

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2358 SCOMM 99 HOUSE SPEC. WORLD TRADE. . RELATIONS, 1995-1996 653

SCOMM

99:15

Resources, Vice Chair
State Affairs, Vice Chair
House Special Committee on Oil & Gas, Vice Chair
House Special Committee on Fisheries



State Capitol
Room 409
Juneau, Alaska 99801-1182

Representative Scott Ogan
House District 27

Legal History of the Subsistence Issue: A Chronological Overview

In order to understand the subsistence preference issue, one must examine the legal history behind it. This outline will provide a concise road map to that history, and will summarize the development of the legal issues.

I. Alaska Constitution: Adopted and ratified by the people of Alaska in 1956, the Alaska Constitution specifically addressed ownership and use of Alaska's fish, wildlife and other resources.

A. Article VIII, § 3 states that fish and wildlife in their natural state are reserved for the *common use* of the people.

B. Article VIII, § 4 requires that all of the state's replenishable resources are to be managed on a sustained yield principle, subject to preferences among beneficial uses.

C. Taken together, these provisions mean that the state cannot grant any group of *people* preferential use of fish and wildlife resources; the only legally acceptable preferences are between beneficial *uses*. *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

II. Alaska Statehood Act: The Alaska Statehood Act was a compact between the people of the State of Alaska and the United States of America providing for Alaska's admission to the Union as a state. It was passed by Congress and ratified by the people of Alaska in 1958, and Alaska was formally admitted as a state by a proclamation of President Eisenhower in 1959.

A. The Statehood Act is not just a law; it's a *compact* between the people of the state and the United States, just like the U.S. Constitution is a compact between the people and the federal government. This is important because it means that Congress cannot unilaterally pass any law that contradicts or violates the terms of the compact. In other words, the Statehood Act takes precedence over other federal laws if there is a conflict.

B. The Statehood Act specifically accepted and ratified the Alaska Constitution as the governing document for the new state, including those provisions reserving fish and wildlife for common use of all Alaskans. (Alaska Statehood Act, § 1)

C. The Act also transferred management of Alaska's fish and wildlife resources to the state, except for special refuges or reservations set apart for wildlife protection.

III. Alaska Native Claims Settlement Act: The Native Claims Settlement Act of 1971 was a full and final settlement of all claims to any rights, title, interest or privilege by people of Native origin in the state of Alaska, and extinguished any claims of Alaska Natives to special hunting or fishing rights. This Act is a legal settlement in the nature of a treaty; it therefore takes precedence over any previous or subsequent laws of Congress.

A. Declaration of Congressional Policy in § 1 states that "the settlement should be accomplished . . . *without establishing any permanent racially defined institutions, rights, [or] privileges . . .*"

B. The settlement provided for payment by the federal government to Alaska Natives of \$462,500,000.00 in cash payments, and another \$500,000,000.00 in assignments of mineral royalties and lease payments received by the State of Alaska. It also granted title to millions of acres of land to regional and village Native corporations established under the Act.

C. In exchange, the Native peoples of the state specifically waived forever any and all aboriginal claims based on previous use or occupancy (in other words, traditional use), or based on any previous statute or treaty. These forfeited claims include claims to any right, title, use or occupancy in or to land and water areas of the State of Alaska:

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and *including any aboriginal hunting and fishing rights that may exist, are hereby extinguished.*

Alaska Native Claims Settlement Act, § 4(b),(c)) (emphasis added).

IV. Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act: In 1980, Congress passed this Implementing Act which contains a number of clarifications and refinements of procedural and administrative issues relating to implementation of the Native Claims Settlement Act and the Statehood Act.

A. Also establishes a new "Alaska Land Bank" program which authorizes holders of large tracts of land to place their land in a federal land bank for a ten year period, renewable in five year increments.

B. A participating landowner agrees (among other things) to manage fish and wildlife on the land in accordance with federal or state management plans, if any.

In exchange, the federal government provides the owner with technical assistance in fish and wildlife management, as well as other benefits. The Act does not transfer management duties to the federal government, however.

V. Alaska National Interest Lands Conservation Act: This Act, passed by Congress in 1980, is often referred to as "ANILCA", and imposes a preference for uses of Alaskan fish and wildlife by "rural residents".

A. Rural or bush residents are granted preference under ANILCA in the taking of fish and wildlife. (16 USC § 3114). While the Act tries to mask its racial preference agenda by granting the preference to rural subsistence users rather than to Natives, the true intent of Congress is revealed in § 3111 where Congress invokes its constitutional authority over "Native affairs" to preserve the "economic, traditional and cultural existence" of "Native and non-Native" rural subsistence users and attempts to "fulfill[] the policies and purposes of the Alaska Native Claims Settlement Act."

B. Defines the preferential "subsistence uses" as "customary and traditional uses" of fish and wildlife (16 USC § 3113). This is exactly the type of claims of aboriginal hunting or fishing rights based on previous use that were "extinguished" by the Native Claims Settlement Act.

C. The Act does not authorize the federal government to manage fish and game in accordance with this subsistence preference; it only authorizes federal judicial intervention if a subsistence user feels that he or she isn't receiving preferential treatment under the state's management plan.

VI. Important Court Cases:

A. In *McDowell v. State*, 785 P.2d 1 (Alaska 1989), the Alaska Supreme Court ruled that the Alaska Constitution, which was ratified and approved by Congress in the Statehood Compact, prohibits granting a rural subsistence preference.

B. In 1984, the 9th Circuit Court of Appeals issued an important ruling in two consolidated cases: *Inupiat Community v. U.S.*, 746 F.2d 570 (9th Cir. 1984) and *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984). The Court stated that Alaska Natives' claims of subsistence hunting and fishing rights had been forever extinguished with the Native Claims Settlement Act. The United States Supreme Court refused to hear the one of the two cases when the Native communities appealed, and in the other case bypassed the issue of extinguishment of Native rights by holding that neither the Native Claims Settlement Act or ANILCA applied to the outer continental shelf. *Gambell v. Clark*, 480 U.S. 531 (1991).

C. These cases clearly hold that any and all claims by Alaska Natives to

subsistence hunting and fishing preferences *cannot stand* under the Alaska Constitution, the Alaska Statehood Act, and the Alaska Native Claims Settlement Act. Yet the federal government has taken over the management of fish and wildlife on federal lands in Alaska in order to forcibly implement ANILCA's unlawful subsistence preference scheme. It was this federal management of Alaska's fish and wildlife resources--which is not authorized in any statute, and which flagrantly violates Alaska's statehood compact with the federal government--that was challenged challenged in the Babbit lawsuit.

SCOMM

99:16



Official Business

Alaska State Legislature

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

TO: Representative Joe Green

FROM: Representative Ramona Barnes
Chair, House Special Committee on World Trade and State/Federal Relations *RFB*

Date: January 18, 1995

RE: Hearing on HJR 16

I have scheduled a hearing on your joint resolution, HJR 16 "Relating to mandates imposed on the states by the federal government" at 5 P.M. on Thursday, January 26th in room 408.

Would you please ask your staff to provide Wayne Maloney of my staff with the necessary backup and sponsor statement information by 5 P.M. Monday, January 23rd? Please also furnish a list of the individuals or representatives of agencies that you expect will testify at the hearing.

SCOMM

99:17

Status Report on 4-3-95 -- 1:00 p.m. EST.

	<i>Party control</i>		
	<i>Governor</i>	<i>Senate</i>	<i>House</i>
■ <i>States that have passed a resolution in both chambers: (13 states)</i>			
Arizona	Rep.	Rep.	Rep.
Arkansas	Dem.	Dem.	Dem.
Delaware	Dem.	Dem.	Rep.
Idaho	Rep.	Rep.	Rep.
Iowa	Rep.	Dem.	Rep.
Kentucky	Dem.	Dem.	Dem.
Missouri	Dem.	Dem.	Dem.
Nebraska (unicameral)			
Ohio	Rep.	Rep.	Rep.
South Dakota	Rep.	Rep.	Rep.
Utah	Rep.	Rep.	Rep.
Virginia	Rep.	Dem.	Dem.
Wyoming	Rep.	Rep.	Rep.

■ *States that have passed the resolution in at least one chamber: (10 states)*

Alaska House	
Colorado Senate	
*Indiana House	Pennsylvania Senate
Michigan Senate	Tennessee House
Minnesota House	Texas Senate
New Jersey Senate	
New York Senate	

*Indiana SCR22 has been superseded by a new resolution which must be passed by the Senate

■ *States that have introduced the resolution in at least one chamber: (12 states)*

Florida House	North Carolina House
Hawaii House	Rhode Island House
Illinois House	South Carolina House
Maryland House and Senate	Vermont Senate
Nevada Assembly	Washington House
Louisiana House	Wisconsin Senate

■ *States where introduction is pending: (4 states)*

Alabama convenes (4/18/95)
Connecticut
Maine
Massachusetts

■ *States where the resolution has been defeated or was not considered: (11 states)*

New Hampshire	West Virginia	Mississippi
North Dakota	Georgia	Montana (House committee tabled)
COS on 3/23)		
Oklahoma resolution)	New Mexico	Kansas (COS language stripped from California)
		Oregon

Delegation Size By State

<u>State</u>	<u>House Version</u>	<u>Senate Version</u>
Arizona		
Arkansas	five	seven
Delaware	seven	seven
Idaho		
Iowa	seven	seven
Kentucky	five	five
Missouri	seven	seven
Nebraska (unicameral)		
Ohio		
South Dakota	seven	seven
Utah	five	five
Virginia	five	five
Wyoming	five	five

Note: In the states where the approved delegation size is different in the other chamber, those states are moving toward amending their resolutions to send a seven-member delegation.

