide for the direct role of the judicial branch either, leaving it to the legislative branch at the federal level with state ratification as the final component. As part of the U.S. Constitution, Article V, as well as all amendments adopted, have been subject to the interpretation of the judicial branch with final decisions delivered by the United States Supreme Court [Dalzell, Beste 1993].

THE SUPREME COURT IN THE AMENDMENT PROCEDURE

The Article V procedure originating directly from the Constitution is the formal method of amendment. However, the specificity of the U.S. legal system and the judicial review where the final interpretation of the federal constitution lies in the hands of nine justices of the U.S. Supreme Court, allows arguing that even though the Article V procedure has been rarely used, the Constitution has constantly been subject to what could be called as the judicial constitutional amendment and is an effect of an extraordinary judicial activism observed in the highest American court [Marshfield 2018; Kmiec 2004].

The Supreme Court opinions (which have the same binding legal value as the provisions they are interpreting) shape the understanding of the supreme law. Those opinions influence the way the constitutional provisions, as well as the adopted amendments, are read and interpreted. If the Supreme Court rules that Amendment II actually provides for the freedom to keep and bear arms to all citizens in the United States and, therefore, ban states from prohibiting access to arms, then it can be regarded as constitutional amendment because prior to this opinion, states were allowed to regulate the issue [*District of Columbia v. Heller*, 2008; *McDonald v. City of Chicago*, 2010]. If the Supreme Court rules that Amendment XIV requires states to license and recognize a marriage between two people of the same sex when the marriage was lawfully licensed and performed out-of state, then again the court changes the understanding of the Constitution which previously was not interpreted as not allowing states to ban same-sex marriage [*Obergefell v. Hodges*, 2015].

THE TWENTY-SEVENTH AMENDMENT

The text of the Amendment is short and clear: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened". As such, it does not allow for any law increasing or decreasing the salary of the members of Congress to become binding in between the terms.

The amendment was intended to amend Article 1, Section 6, Clause 1 of the Constitution reading: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States".

The idea for the regulation was introduced by James Madison who, during the First Congress on June 8, 1789, argued that "there is a seeming impropriety in leaving any set of men without control to put their hand into the public coffers, to take out money to put in their pockets" [Licht 1991].

The Compensation Amendment was proposed by Madison together with eleven other amendments which were to become the Bill of Rights. The other

amendment introduced back then in the Bill of Rights, as the first one in the catalogue, was the Congressional Apportionment amendment that regarded the determination of the appropriate size of the House of Representatives depending on the census [Biles 2017].

The adopted proposal of all amendments was submitted for the ratification in thirteen states on September 25, 1789. The required number of ratifications was reached in two years for the ten out of twelve proposed amendments and, as a result, these became the final ones within the Bill of Rights and came into force in 1791.

By 1791, the Compensation Amendment (which did not have a deadline imposed on ratification by states) was ratified by 6 states. One more state ratified it a year later, but it was eighty-one years later when the next state submitted the ratification documents (in 1873) and another hundred and five years when the ninth state completed the procedure (in 1978). By then of course, the required number of ratifications was set at 38.

Meanwhile, however, the U.S. Supreme Court ruled in 1939 that it was the Congress decision whether the proposed amendment was "lost in its vitality through lapse of time". As a result, if there is no specified ratification deadline, the amendment remains open for ratification for an unlimited period of time [*Coleman v. Miller*, 1939].

The long-forgotten amendment resurfaced when in 1982, a college student, Gregory Watson picked up the topic of the twenty-seventh amendment for his class essay and discovered that it could still be ratified as Congress never set a deadline for ratification. In his paper, he argued for the possibility of ratification but his arguments were unconvincing to his professor who graded the paper with "C" only. The low grade triggered additional interest and need to prove his arguments and Watson began a self-organized and self-funded campaign aimed at state legislators to ratify the Amendment, despite many negative reactions coming both from political and academic corners trying to discriminate the idea and calling it "dead". The campaign was surprisingly successful. Watson's efforts were supported and well-heard from other corners, especially in the light of the multiple pay raises Congress granted itself during the 1980s and the scandal surrounding the 1991 Senate's "midnight pay raise" [Paulsen 1993].

States moved on with ratification procedures – starting with Maine in 1983, Colorado in 1984, five states in 1985, three states in 1986, four states in 1987, three states in 1988, seven states in 1989 (including ratification in Texas with very influential support from the state Senator), two states in 1990, one in 1991 and three states in 1992, with the last ratification document submitted by Michigan. As a result and according to the procedure, the Archivist of the United States certified the Amendment's ratification on May 18, 1992. The Amendment became part of the U.S. Constitution – ten years after Watson's unsatisfying grade motivated him and 203 years after it was originally proposed by James Madison. Professor Bernstein called Watson the stepfather of the twenty-seventh amendment [Bernstein 1992].

U.S. CONGRESSMEN COMPENSATION

During the Constitutional Convention, Benjamin Franklin proposed the elected government officials not to be paid for their service. However, other Founding Fathers decided differently. From 1789 to 1855, Members of Congress received only a daily payment – US$ 6 while in session. The Members of Congress began receiving annual salary in 1855 – US$ 3,000 per year [U.S. Senate].

Table 2. History of Annual Salaries – Members of Congress and Leadership

Year	Members of Congress	Speaker of the House	Majority and Minority Leaders and President *Pro Tempore*
2015	$174,000	$223,500	$193,400
2014	$174,000	$223,500	$193,400
2013	$174,000	$223,500	$193,400
2012	$174,000	$223,500	$193,400
2011	$174,000	$223,500	$193,400
2010	$174,000	$223,500	$193,400
2009	$174,000	$223,500	$193,400
2008	$169,300	$217,400	$188,100
2007	$165,200	$212,100	$183,500
2006	$165,200	$212,100	$183,500
2005	$162,100	$208,100	$180,100
2004	$158,100	$203,000	$175,700
2003	$154,700	$198,600	$171,900
2002	$150,000	$192,600	$166,700
2001	$145,100	$186,300	$161,200
2000	$141,300	$181,400	$156,900
1985	$75,100	n/a	n/a
1975	$44,600	n/a	n/a
1955	$12,500	n/a	n/a
1925	$7,500	n/a	n/a
1900	$5,000	n/a	n/a
1873	$7,500	n/a	n/a
1855	$3,000	n/a	n/a
1825	$8 per day	n/a	n/a
1800	$6 per day	n/a	n/a
1789	$6 per day	n/a	n/a

Source: https://www.legistorm.com/member_of_congress_salaries.html

The level of compensation of Members of Congress has remained unchanged since 2009. According to Article I, Section 6 of the U.S. Constitution, Members of Congress are "ascertained by law, and paid out of the Treasury of the United States". The regulation is governed by the Ethics Reform Act (1989) and the twenty-seventh Amendment to the Constitution [Congress.Gov].

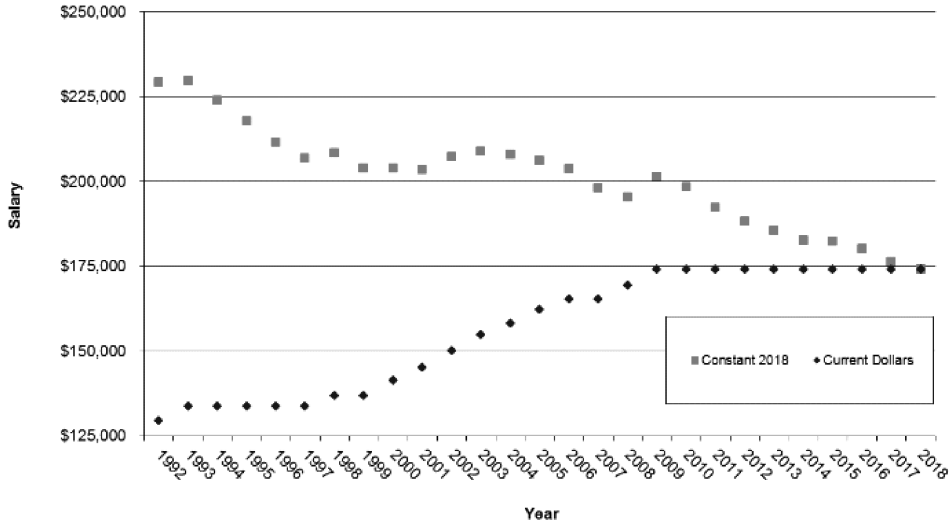
Table 3. Compensation of the U.S. Parliament Members