Op Ed column, by Sen. Jeff Wells -- Colorado Springs Gazette Telegraph

Last November's election results sent a clear message to politicians across this country that it's time for a change. It's time for the states to mount a new initiative against the concentration of power in Washington and to reclaim the power of the states.

The Conference of the States is a creative new way to address the current imbalance in our federal-state system. The Conference will present an opportunity for the states to make a more powerful statement than each state can make alone. We can gather together, debate the issues, resolve any differences over details, and speak out for what all of us, regardless of region or party, believe is needed to restore the principles of the Tenth Amendment.

While there are plenty of examples of federal authority run rampant, two will illustrate the problem. First, unfunded federal mandates, such as those in the welfare and environmental areas, make writing the state budget a nearly impossible task. Colorado's tax money is being commandeered for a federal agenda -- money that could be used to solve Colorado's problems. Second, court decisions ignore the Tenth Amendment and diminish state sovereignty, turning states into agents of the federal government in implementing federal policy.

The purpose of the Conference of the States is to address the imbalance that exists between federal and state power. The Conference will convene when a majority of the states have agreed to send delegates. Its function will be to suggest measures that can make the principles of the Tenth Amendment a reality once again.

The Conference could recommend legislation, a litigation strategy, and

ultimately federal constitutional proposals to restore a proper balance between the federal government and the states. An example might be a Balanced Budget Amendment. Votes in Congress may be swayed if a substantial majority of states supported such a measure.

However, it is crystal clear that the Conference of the States has no legal authority, only the moral force of its proposals. The Conference should not be mistaken for the process prescribed by the U.S. Constitution to propose federal constitutional amendments. Arguments that the Conference might set in motion a process to completely rewrite the constitution are based on fear, not the facts.

Here are the facts:

The U.S. Constitution requires that the *federal Congress* propose constitutional amendments. As an alternative, *Congress* is required to call a convention, which could then propose an amendment, if two-thirds of the state legislatures apply. The resolutions introduced in state legislatures to authorize participation in the Conference of the States simply cannot be read as applications for a constitutional convention. They are not directed to Congress. Many of them, including Colorado's, say that they are not applications for a constitutional convention. In fact, since the convention that wrote our original constitution, we have never had a constitutional convention.

Nothing in the constitution gives the Conference any standing to seek recognition from Congress as a constitutional convention. No group of citizens, even governors or legislators, can call themselves into a constitutional convention -- it takes action by Congress. Furthermore, Congress has no power to recognize the Conference as a constitutional convention, since it can call a convention only upon application by 34 states.

Sen. Hank Brown and Sen. Jesse Helms, two senators not noted for their liberalism, are not worried about the Conference of the States. In fact, these

senators have introduced a resolution in Congress asking that the states convene a Conference of the States for the express purpose of suggesting changes to require a balanced budget and to prohibit unfunded federal mandates. If the Conference they support recommends these measures, the recommendations will still have to clear the procedural hurdles prescribed by our federal constitution.

Those who are afraid that the Conference of the States might turn into a "runaway" constitutional convention assume a series of improbable, illogical, and even illegal events. On the contrary, the people who would be involved in the Conference have no authority to participate in a constitutional convention and must apply the law -- after all, they are public figures who must answer to the people.

If unbiased fears block the Conference of the States, the states will have lost an important opportunity to begin to redress the imbalance between the federal and state governments. The defeat of the Balanced Budget Amendment makes it clear that such a Conference is required to urge Congress to take the states, their problems, and their desires seriously. The holding of a Conference of the States will actually help remove the threat of a runaway constitutional convention. This is a responsible, bipartisan effort which deserves widespread support.

LONG VERSION



JEFFREY M. WELLS
State Senator
524 South Cascade #1
Colorado Springs, Colorado 80903
471-4110

Senate Chamber
State of Colorado
Denver

SENATE MAJORITY LEADER

U.S. Senate Judiciary Subcommittee on the Constitution, Federalism, and Property Rights - March 24, 1995

Testimony of Sen. Jeff Wells (CO)

Good morning. I am State Senator Jeff Wells from Colorado, and I appreciate the opportunity to testify before this committee at such a critical time and on such an important topic. I have been in state government for thirteen years and just recently completed a term as chairman of CSG's Western Legislative Conference -- comprised of the House and Senate leaders from all 13 states and 3 territories in the West. I am the current Vice-Chairman of CSG. I am also a member of the Conference of the States' Steering Committee.

It seems to me that the Conference is a creative new way to address the current imbalance in our federal-state system. The Conference will present an opportunity for the states to make a more powerful statement than each of us can make alone. We can gather together, debate the issues, resolve any differences over details, and speak out for what all of us, regardless of region or party, believe is needed to restore the principles of federalism.

In 1989 the Council of State Governments issued a report that states, "One of the virtues of our federal system is its flexibility which, among other things, enables one or another of our constitutional partners to rise to the challenges of particular moments in our history. So long as the challenges are met and our federalism is brought back into balance on a higher plane, then our federal republic is strengthened by this dynamism. However, when the challenges

are not adequately met, and when one constitutional partner becomes [so?] preeminent as to begin to endanger the constitutional integrity of the other partners, then our federalism is placed in jeopardy." That statement is as applicable now as it was five years ago.

I would like to make some comments about the legal status of the Conference of the States. The Conference is not, and cannot be construed to be, a threat to turn into a "runaway" constitutional convention. The U S. Constitution requires that the *federal Congress* propose constitutional amendments. As an alternative, *Congress* is required to call a convention, which could then propose an amendment, if two-thirds of the state legislatures apply. The resolutions introduced in state legislatures to authorize participation in the Conference of the States simply cannot be read as applications for a constitutional convention. They are not directed to Congress. Many of them, including Colorado's, say that they are not applications for a constitutional convention. In fact, since the convention that wrote our original constitution, we have never had a constitutional convention.

Nothing in the constitution gives the Conference any standing to seek recognition from Congress as a constitutional convention. No group of citizens, even governors or legislators, can call themselves into a constitutional convention -- it takes action by Congress. Furthermore, Congress has no power to recognize the Conference as a constitutional convention, since it can call a convention only upon application by 34 states. Those who are afraid that the Conference might turn into a runaway constitutional convention are assuming a series of improbable, illogical, and even illegal events.

For most of our history, the states and the federal government were partners in governing our citizens. Each respected the role of the other. However, in the last twenty or thirty years, a combination of unfunded federal

mandates and unfounded federal court decisions has put the states in the position of mere agents of the federal government, carrying out a federal policy agenda. Rather than partners, the states have become administrative agencies.

One of the most discouraging developments was the Supreme Court's 1985 decision in Garcia v. San Antonio Metropolitan Transit Authority. That decision involved application of the federal Fair Labor Standards Act to states and local governments. I do not need to remind you that the FLSA contains many detailed requirements that can impact heavily on an employer's budget. In reversing the earlier case of National League of Cities v. Usery and holding that states and cities are subject to the FLSA, the Garcia case had a devastating impact on the ability of the states and local governments to manage their own budgets.

But the more devastating impact of Garcia was the ground for the decision. The Supreme Court, for all practical purposes, abdicated its authority and responsibility to decide questions of federal-state relationships and instead instructed states which were dissatisfied with federal preemptions to look to the political process. States could only read that to mean that they should get in line before Congress, along with other special interest groups, and lobby for their governing rights.

More recent legal developments indicate there is a ray of hope. In New York v. United States, a 1992 decision, the Supreme Court did adjudicate federal-state relationships in the context of a particularly egregious statute concerning disposal of hazardous waste. There the Supreme Court held that the Tenth Amendment forbids Congress to order states as governments to take any action. Although it may put pressure on states, in the form of preemptive legislation and incentive grants, it cannot "commandeer" state financial or regulatory resources.

The New York case built on a 1991 case from Missouri called Gregory v. Ashcroft. In Gregory, the Supreme Court upheld the application of Missouri's

constitutional provision on mandatory retirement for state judges over a challenge based on the federal Age Discrimination in Employment Act.

Further litigation is working its way through the judicial system. The Supreme Court will decide the case of United States v. Lopez this term. That case presents a Commerce Clause challenge to the federal law that makes it a crime to possess a firearm within 1,000 feet of a school. Finally, there are a number of cases that challenge the constitutionality of the Brady Act's commandeering of state law enforcement officials to implement the federal law. You might be interested to know that federal district courts in Montana and Arizona have declared the applicable portion of the Brady Act unconstitutional, while a federal court in Texas has upheld it.

This very quick review shows the lack of judicial consensus on federal-state relationship issues. It also illustrates why I and many of my colleagues feel a great deal of frustration in regard to state relations with the federal government. This is not simple frustration with a case or two I believe to be wrongly decided. It is a frustration with the system and the process that calls not just for a litigation strategy but perhaps for structural change and amendment of the constitution. I am hopeful that the Conference of the States will provide that opportunity.

You may wonder why states are so concerned about these issues, especially when a measure like the Unfunded Mandates Act is on its way to the President. The reason is that legislation can only go so far to address what is a massive problem facing state governments today. Mandates are only a major symptom of a much larger crisis facing our federalist system -- that of the federal government's refusal to acknowledge states as partners in governance and the powers reserved to the states under the Tenth Amendment.

There has been opposition to the Conference of the States and undue fear

of a constitutional convention. Opposition has come from both conservative and liberal groups, and unfortunately it has been successful in delaying resolutions of participation in a few states, including Colorado. It is crystal clear, however, that no change can be made to the federal constitution without following the procedures set forth in Article V of the constitution. Nobody involved with the Conference of the States intends otherwise. Moreover, the holding of a Conference of the States will actually help remove the threat of a runaway constitutional convention.

Thank you for according me the opportunity to speak about the Conference.

1

1 of 1 items

CQ's WASHINGTON ALERT 04/06/95

*** FULL REPORT -- DIGEST, LEGISLATIVE ACTION, COSPONSORS, SPEECHES ***

MEASURE: SRes82

SPONSOR: Brown (R-CO)

OFFICIAL TITLE: A resolution to petition the states to convene a
Conference of the States to consider a balanced budget
amendment to the Constitution.

INTRODUCED: 03/02/95

COSPONSORS: 1 (Dems: 0 Reps: 1 Ind: 0)

COMMITTEES: Senate Judiciary

CRS DIGEST:

Petitions the States to convene a Conference of the States for the
express and exclusive purpose of drafting an Amendment to the
Constitution requiring a balanced budget and prohibiting the imposition
of unfunded mandates on the States. Requires the States to consider
whether it is necessary to convene a Constitutional Convention in order
to adopt such Amendment.

CRS SUBJECT INDEX TERMS:

Federal budgets
Balanced budgets
Budgets
Conferences
Congress
Constitution
Constitutional amendments
Constitutional conventions
Federal-state relations
Government regulation
Intergovernmental fiscal relations
Legislation--Costs
Politics and government
Regulatory reform
State and local government

LEGISLATIVE ACTION:

03/02/95 Referred to Committee on the Judiciary (Text of
resolution appears on pg. S3427 of the March 2, 1995,
Congressional Record) (CR p. S3390)

03/02/95 Original cosponsor(s): 1
Helms (R-NC)

There are no more items to display.

①

1

1 of 1 items

CQ's WASHINGTON ALERT 04/06/95

SRES82

Brown H. (R-CO)
Introduced in Senate

03/02/95

(55 lines)

To petition the States to convene a Conference of the States to
consider a Balanced Budget Amendment to the Constitution.

Special typefaces used in this bill version:

// \\ Italic
Item Key: 2339

104TH CONGRESS
1ST SESSION

S. RES. 82

To petition the States to convene a Conference of the States to
consider a Balanced Budget Amendment to the Constitution.

IN THE SENATE OF THE UNITED STATES

March 2 (legislative day, FEBRUARY 22), 1995

Mr. BROWN (for himself and Mr. HELMS) submitted the following
resolution; which was referred to the Committee on the Judiciary

RESOLUTION

To petition the States to convene a Conference of the States to
consider a Balanced Budget Amendment to the Constitution.

Whereas Article I of the Constitution of the United States of
America provides that the Congress is vested with the authority to
lay and collect taxes, to pay the debts of the United States, to
borrow money on the credit of the United States, and to
appropriate money from the Treasury;

Whereas for the past quarter century Congress has been unable to
balance the Nation's budget in any year;

Whereas the President of the United States has submitted a budget
which increases the deficit in future years;

Whereas Members of Congress have been unable to agree on language
for an Amendment to the Constitution which would require a
balanced budget; and

Whereas Congress has therefore attempted to deny the several States

②

of the United States the opportunity to vote on a Constitutional Amendment requiring a balanced budget: Now, therefore, be it

//Resolved, That Congress hereby petitions the several States of the United States of America to convene a Conference of the States for the express and exclusive purpose of drafting an Amendment to the Constitution of the United States requiring a balanced budget and prohibiting the imposition of unfunded mandates on the States, and that such States then consider whether it is necessary for the States to convene a Constitutional Convention pursuant to Article V of the Constitution of the United States in order to adopt such Amendment.\\

There are no more items to read.

Enter one or more numbers or ALL to display item(s),
Enter another display command and one or more numbers or ALL,
Enter MARK or SAVE and one or more numbers to limit or save your set,
Enter SMARTMATCH and a number to find comparable items,
Or enter BACK, HELP, or STOP
>

Status Report on 4-3-95 - 1:00 p.m. EST.

	<i>Party control</i>		
	<i>Governor</i>	<i>Senate</i>	<i>House</i>
	Rep.	Rep.	Rep.
■ States that have passed a resolution in both chambers: (13 states)			
Arizona			
Arkansas	Dem.	Dem.	Dem.
Delaware	Dem.	Dem.	Rep.
Idaho	Rep.	Rep.	Rep.
Iowa	Rep.	Dem.	Rep.
Kentucky	Dem.	Dem.	Dem.
Missouri	Dem.	Dem.	Dem.
Nebraska (unicameral)			
Ohio	Rep.	Rep.	Rep.
South Dakota	Rep.	Rep.	Rep.
Utah	Rep.	Rep.	Rep.
Virginia	Rep.	Dem.	Dem.
Wyoming	Rep.	Rep.	Rep.

■ States that have passed the resolution in at least one chamber: (10 states)

Alaska House	
Colorado Senate	
*Indiana House	Pennsylvania Senate
Michigan Senate	Tennessee House
Minnesota House	Texas Senate
New Jersey Senate	
New York Senate	

Indiana SCR22 has been superseded by a new resolution which must be passed by the Senate*■ States that have introduced the resolution in at least one chamber: (12 states)**

Florida House	North Carolina House
Hawaii House	Rhode Island House
Illinois House	South Carolina House
Maryland House and Senate	Vermont Senate
Nevada Assembly	Washington House
Louisiana House	Wisconsin Senate

■ States where introduction is pending: (4 states)

Alabama convenes (4/18/95)
 Connecticut
 Maine
 Massachusetts

■ States where the resolution has been defeated or was not considered: (11 states)

New Hampshire	West Virginia	Mississippi
North Dakota	Georgia	Montana (House committee tabled)
COS on 3/23)		
Oklahoma	New Mexico	Kansas (COS language stripped from
resolution)		California
		Oregon

Delegation Size By State

<u>State</u>	<u>House Version</u>	<u>Senate Version</u>
Arizona		
Arkansas	five	seven
Delaware	seven	seven
Idaho		
Iowa	seven	seven
Kentucky	five	five
Missouri	seven	seven
Nebraska (unicameral)		
Ohio		
South Dakota	seven	seven
Utah	five	five
Virginia	five	five
Wyoming	five	five

Note: In the states where the approved delegation size is different in the other chamber, these states are moving toward amending their resolutions to send a seven-member delegation.

TAPE 95-2, SIDE B
Number 000

HJR 20 - A Resolution relating to unfunded federal mandates and the Conference of the States

CHAIRMAN BARNES stated that this resolution authorizes the State of Alaska to send a delegation to represent the people of Alaska at a Conference of the States. This conference would be the first formal meeting of the 50 states since 1786. She noted that the conference will convene no later than 270 days after at least 26 legislatures adopt similar resolutions and that Alaska would be represented by five voting members consisting of the governor and four legislators, two from each body. The action plan to be voted on at this conference will be called a States' Petition. It will be presented to each state in the form of a resolution for ratification, then presented to Congress as the will of the states of the Union. Chairman Barnes said that since 1990 alone, the federal government has enacted over 40 major statutes imposing expensive regulations and requirements on state and local governments. This is first step toward reversing the trend and restoring the balanced system of government envisioned by the Tenth Amendment.

Number 100

BRIAN WEBERG, Program Director, National Conference of State Legislators, supports the measure and adds that three states (Kentucky, Utah, Virginia) as of January 27, 1995 had passed this resolution and six other states, it has passed at least one house chamber and introduced in 19 other states. He anticipates more states becoming interested in this type of legislation. Mr. Weberg stated that many states have Tenth Amendments before them.

Number 142

CHAIRMAN BARNES added that she's pleased to see NCSL take a more active part in State's Rights' issues.

REPRESENTATIVE ELDON MULDER echoed Chairman Barnes remarks about the leadership role that NCSL has taken in regards to states' rights.

Number 155

REPRESENTATIVE PHILLIPS asked what kind of feedback had NCSL received from Congress.

MR. WEBERG reported that Congress was very receptive to this kind of initiative. He stated that a meeting would take place in March in Washington, D.C., where state legislators with the new congressional leaders and administration and get a good notion of how they feel and probably at that point NCSL would know if this is going to go forward.

MR. WEBERG also said that since no states' conference of this nature had taken place in over 200 years, both the press and public would be focused on this. So if a unified opinion comes out of this, it's going to be heard.

Number 188

MR. KREINHEDER offered a statement of support from the Knowles administration for HJR 20. The administration believes some of the important areas would be welfare reform, education, environmental protection and health care. In many of other cases, what works for some states will not work in some places.

CHAIRMAN BARNES expressed to Mr. Kreinheder how appreciative she was of the administration's support and asked him to convey her sentiments to the administration.

Number 214

REPRESENTATIVE MULDER voiced concern that the proposed Convention through this legislation was a viable alternative to a Constitutional Convention.

REPRESENTATIVE DAVIS made the motion to move HJR 20 out of committee.

CHAIRMAN BARNES asked if there were any objections. Hearing none, the motion was adopted.

Number 230

CHAIRMAN BARNES announced that the next World Trade committee meeting will be a joint committee meeting with International Trade and Tourism on Thursday, February 9, 1995 at 5 p.m. in the Butrovich Room. We will hear from John Sibert, Executive Director of the Alaska Science and Technology Foundation.

There being no further business to come before the House Special Committee on World Trade and State/Federal Relations, Chairman Barnes adjourned the meeting at 6:08 p.m.

The Conference of the States

A state movement demands equal partnership with the federal government.

State legislatures across the country this year will consider convening a Conference of the States to fix an imbalance of power between the states and the federal government.