Members of Congress	Compensation in US$ per year
Senators	174,000
Representatives	174,000
Delegates	174,000
The Resident Commissioner from Puerto Rico	174,000
The Speaker of the House	223,500
The President *pro tempore* of the Senate	193,400
Majority and minority leaders in the House and Senate	193,400

Source: Brudnick [2018a].

Members of Congress receive salaries during term-of-office they are elected for. They do not get salaries beyond it. They do not receive additional compensations for service on committees or repayment of student loans.

In 1992, after the Ethics Reform Act, Representatives and Senators received the same salaries. The Ethics Reform Act 1986 increased pay for Representatives and Senators at different rates.



Graph 1. Salary for Members of Congress 1992–2018

Source: Brudnick [2018b].

The base salary for members of the U.S. House and Senate was US$ 174,000 per year. Salaries have not been increased since 2009. Congressmen are prohibited from receiving income from fiduciary relationships, e.g. jobs that require the management of another person's wealth or assets, including lawyers and bankers. The reasoning here is that barring U.S. Representatives from earning income from fiduciary relationships will minimize conflicts of interest [Hill, Ridge, Ingram 2018].

CLOSING REMARKS

The aim of the paper was to discuss the specificity of the U.S. Constitution together with its amendment procedure and to focus on the latest – twenty-seventh – amendment to the U.S. Constitution. The paper examined the amendment procedure deriving directly from the U.S. Constitution, as well as the significant role of the Supreme Court in the constitutional interpretation also providing for the unique way of amendment. The specificity of the U.S. legal system and the judicial review allow arguing that even though the Article V procedure has not been often used, we can observe the phenomenon called judicial constitutional amendment as a result of extraordinary judicial activism carried out in the U.S. Supreme Court.

The core idea behind the latest amendment came from James Madison [Madison's Speech…, 2018] and became part of the Constitution after 203 years thanks to the headstrong student. This amendment does not allow for any law increasing or decreasing the salary of Members of Congress to become binding in between the terms.

Tytuł: Poprawka w amerykańskiej Konstytucji dotycząca wynagrodzenia deputowanych

Streszczenie: Konstytucja Stanów Zjednoczonych Ameryki wyróżnia się na tle konstytucji europejskich z kilku powodów. Po pierwsze, jest jedną z najkrótszych konstytucji, biorąc pod uwagę liczbę artykułów. Po drugie, należy do konstytucji sztywnych, trudno zmienianych. Po trzecie, jakiekolwiek zmiany konstytucyjne nie są wprowadzane do jej treści, ale umieszczane w postaci numerowanych poprawek. Po czwarte, od uchwalenia Konstytucji w 1789 r. wprowadzono zaledwie 27 poprawek, z czego ostatnia czekała na wejście w życie 203 lata. Ostatnia poprawka dotyczy zakazu zmiany wysokości uposażenia parlamentarzystów w trakcie kadencji i jest jedną z najciekawszych, biorąc pod uwagę jej kontekst historyczny.