The Conference will take place when 26 states approve an identical resolution calling for it.

A bipartisan group of four governors and dozens of officials from almost every state approved the idea Dec. 4 at a meeting of the Governing Board of The Council of State Governments, a 61-year-old non-profit, nonpartisan institution.

"We have moved from the talk stage to the action stage," said Gov. Ben Nelson, a Democrat from Nebraska and the outgoing president of CSG. "It is time for us to move even further here today. States, counties and cities need to have the authority to take care of the issues close to their people."

A Conference of the States would attempt to shore up the powers of the states in the federal system, a problem state leaders say has intensified in the last two decades. Examples of this problem include a growing number of underfunded and unfunded mandates from Congress, expansion of the federal bureaucracy and the restraints that federal laws place on state attempts to improve services, like health care and welfare.

Republican Gov. Mike Leavitt of Utah quoted passages from James Madison's Federalist Papers during the meeting as he urged state officials to pass the plan. "James Madison might well have known that a meeting like this might need to oc-

cur," he said. "... That there would be a need for states to band together."

The proposal to convene a Conference of the States was approved almost unanimously in a voice vote after state officials questioned Govs. Nelson and Leavitt about the idea: How would it work? Who would participate? What is the next step?

The Conference of the States would work like this: States will receive a proposed resolution supporting the idea for introduction in their legislative chambers. When a majority of legislatures passes the resolution, a steering group will convene the Conference, probably in the fall of 1995. Each state that passes the resolution will send a five-member delegation consisting of the governor and a bipartisan mix of legislators. If the governor from that state were unwilling or unable to attend, then a fifth delegate would be elected.

Delegates to the Conference will debate remedies that states could use to correct the imbalance of power and then adopt an action plan. Remedies could range from legislative to legal strategies to possible constitutional solutions. The plan then will be sent back to state legislatures for ratification.

At the very least, the Conference of the States will be a good opportunity for states to get the word out about what they have accomplished, officials said.

"States really have become the engines of innovation and change," said CSG Executive Director Dan Sprague. "Every state has revised its constitution, updated its ethics laws and lives within its means. People need to hear how states have become

leaders in reinventing government."

Concerns about the Conference of the States were raised by Wisconsin Sen. Fred Risser, who said he was concerned the process might become an opportunity for special interest groups to further their goals. "Unless you can convince me," he said, "I am quite apprehensive."

In response, Leavitt said that any action proposed by the Conference of the States would have to be approved by three-quarters of the state legislatures before it could become an official statement of that body. "If 75 percent approve it," he said, "then I think it is wise."

Leavitt said there were three things that could kill the Conference of the States, which he termed deadly sins:

- If the Conference becomes a partisan issue, then it will fail. Of the four governors at the CSG meeting who spoke in favor of the plan, two were Democrats and two were Republicans.

- If the Conference became tied to an issue like gun control, abortion or school prayer, then it would fail. Supporters have been careful to say that this effort is not an attempt to turn back the clock. Rather, it is an attempt to correct the imbalance so that government is more efficient.

- And if the Conference becomes tied to any group or personality, then it would not succeed.

After reciting these deadly sins, Leavitt looked to the dozens of state officials gathered at the table. He said, "The time has arrived. This may be a historic moment."

CSG will continue to communicate with state leaders about the next steps for the Conference of the States. □



WESTERN LEGISLATIVE CONFERENCE THE COUNCIL OF STATE GOVERNMENTS
 121 SECOND ST. 4TH FL. SAN FRANCISCO, CA 94105 PHONE (415) 974-6422 FAX (415) 974-1747



March 9, 1995

INFORMATIONAL
ONLY

Speaker Gail Phillips
 House of Representatives
 State Capitol
 Juneau, AK 99801

WESTERN STATES

ALASKA

ARIZONA

CALIFORNIA

COLORADO

HAWAII

IDAHO

MONTANA

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NEW MEXICO

OREGON

UTAH

WASHINGTON

WYOMING

PACIFIC ISLANDS

AMERICAN SAMOA

COMMONWEALTH OF THE
 NORTHERN MARIANA
 ISLANDS

GUAM

Dear Speaker Phillips:

You know about a pending resolution in your Legislature that calls for the first formal gathering of the states in more than 200 years. It's called the Conference of the States. We are pleased to report that 12 states have already passed a Resolution of Participation in both chambers; 10 others have passed it one chamber; 23 more have introduced it and will be acting soon.

Unfortunately for state government, a few well-organized groups are now attempting to discredit the Conference of the States saying it is a covert attempt to call a Constitutional Convention to scrap the founding principles of our country. We are writing to tell you it is literally impossible for the Conference of the States to mutate into a Constitutional Convention and none of the sponsoring organizations --CSG, NCSL, and NGA--want one.

The Conference of the States is a well-reasoned, scrupulously bipartisan effort to examine the growing imbalance of power between the states and federal government. The Conference of the States will be a formal, yet nonlegal, assembly of the states to discuss long-term, structural imbalances. There is no reason to fear it becoming a Constitutional Convention for three important reasons:

1. The United States Constitution plainly mandates procedures for calling a Constitutional Convention and for amending the Constitution. The Founders carefully built in hurdles and safeguards to ensure that the Constitution could not be amended on impulse or caprice. The Conference of the States does not follow the necessary procedures or meet the constitutional requirements to amend the Constitution. Article V of the Constitution gives power to Congress to propose constitutional amendments "whenever two-thirds of both Houses shall deem it necessary." A second method of proposing amendments gives Congress the authority to call a convention "on the application of the legislatures of two-thirds of the several states." In either case, any amendment proposed must go back to the states for ratification by three-fourths of the legislatures. The resolutions being passed in state legislatures calling for the Conference of the States do not remotely fulfill these constitutional requirements. They do not make application to Congress to convene a convention.

Speaker Gail Phillips
March 9, 1995
Page 2

2. The delegates to the Conference of the States will be the nation's governors and legislative leaders from all 50 states. These are careful, thoughtful, elected officials directly accountable to the voters. These delegates respect the Constitution and the ideals of this country's Founders--that's why the Conference of the States is being convened.
3. Proposals made at the Conference of the States will have no binding legal or constitutional authority. They will merely be suggestions, relying entirely upon the power of persuasion, that will be taken back to state legislatures where they will be voted on by all legislators to determine the depth and breadths of support. Only if they have support of most of the state legislatures in the country will they then be taken to Congress. If any of the proposals suggest a constitutional amendment, the Congress will have to approve it by two-thirds votes then send it back to the states for ratification by three-fourths of the legislatures. The safeguards outlined in Article V of the Constitution are extremely rigorous and can in no way be circumvented or ignored.

We urge you to give strong support to the Conference of the States and, if desirable, your state might even want to consider language prohibiting your state delegation from participating in a constitutional convention. Two sample amendments are attached to this letter.

Thomas Jefferson envisioned states convening once "every generation or so," precisely as is now being proposed. It is indeed disappointing that the first open, bipartisan, non-binding effort in 200 years to bring states together for this very purpose is being resisted and misrepresented by a few. States have a unique and extraordinary responsibility to function as a co-equal partner in our great American federalist system. Passing the resolution for The Conference of the States now is the best way to fulfill this commitment. If you have further questions on this issue we urge you to call our information hotline at (606)-244-8158.

Assemblyman David E. Humke
Chairman, Western Legislative Conference

Attachment



NATIONAL CONFERENCE OF STATE LEGISLATURES

1560 BROADWAY SUITE 700 DENVER, COLORADO 80202
303-830-2200 FAX: 303-863-8003

JANE L. CAMPBELL
ASSISTANT HOUSE MINORITY LEADER
OHIO
PRESIDENT, NCSL

TED FERRIS
DIRECTOR, JOINT LEGISLATIVE
BUDGET COMMITTEE
ARIZONA
STAFF CHAIR, NCSL

WILLIAM POUND
EXECUTIVE DIRECTOR

MEMORANDUM

To: NCSL Executive Committee
NCSL Federalism Task Force

From: Bill Pound *Bill*

Date: January 12, 1994

Subject: Conference of the States

The attached material on the Conference of the States was recently sent to Presiding Officers from the Council of State Governments. It contains the "Resolution of Participation in a Conference of the States" that was agreed to by the steering committee representing NCSL, NGA and CSG, as well as background information on the proposed conference. The resolution of participation will be introduced in many legislatures this month.

If you have questions, please call me.

Conference of the States

Restoring Balance in the Federal System

January 6, 1995

Dear Legislative Leader:

The Steering Committee of The Conference of the States (COS) hereby transmits the proposed "resolution of participation" to all 50 state governors and legislative leaders. We ask that you take whatever steps are necessary and appropriate to gain broad, bipartisan sponsorship for this resolution and to introduce it for early endorsement by each legislative chamber.

Attached are a few supporting documents for your information. A national press conference about The Conference of the States will be scheduled for a later date. After that press conference, CSG will assist individual states in coordinating press conferences in their capitals. Also, additional information on The Conference of the States will be sent out as it becomes available.

At this time, we expect that the cost to each state in travel and related expenses for participation in a Spring organizing meeting and the formal Conference in the Fall will be between \$10,000 and \$20,000.

In closing, we want to stress our conviction that The Conference of the States must remain a nonpartisan, non-ideological, non-single issue, group- or individual-identified initiative. It is a fundamental, structural, long-term American federalism concern in which all states have a responsibility to engage. We hope all 50 states will do so in a constructive manner. Thank you in advance for your support.

Gov. Howard Dean
NGA, Chairman

Gov. Ben Nelson
CSG Immediate Past President

Rep. Jane Campbell
NCSL President

Gov. Tommy G. Thompson
NGA, Vice-Chairman

Assemblyman Bob Wertz
CSG Chairman

Sen. Jim Lack
NCSL President-Elect

Gov. Mel Carnahan
CSG President

Sen. President Stan Aronoff
CSG Chairman-Elect

Sen. Bob Connor
NCSL Immediate Past President

Gov. Mike Leavitt
CSG President-Elect

Sen. Jeff Wells
CSG Vice Chairman

Rep. Bob Hunter
CSG Immediate Past Chairman

Convenor: The Council of State Governments in conjunction with the National Conference of State Legislators
and the National Governors' Association

P.O. Box 11910 • Lexington, KY 40578-1910 • 606/244-8000 • 606/244-8001 FAX

Conference of the States

Restoring Balance in the Federal System

FACT SHEET

I. OVERVIEW

- The call for The Conference of the States (COS) is attracting broad support from state officials as a historic formal convocation of the states to communicate at the highest level important federalism principles to Congress and the American people.
- COS is a non-legal, yet formal process to develop an action plan to restore balance to the federal system.
- COS will be convened when a majority of states pass identical resolutions of participation.
- It is anticipated that each state will vote to send a five-member delegation to COS -- the governor and four legislators -- two from each chamber and each party. Two alternate legislators, one from each party, also will be appointed from each chamber.
- It is expected COS will occur in the Fall of 1995 in a historically symbolic location such as Philadelphia. It will be the first formal meeting of the states since 1787.
- The end product of COS will be an agreed-to action plan, written in the form of a States' Petition -- a new instrument in the American democracy -- specifying a set of statutory, legal and constitutional measures essential to an effective, balanced state-federal partnership.

II. DEFINING CHARACTERISTICS

- COS enjoys broad, bipartisan support from state leaders in both parties. It is guided by a national, bipartisan steering committee of state elected officials under the auspices of The Council of State Governments, in cooperation with the National Governors' Association and the National Conferences of State Legislatures.
- COS is not a Republican or Democrat vehicle -- it is an initiative of, for, and by the states to advocate a balanced federal system -- with a strong, yet limited, federal government -- and with states (and local governments) handling a larger share of the domestic governance role.
- COS does not address or advocate any single or special issue interests, nor does it identify with any group or individual.

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- COS is a forum for the states to formally, collectively, and responsibly define their rightful roles in the federal system, based upon past principles and the new governance challenges of the 21st century.

III. STATES AS AGENTS OF REFORM

- State governments, along with local governments, have become positive forces of governmental change and reform in recent years. Yet, with the national media's preoccupation with Washington, D.C., there has been little or no public recognition of these facts:
 - All states have updated and modernized their constitutions in the last 30 or so years.
 - Most states have thoroughly revised their ethics codes and standards in the last five years.
 - Most states have restructured, downsized and privatized key functions in the last few years.
 - Most states elect more women and minorities to office, as do local governments, than does the federal government. They are more representative of, and responsive to, citizens.
 - And, virtually all states are living within their budgetary limits, in contrast to the federal level, which has been overspending in recent years more than all 50 state general fund budgets combined.
- In domestic policy areas, states are the acknowledged leaders and innovators in:
 - Health care redesign; welfare reform; education restructuring; corrections policy; environmental innovation; and in many management areas -- including TQM, customer service and benchmarking to improve accountability for outcomes and for efficiency.

IV. CONCLUSION

- Convening The Conference of the States provides an invaluable forum to develop an accurate picture of the positive things states are doing and to address a profound structural distortion in the American political system.
- COS offers states and citizens a historic opportunity to revisit our founding governing principles and the appropriate state-federal structural balance best suited to American society in the 21st century.
- COS is a non-constitutional, non-binding vehicle for American states to reclaim their rightful, co-equal status in the federal system and to work closely with citizens on the public challenges ahead.

RESOLUTION OF PARTICIPATION IN A CONFERENCE OF THE STATES

[Whereas clauses to be provided by individual states - see attached Council of State Governments' Governing Board resolution as sample]

The following identical language needs to be incorporated into each state's resolution:

Now, Therefore, Be It Resolved:

That the following be adopted:

(1) A delegation of five voting persons from the State of shall be appointed to represent the State of at a Conference of the States for the purposes described in Section (2) to be convened as provided in Section (3). The delegation shall consist of five voting persons as follows: (a) the governor or, if the governor does not wish to be a member of the delegation then a constitutional officer selected by the governor; and (b) four legislators, two from each house selected by the presiding officer of that house. No more than two of the four legislators may be from the same political party. Each presiding officer may designate two alternate legislator delegates, one from each party, who have voting privileges in the absence of the primary delegates.

(2) The delegates of The Conference of the States will propose, debate and vote on elements of an action plan to restore checks and balances between states and the national government. Measures agreed upon will be formalized in an instrument called a States' Petition and returned to the delegation's state for consideration by the entire legislature.

(3) The Conference of the States shall be convened under the §501(c)3 auspices of The Council of State Governments in cooperation with the National Governors' Association and the National Conference of State Legislatures no later than 270 days after at least 26 legislatures adopt this resolution without amendment.

(4) Prior to the official convening of The Conference of the States the steering committee will draft:

- (a) the governance structure and procedural rules for the Conference;
- (b) the process for receiving rebalancing proposals; and
- (c) the financial and administrative functions of the Conference, including The Council of State Governments as fiscal agent.

(5) The bylaws shall:

- (a) conform to the provisions of this resolution;
- (b) specify that each state delegation shall have one vote at the Conference; and
- (c) specify that the Conference agenda be limited to fundamental, structural, long-term reforms.

(6) Upon the official convening of The Conference of the States, the State delegations will vote upon and approve the Conference governing structure, operating rules and bylaws.

**Resolution
Calling for a Conference of the States
to be promoted and convened by
The Council of State Governments**

**For the purpose of restoring
balance in the federal system**

Pinehurst, North Carolina

Whereas: The United States' Constitution established a balanced compound system of governance and through the Tenth Amendment reserved all non-delegated and non-prohibited powers to the States or to the people; and

Whereas: Over many years, the Federal government has dramatically expanded the scope of its power and preempted state government authority and increasingly has treated States as administrative subdivisions or as special interest groups, rather than co-equal partners; and

Whereas: The Federal government has generated massive deficits and continues to mandate programs that State and Local governments must administer; and

Whereas: The number of federal unfunded mandates has grown exponentially during the last 30 years and has profoundly distorted State budgets, thereby handcuffing the ability of State leaders to provide appropriate and needed services to their constituencies; and

Whereas: Since 1990, the Federal government has enacted at least 42 major statutes imposing burdensome and expensive regulations and requirements on States and Localities, which is nearly equal to all those enacted in the prior two decades combined; and

Whereas: Persistent, State-led endeavors have consistently failed to generate any substantial reaction or remedy from the Federal government; and

Whereas: The U.S. Supreme Court has repeatedly determined that the States must look to the Congress and related political remedies for protection against Federal encroachments on the reserved powers of the States; and

Whereas: The Council of State Governments, through its Intergovernmental Affairs Committee, has been the champion of State sovereignty for many years; and

Whereas: In recent years, States have been the principal agents of government reform, including updating their constitutions, modernizing and restructuring governmental institutions, and, along with Local governments, have been the pioneers of government innovation, thus responding to the needs of their citizens; and

Whereas: The Council of State Governments recognizes a sense of urgency in calling for The Conference of the States, whereby each State government would send a delegation to develop a comprehensive Action Plan to restore balance in the Federal system; and

Whereas: The aforementioned experience of The Council of State Governments, in conjunction with its regional structure and groupings of elected and appointed officials from all three branches of State government, reflects an entity ideally suited to promote and facilitate such a conference; and

Whereas: The Conference of the States will communicate broad bipartisan public concern on the extent to which the American political system has been distorted and provide a formal forum for State governments to collectively propose constructive remedies for a more balanced State-Federal governance partnership for the 21st century.

Now Therefore Be It Resolved:

By the Intergovernmental Affairs Committee and the Executive Committee of The Council of State Governments that these Committees recommend to the Governing Board that CSG fully endorse the concept of The Conference of the States; and

Be It Further Resolved:

That these Committees also recommend to the Governing Board that The Council of State Governments be the primary catalyst for all State governments, to organize and convene The Conference of the States, with the following stipulations:

- I. That the Council create a bipartisan Steering Committee representing a cross-section of State leaders to guide the promotion, planning and convening of The Conference of the States; and
- II. That the Council maintain ongoing consultation with the National Governors' Association, the National Conference of State Legislatures and other appropriate State governmental organizations in this process; and
- III. That the Council and The Conference of the States Steering Committee strictly avoid identification with special interests and individuals by focusing activities on working with State government leaders in each geographic region and each State to ensure that The Conference of the States is an initiative of and for the States and the people they represent.

CSG President
Governor E. Benjamin Nelson

CSG Chairman
Representative Robert C. Hunter

**The Conference of the States
An Action Plan For Balanced
Competition in the Federal
System**

Convener: The Council of State Governments in conjunction with the National
Conference of State Legislatures and the National Governors' Association
•P.O. Box 11910•Lexington, KY 40578-1910
•606/244-8000•606/244-8001 fax

The Conference of the States

It is an unfortunate fact of American political life that the national government has become so dominant in our federal system that the checks and balances established by the nation's founders are eroding. James Madison, Thomas Jefferson and Alexander Hamilton would be dismayed by the dysfunction and lack of public confidence this imbalance have engendered in the government they formed.