Słowa kluczowe: poprawka, uposażenie, Konstytucja Stanów Zjednoczonych Ameryki

REFERENCES

1. Bernstein, R.B., 1992, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, "Fordham Law Review", 61.
2. Biles, Ch.M., 2017, *The History of Congressional Apportionment*, Humboldt State University Press, Humboldt.
3. Brudnick, I.A., 2018a, *Congressional Salaries and Allowances: In Brief*, Congressional Research Service, April 2018, https://www.senate.gov/CRSpubs/9c14ec69-c4e4-4bd8-8953-f73daa1640e4.pdf (access:10.05.2018).
4. Brudnick, I.A., 2018b, *Salaries of Members of Congress. Recent Actions and Historical Tables*, Congressional Research Service, April 2018, https://fas.org/sgp/crs/misc/97-1011.pdf (access: 10.05.2018).
5. Cohen, W., Varat, J.D., 1997, *Constitutional Law. Cases and Materials*, Westbury, New York.

6. *Coleman v. Miller*, 307 U.S. 433 (1939).
7. Collet, T.S., 2010, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, "Loyola University Chicago Law Journal", 41.
8. Congress.Gov, https://www.congress.gov/bill/101st-congress/house-bill/3660 (access: 10.05.2018).
9. Constitutional Amendment Process, Federal Register, National Archives. Online version, https://www.archives.gov/federal-register/constitution (access: 12.05.2018).
10. Dalzell, S., Beste, E.J., 1993, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, "The George Washington Law Review", 62.
11. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
12. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
13. Hill, A.D., Ridge, J.W., Ingram, A., 2018, *The Growing Conflict-of-Interest Problem in the U.S. Congress*, https://hbr.org/2017/02/the-growing-conflict-of-interest-problem-in-the-u-s-congress (access: 11.05.2018).
14. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).
15. https://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-7.pdf (access: 12.05.2018).
16. https://www.legistorm.com/member_of_congress_salaries.html (access: 08.05.2018).
17. https://www.usconstitution.net/constamrat.html (access: 12.05.2018).
18. Kmiec, K.D., 2004, *The Origin and Current Meanings of Judicial Activism*, "California Law Review", 92.
19. Lynch, M.J., 2001, *The Other Amendments: Constitutional Amendments that Failed*, "Law Library Journal", 93.
20. Lytle, D., 2007, *Celebrating the Constitution, in and around the Bar, CBA President's Message*, "SEP Colorado Law", 36.
21. Madison's Speech Proposing Amendments to the Constitution, http://teachingamericanhistory.org/bor/madison_17890608/ (access: 11.05.2018).
22. Madison's Speech to the House of Representatives, June 8, 1789, [in:] R.A. Licht (ed.), *The Framers and Fundamental Rights*, American Enterprise Institute Press, Washington D.C. 1991.
23. Marshfield, J.R., 2018, *The Amendment Effect*, "Boston University Law Review", 98.
24. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).
25. Neale, T.H., 2014, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, https://www.everycrsreport.com/files/20140411_R42589_f565d06c544815456eb3805d4f52c2b5749d36b7.pdf (access: 12.05.2018).
26. *Obergefell v. Hodges*, 576 U.S. (2015).
27. Paulsen, M.S., 1993, *A general theory of Article V: The constitutional lessons of the twenty-seventh amendment*, "The Yale Law Journal", 103.
28. Rogers, K.J., 2007, *The other way to amend the constitution: The Article V constitutional convention amendment process*, "Harvard Journal of Law & Public Policy", 30.
29. U.S.C.: Title 1, Chapter 2, Section 106 (b) – Amendments to Constitution.
30. *United States Constitutional Amendment Process. Legal Principles for State Legislators*, Research Department, Minnesota House of Representatives, 2016.
31. United States Senate, https://www.senate.gov/senators/SenateSalariesSince1789.htm (access: 10.05.2018).
32. *United States v. Sprague*, 282 U.S. 716 (1931).