Whenever state and local officials get together, the discussion naturally turns to this problem. In the last few years, the rhetoric has become especially heated over unfunded federal mandates. Local and state leaders across the nation are in near unanimous agreement that something must be done. They introduce legislation, testify before Congress, pass resolutions and give impassioned speeches ... but little changes. State leaders do not lack the desire or energy to take action; what they lack is a plan, a real process. This paper offers a simple but powerful plan.

But first, a dose of reality. Even with the changed political landscape as a result of the last election, we cannot count on Congress to fix this problem by itself. In fact, with the likely prospect of a Balanced Budget Amendment and tax cuts on the horizon, states are at considerable risk that Congress could push its budget problems down to the states. No matter which party controls Congress, it is not likely to relinquish power without feeling the pressure of an electorate that demands it. States must protect the balance that Jefferson, Hamilton and Madison created by advancing structural, permanent reform that will not be subject to the whims of whoever controls Congress. States also cannot depend on the courts or the federal bureaucracy to restore balance in the system. Over the last 60 years, the federal courts generally have not been friendly to states in their disputes with the federal government.

Balance will only be restored in the way intended by Madison, Jefferson and Hamilton -- when states take the initiative. As state leaders (with our allies in local governments), we must step up to our constitutional obligation and compete for power in the federal system. States have a place at the constitutional table. It is the proper role, in fact the obligation and stewardship, of states to be jealous and protective of their role and to fight for balance.

In this quest, state and local leaders face what can best be described as a "dilemma of extremes." At one extreme is the effort currently under way, consisting mostly of complaining, hoping and waiting for more flexibility. Congress has paid lip service, but little has changed. At the other extreme, some activists are calling for states to convene a constitutional convention, a politically unlikely event that is fraught with danger and opposition.

The purpose of this paper is to offer a middle ground, between the two extremes. This plan must be more forceful and assertive than hoping, complaining and waiting, but not so radical as a constitutional convention.

Our tools to create leverage for states fall into three categories: political (in the sense of winning the people's support), legal and constitutional. All three are important. Citizen support for this effort is strong. People feel alienated and disconnected from the federal government. If government is going to make decisions that affect their lives, people want decisions made in their hometown or state capital -- not in Washington, D.C. State leaders recognize they need a formal legal strategy. Too often, important federal court cases have been left to individual states that were inadequately prepared and poorly financed.

Constitutional tools are also crucial. For at least 15 years, respected state and local government organizations like the National Governors' Association, the National Conference of State Legislatures, The Council of State Governments and the U.S. Advisory Commission on Intergovernmental Relations have joined prominent academic and legal scholars in proposing various constitutional amendments that would help restore proper balance between states and the national government.

Using the political, legal and constitutional tools, we believe it is time for states to take the initiative. States must employ a means of communicating their resolve and commitment to Congress and to the American people. It is our job, our responsibility, our stewardship. State leaders must act or be held responsible by history for allowing the brilliant federalist creation of Madison, Jefferson and Hamilton to expire from neglect.

We propose a process that would consolidate and focus state power. This process would culminate in a historic event called *The Conference of the States*. The following is an outline of the process:

- In each state legislature, a Resolution of Participation in The Conference of the States will be filed early in the 1995 legislative session. The resolution authorizes the appointment of a bipartisan, five-person voting delegation of legislators and the governor from each state to attend the Conference.
- When a majority of states have passed Resolutions of Participation, an entity called The Conference of the States will be formed by the delegates from each state. A Steering Committee for the Conference has been formed to propose rules, assuring that each state delegation receives one vote.
- The Conference of the States then will be held, perhaps in a city with historic constitutional significance such as Philadelphia or Annapolis. At the Conference, delegations will consider, refine and vote on ways of correcting the imbalance in the federal system. Any item receiving the support of the state delegations will become part of a new instrument of American democracy called a *States' Petition*. The States' Petition will be, in effect, the action plan emerging from The Conference of the States. It will constitute the highest form of formal communication between the states and the Congress. A States' Petition gains its authority from the sheer power of the process the states follow to initiate it. It is a procedure outside the traditional constitutional process, and has no force of law or binding authority. But it must not be ignored or taken lightly because it symbolizes a test of the states' relevance. Ignoring the Petition would signal to the states an intolerable arrogance on the part of Congress.

- The States' Petition then will be taken back to the states for the approval of each state's legislature. Constitutional amendments included in the Petition will require approval by a super-majority of state legislatures to continue as part of the State's Petition.
- Armed with the final States' Petition, the representatives of each state then will gather in Washington to present the Petition and formally request that Congress respond.

While the Petition would have no force of law and would not be binding on Congress, it is likely that Congress would respond. To ignore the carefully reasoned, formal Petition of America's state legislatures would be unthinkable. Rejection of the Petition would communicate to the people that Congress is unwilling to listen. It would confirm an arrogance that states could not ignore. Rejection also would ignite a national political debate that no candidate for Congress, for president, for governor or for any state legislative race could avoid. The questions of Madison, Jefferson and Hamilton would be asked again: Do we want a government dominated by Washington or a balanced federalist system? The answer to that question is the same today as it was in 1787.

The Conference of the States initiative must be based on some important principles:

- ◆ It must be scrupulously bipartisan;
- ◆ It must seek fundamental, long-term, structural change, as opposed to attempting to resolve the specific issues of the day;
- ◆ It must avoid single-issue causes and proponents. No special-interest groups or individuals can be allowed to co-opt the initiative for their own purposes; and
- ◆ It must concentrate state power and focus national attention on federalism.

The Conference of the States QUESTIONS AND ANSWERS

Who will organize The Conference of the States?

The Conference of the States will be formally organized by governors and delegates appointed by legislative leadership from each participating state. The preliminary work will be overseen by a national steering committee comprised of state elected leaders appointed by The Council of State Governments (CSG), the National Conference of State Legislatures (NCSL), and the National Governors' Association (NGA). CSG, a respected bipartisan organization made up of leaders from all three branches of state government, will be the convener and fiscal agent. The state delegations to The Conference of the States will have final approval of all proposed Conference governance issues and organizational rules.

When will The Conference of the States be held?

It is anticipated that if as many as 26 states pass Resolutions of Participation during the 1995 legislative season, the Conference will be held in the fall of 1995. This would allow a States' Petition to be presented in state legislatures in early 1996, and to Congress later in 1996. If states quickly pass the Resolutions of Participation, this timetable could be accelerated.

Who supports The Conference of the States?

A broad, bipartisan coalition of governors and state legislative leaders from every region of the country has agreed to help plan, organize and participate in The Conference of the States. CSG, NCSL and NGA have all formally endorsed the Conference. Besides governors and state legislators, the coalition of supporters includes other state and local government officials and associations, academics and scholars, and business leaders.

Who will select the participants in the Conference?

The Resolution of Participation, which has been sent to legislatures in every state, provides for five voting delegates from each state. Four of the delegates will be legislators, two from each party and two from each house, appointed by the presiding officers of the houses. The other is the governor. If the governor cannot attend, he or she can appoint a constitutional officer in his/her place. This process will give the Conference 250 voting delegates, assuming every state participates. Each state will have one vote. Each presiding officer also may appoint two legislative alternate delegates, one from each party, who shall vote in the absence of primary delegates. If a state legislature does not pass the Resolution of Participation, a nonvoting delegation from the state may attend the Conference. The states' final ratification of the States' Petition that emerges from the Conference will be the true test of support by states.

What is a States' Petition?

The action plan produced by The Conference of the States will be called a States' Petition, a new instrument in American democracy. The Petition will be presented to each state in the form of a resolution for ratification. If ratified by the legislatures, the petition will be presented to Congress as the will of the states of the Union. Because the Petition will have gone through such a formal and rigorous process of approval and consensus, it should be considered the highest and most serious level of communication by the states to Congress. If ignored by Congress, states will know they must look to other means to bring a better balance to the federal system.

The States' Petition drafted at The Conference of the States will ignite a major political debate, forcing candidates to take positions on federalism issues. The matter of federal/state competition and balance will become a pre-eminent political issue of the day, providing leverage and making states more competitive. The Petition also will provide a rallying point for citizens who are frustrated and who want responsible change. A number of years ago, the Equal Rights Amendment became a national issue around which debate occurred at all levels of government and in every district. While that amendment did not pass, it had an enormous impact on how Americans view gender and equity issues. In the same way, The Conference of the States and the resulting States' Petition will elevate the issue of federalism to a high level of consciousness and debate.

Where will the Conference be held?

There would be historic symbolism in holding the Conference in Annapolis, Md. That is where a group of states held a conference in 1786 that was a precursor to the Constitutional Convention held the next year in Philadelphia. However, the Steering Committee, in consultation with official state delegations, will determine the location.

Does this effort mean that states can stop fighting against unfunded mandates and other such concerns?

Absolutely not. States must use every means to address this issue. The excellent effort by NGA and NCSL to win passage of unfunded mandates legislation should be pursued aggressively. All of these efforts will complement each other. As The Conference of States moves forward, it will motivate Congress to act on these related issues. States must use legislative, legal and constitutional means to restore balance to the system.

How will the Conference be financed?

It is likely that state legislatures will be asked to appropriate a small amount of money from each participating state to pay the actual costs of the Conference.

What could hurt this effort?

Partisanship and special interests' influence are the two factors that could seriously damage the initiative. Bipartisan support is crucial, or the Conference simply will not be successful. And if any special interest group or single-issue organization takes over or unduly influences the process, it will collapse. Supporters must be willing to put aside partisanship and their concerns on specific issues and focus on broad, fundamental, structural, long-term reforms if the effort is to be efficacious. The Conference must not become a forum for pro- or anti-abortion, or pro- or anti-gun control groups that might want amendments of their own. There are hundreds of causes that people would like to address with constitutional amendments. The Conference is not a forum for such discussions. It must remain focused on the fundamental issue of providing leverage and bringing balance to federal/state relationships. Also, the Conference must not attempt to swing the pendulum too far in the other direction by proposing too much authority for the states. A strong national government is still needed.

How will the Conference of the States agenda be limited to structural reform so that it doesn't get bogged down with myriad special interest issues?

Two important ways: (1) The language of the Resolution of Participation limits the Conference to fundamental structural change, and (2) The rules proposed for the Conference must be consistent with the Resolution of Participation in limiting the conference agenda to fundamental long-range reforms.

Is the Conference anything like a Constitutional Convention?

The Conference will be a forum for states to express their will, but it will have no binding authority or force of law. It is the most powerful way for states to express their will to Congress and the American people short of a Constitutional Convention. Even after the States' Petition is ratified by a super-majority of states, it will merely represent the states' wishes. But it is expected that it will have enough power and influence to motivate Congress to act. The Conference of States is not a constitutional convention, but its process will provide more clout than continuing the hoping and complaining that is presently going on.

Is this a Republican plan or a Democratic plan?

The plan has nothing to do with political partisanship. It is not a Republican or a Democrat plan. It builds upon the research and work accomplished over several years by many groups, including the National Governors' Association, the National Conference of State Legislatures, The Council of State Governments and others. It is supported by governors, legislators and other local leaders of both

major political parties. The fact is that political partisanship will kill this effort faster than anything else. Anyone who tries to make this initiative partisan is an enemy of The Conference of the States, not a supporter. Bipartisanship is a cardinal rule that must be adhered to by all who want to be involved. The plan is motivated by much more than political ideology. While balanced competition in the federal system is important for maximum personal liberty, it is also important for reasons of efficiency, cost-effectiveness and global competitiveness.

Where will the proposals come from that will be considered at The Conference of the States?

The Steering Committee will propose rules governing this matter. However, to ensure that reform proposals considered at the Conference have been carefully analyzed, we anticipate that major national organizations of elected officials (NGA, NCSL, CSG, mayors, county leaders, etc.) will be invited to submit proposals. Thus, all proposals will have been scrutinized before being submitted to The Conference of the States.

Will a conference of a few days provide enough time to adequately discuss and approve these important matters?

The Conference process will likely include more than one meeting. An initial meeting to organize the Conference, receive input and proposals, and establish rules and procedures will be necessary. Then, the official Conference will meet later to discuss, refine and pass the proposals.

What is the role of Congress in this initiative?

We anticipate that a delegation from Congress will be invited to participate in discussions at the Conference, but not be allowed to vote.

Has a Conference of the States ever been held before?

It is fascinating to note that the problem we confront today regarding balance in the federal system is similar to what the founding fathers of this country faced more than 200 years ago with regard to the Articles of Confederation -- only just the reverse. Then, the national government was too weak and the states too strong. Today, the national government is too powerful and the states too weak. In both cases, a lack of checks and balances had thrown the system out of kilter. It is important to see how the founding fathers solved the problems of the weak Confederation. Some of what occurred then can help guide us today in properly balancing the federal system.

The 13 states were, in effect, nearly autonomous countries under the Articles of Confederation. States had all the power. The Confederation Congress had little power. The Congress could not require the states to carry out any of its decisions. Every bill that Congress passed had to be approved by nine of the 13 states. There was no national military; no ability to regulate foreign trade or commerce among the states; no ability to resolve arguments over state boundaries.

George Washington, who became increasingly angry during the Revolutionary War at the national government's inability to provide food, clothes and armaments, sadly described the Confederation as a "rope of sand" and observed that "the Confederation appears to me to be a shadow without substance." Something had to be done, but where would the political will come from to strengthen the national government? It would take courageous people of good will to initiate changes.

The first break came at the instigation of Alexander Hamilton, James Madison and the Virginia Legislature. They called for a Conference of States to consider common interests in commercial regulations. Only five states attended that historic meeting in 1786 in Annapolis, Md. But it was clear to them that something fundamental and structural needed to be done to properly balance

federal-state interests. Out of that conference came a report asking that all states send delegates to another meeting in Philadelphia on the second Monday of the following May. Little did anyone know that invitation would be the thunderbolt that would lead to the birth of our government system. That meeting in 1786 in Annapolis provided a precedent for states to come together to resolve problems in the federal system.

What solutions might be proposed at The Conference of the States?

Before this process even takes place, it would be presumptuous of the supporters to suggest what solutions might emerge. However, there exist some good examples of possible solutions in the suggestions of past commissions and task forces that have addressed the issue. A great deal of important research has been done by NGA, NCSL, The Council of State Governments and the U.S. Advisory Commission on Intergovernmental Relations. With regard to constitutional solutions, most of the scholarly thinking over the past two decades has concluded that states should focus on "process amendments" to the Constitution that, over time, would bring a better balance in the system. It would be foolish for any individual or group to attempt to sort out the precise roles of the national and state governments in a constitutional amendment. No one is smart enough to assign specific programs and tasks to one level of government or the other, and make the system balance. Most programs have become such complex combinations of federal, state and local participation, that it would be disruptive and impractical to attempt swift and precise delineations.

Some parties have suggested amending the 10th Amendment to give it strength and teeth in clearly defining the roles of the two levels of government. But that is problematic because the outcomes of future court cases based on the strengthened 10th Amendment would be so unknown. Constitutional lawyers would argue for years over what impact revising the wording of the Tenth Amendment might have. States would be leaving the fate of federalism entirely to the federal courts and the result could be drastic changes in federal-state roles or no changes at all.

A better strategy would be to focus on "process amendments," the results of which would be much more predictable and that would naturally bring about a better balance in the system over a number of years. A number of individuals and task forces have recommended, for example, adding a clause to Article V that would put states on equal footing with the Congress in proposing constitutional amendments. It would provide a more direct method for states to propose constitutional amendments than the unworkable and never-used Constitutional Convention process. The founders clearly intended states to be able to initiate constitutional reform, as well as ratify amendments proposed by the Congress. Under this amendment, three-fourths of state legislatures could propose an amendment to the Constitution that would become valid unless within a two-year period the Congress rejected the amendment by two-thirds votes of both houses. While the Article V amendment would not immediately change federal-state relationships, it would over time help balance the system because the Congress would be respectful of states' ability to propose amendments and would thus be less officious and overbearing and more considerate of the states' equal role in the federal system. It would still be very difficult to amend the Constitution, but states could propose amendments through a mechanism similar to what Congress enjoys today. It would put the states and the Congress on a more equal footing.

Another example of a "process amendment" is one proposed by former Arizona Gov. Bruce Babbitt at an NGA meeting in 1980. It would give states by petition of two-thirds of the legislatures the power to sunset any federal law except those dealing with defense and foreign affairs. Such an amendment would be much more radical than the Article V amendment, but discussion of it at The Conference of States would certainly get the attention of the Congress.

In themselves, these "process amendment" proposals are neutral in that they are procedural and do not change public policy, appropriations or the roles of the levels of government. But they would

change the framework in which public policy is developed, assisting the states in addressing the imbalances of power.

One other possible amendment is worth mentioning. The Council of State Governments and other task forces have recommended that a sentence be added to the 10th Amendment clearly stating that the courts have responsibility to adjudicate the boundaries between national and state authority. Some feel that addition is necessary because the Supreme Court has ruled on two occasions that states and local governments must defend against federal encroachments by lobbying the Congress through the national political process rather than relying on the federal courts to act as "umpire." In other words, the court did not find any special equal constitutional role for the states, but rather treated them like any special interest group that must petition Congress to improve its lot. State leaders believe that states enjoy an equal role with the national government in the federal system and they should not be at the mercy of Congress in federal-state disputes. The amendment would clarify that the courts must act as neutral referees in such disputes.

Those amendments are simply ideas and suggestions that could be considered at The Conference of States, along with others. The authors are confident that the Conference would focus on reasonable, responsible process amendments that would not be overly disruptive or attempt to precisely delineate the role of the levels of government.

The Conference of the States

BACKGROUND INFORMATION

The evolution of federalism: How the federal government became pre-eminent

A 1989 report by a task force of The Council of State Governments says: "One of the virtues of our federalism is its flexibility which, among other things, enables one or another of our constitutional partners to rise to the challenges of particular moments in our history. So long as the challenges are met and our federalism is brought back into balance on a higher plane, then our federal republic is strengthened by this dynamism. However, when the challenges are not met adequately, and when one constitutional partner becomes so pre-eminent as to begin to endanger the constitutional integrity of the other partners, then our federalism is placed in jeopardy."

There is no question that the federal government has stepped forward at crucial times in the history of this country -- when states were unwilling, unable or slow to act -- to address important problems. In the natural and intended competition that exists among branches and levels of government, when a need arises or a power vacuum exists, it will be filled by whatever branch or level rises to the occasion. Citizens during the Progressive Era sought major social and economic reforms. States were slow to respond, so reforms occurred at the national level, led by the presidencies of Republican Theodore Roosevelt and Democrat Woodrow Wilson. State primacy was eroded. Industry misconduct then prompted unprecedented national intervention in economic affairs and a new willingness by the American people to look to Washington, rather than to state capitals, for protection against domestic threats to health and safety.

Any last resistance to an expanding national role was overwhelmed by President Franklin D. Roosevelt's vast responses to the Great Depression and World War II. National dollars pumped life into the economy and states surrendered autonomy in exchange for assistance. The states' reluctance to act on environmental regulation and civil rights matters further allowed the national government to usurp state prerogatives. President Lyndon Johnson's Great Society constituted another giant leap in the growth of the federal government. The states did not resist, and the age of fiscal federalism began. Governors and mayors were happy to receive a flood of federal dollars, even if accompanied by burdensome paperwork and regulation. All of this happened in relatively small increments and for

seemingly good purposes. In many cases, it was the fault of state and local governments, which did not respond promptly to serious problems or were willing to give up autonomy for federal dollars.

Today, however, the dynamics of society – and of government and our federal system – have changed dramatically. The Industrial Age of centralized authority and top-down management has ended and we are entering a new era, the Information Age, in which small, flexible, autonomous units, whether business or government, will out-compete and outperform their bureaucratic counterparts. Today, it is state and local governments that are meeting citizen needs, that are providing innovative and workable solutions to problems of health care, social services, education, crime and the environment. In almost every case, these innovative programs are difficult to create and implement because of federal regulatory barriers and constraints. Successful health care and welfare reform programs require dozens of waivers from federal regulations. With true freedom and flexibility – and by leaving funding resources at state levels – states would move much more rapidly to solve society's pressing problems. Today, it is the federal government that is bankrupt, financially and politically. It is the federal government where gridlock occurs, where there is much talk and little action, where one-size-fits-all programs and over-regulation don't fit this nation's diversity. It is a bloated and over-extended – yet unresponsive – federal bureaucracy that has left citizens surly and cynical, distrustful of government and disgusted with Washington. National survey research shows that unprecedented numbers of people feel impotent, unable to influence a government far from home that no longer reflects their interests, that hurts more than helps. Seventy percent of respondents to a Times Mirror survey said dealing with a federal bureaucracy is not worth the trouble. Two-thirds of Americans said Washington needs new leaders. Eighty-three percent said elected officials in Washington "lose touch with the people pretty quickly."

While the federal government was pre-eminent and rose to the challenges of the Industrial Age, state and local governments are ready to rise to the challenges of this new era in history, the Information Age, when diversity, experimentation and local control are needed. States will bring our federalism back into balance on a higher plane, for a more just, clean, safer and prosperous America.

"Balanced competition" in the federal system

In the great debate of the Constitutional Convention in 1787, two issues were of paramount importance: 1) large states vs. small states; and 2) national government vs. state authority. To balance the interests of large and small states, the delegates produced a brilliant solution, today referred to as the Great Compromise. It gave each state equal representation in the U.S. Senate, with representation in the House determined by population. To balance power between the states and the national government, and to prevent domination by any branch of government, the Constitution created what Madison called a "compound republic," with power split between two levels – national and state – and then split again among three branches of government at both levels. "Hence, a double security arises to the rights of the people," said Madison. The new Constitution, along with the Bill of Rights, gave superior power in limited areas to the national government, but reserved all other authority to the states. It intended to keep most everyday governmental functions at the level closest to the people.

The Constitution established a balanced competition among levels and branches of government. The people are protected, and the best public policy emerges, only when those levels and branches are willing and able to compete for power, when checks and balances exist. If any one level or branch of government is unable to compete, power will be concentrated improperly and the rights of the people will be endangered. The Articles of Confederation failed because power was concentrated in states and the national government was unable to compete. The 10th Amendment reserved all nondelegated and nonprohibited power to the states or to the people, clearly reserving a major role for state and local officials. The fact that originally state legislatures elected U.S. senators was

another clear indication that states were to be major players and their interests well represented at the federal level.

As we know so well, over many years the original checks and balances created by the founders have been eroded and the national government has consolidated power and authority, while states have lost power and their ability to compete. The system is simply not working. States are no longer competitive forces able to act as a check and balance to the federal government. Instead of being a full-fledged counterbalance to federal dominance, states are being treated and viewed like administrative units. The protections offered by the Miracle of Philadelphia are significantly eroded. Thus, the federal government is running huge deficits, is over-regulating states and citizens, is imposing one-size-fits-all requirements, is out-of-touch with local concerns, and is engaging in the new dishonesty in government – unfunded mandates. The solution is to restore competition and checks and balances in the system. States must obtain more leverage so they can compete for power. The Conference of the States is the best means to obtain that leverage.

How this effort differs from past movements like "States' Rights" and "New Federalism"

This initiative is much different than the failed efforts of the past. The states' rights movement became focused narrowly on specific issues and became a threat to civil rights and environmental progress. Under the banner of states' rights, some civil rights were trampled and some radical positions were taken. States' rights failed to acknowledge the need for a strong central government to coordinate state activity on major national issues, and it gained a reputation as being radical and far-out. New Federalism failed because it was not long-term reform. It amounted mostly to the federal government providing funding for states in block grants with some flexibility. New Federalism caused states to ask the wrong question: "Is this program funded?" rather than, "Is this the proper role of federal and state governments?" Later, the federal budget became tight, and some of the money dried up, leaving states to administer many programs without adequate funding.

By contrast, The Conference of the States effort seeks to use a reasoned, responsible process to find the proper federal-state balance. It focuses on fundamental, structural, long-term, rebalancing, not on specific issues or emotional hot buttons. It does not seek to determine the precise roles of state and national governments, but instead relies on a changed framework – the marketplace – to slowly sort out the roles over a period of years. This initiative also involves a much more powerful process to create change, bringing together leaders from every state in a bipartisan fashion. No other past federalism initiative has attempted to use such a structured and inclusive process to win consensus.

Timing is critical

The timing for this initiative is right, and it would be a mistake to postpone the Conference beyond 1995. We have just finished a highly partisan political year that has left the citizenry cynical and distrustful of big government. The time to move forward is now. In 1996 we will begin another highly partisan political year that will include a presidential election. That campaign will make it almost impossible to keep the effort bipartisan and to achieve consensus. Thus, the year 1995 is a window of opportunity that we must not miss. There exists plenty of time for this initiative to receive consideration and scrutiny in every state in the country.

How centralization at the federal level hurts states

As the federal government has become pre-eminent, Congress and the bureaucracy have imposed innumerable regulations and mandates that stifle states. Unfunded federal mandates rob states of

innovation capital. They remove incentives and add barriers for states to fulfill their important role as "laboratories of democracy," as described by Supreme Court Justice Louis Brandeis: "There must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs ... Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Today, states are doing their best to experiment, and they have come up with innovative solutions to problems. But thanks to myriad federal regulations in every area of government, there is not enough experimentation. States could be far more innovative and find more solutions with more freedom.

Another casualty of federal uniformity and one-size-fits-all regulations is values in government. Many politicians are now talking about values, alarmed at the increasing numbers of fatherless children, children giving birth to children, youth violence and structural welfare dependency. But it is very difficult to insert values and standards in public policy when that policy comes from Washington. Public policy from Washington is almost always values-neutral, devoid of values or reflects the values of the lowest common denominator. It can't be any other way because Washington policy applies equally to the smallest rural town and the biggest big city. Only when public policy is formed at state and local levels can local values and standards be applied. Federal regulations and guidelines preclude the application of values and standards in almost every area of governance.

How states can best compete for power

It is natural and proper for states to compete for power in the federal system. Few people, even many federal officials, disagree that the system is out of balance. It needs fixing. Without a Conference, states truly face a "dilemma of extremes." On one hand, they can go on hoping and complaining, which just hasn't worked. On the other hand, they can call a Constitutional Convention, which is radical and has proven unworkable. The Conference offers a middle ground. It is based on sound principles and requires the support of a super-majority of state legislatures to be successful. It is reasonable and makes sense. It is not radical or extreme. It provides states a powerful tool that they did not have to this point. Even if no amendment is ever adopted, the Conference will have the effect of elevating federalism to a new level of national consciousness. It will have salutary effects, whatever stage it gets to.

Individual states constitute good government because they represent power dispersed through 50 separate entities. That keeps states close to the people and responsive to their concerns. While that quality has virtue as a principle of governance, it makes competing with a monolithic force like the federal government difficult. State power is dispersed. Federal power is concentrated. Dispersed power is at a disadvantage when competing with concentrated power. In order to challenge and compete for their rightful role, states require a rallying event, a means of consolidating their power, showcasing the collective will of the states, and taking collective action. It should be the middle ground between the two extremes ... a process less disruptive than calling a constitutional convention, but one that is more than complaining, hoping and waiting. It should demand results and response and should elevate federalism to a new level of national consciousness. It should be a call to action.

The proper federal/state balance

Our system of federalism was skillfully crafted by the far-sighted founders of this nation to protect individual rights. A system in which states were too powerful and the national government too weak would be just as bad (or worse) than the situation we find ourselves in today. Balanced federalism has provided the framework within which generations of Americans have prospered and enjoyed freedom. For many decades, balanced federalism provided government close to home,

increasing flexibility and innovation in public policy. It has supported the diversity that has made this nation great. "Our federalism," says a 1989 report by a task force of The Council of State Governments, "is a precious form of government that has stood the test of time against the twin perils of anarchy and tyranny which have heretofore dominated the history of mankind."

The supporters of this plan believe in a reasonably strong central government, as outlined in the Constitution. This effort is not an attempt to destroy the federal government or to make states the dominant players in our system. The intent is to restore necessary checks and balances, with balanced competition — a level playing field — between the states and federal government. In a balanced system, state and federal leaders will still compete and disagree with each other. Each level will still try to address problems. There will still be discussions, negotiations and compromise on a wide range of issues. But the negotiations will be peer-to-peer, rather than master-to-servant. And discussions will focus not just on "Is it a good program?", but also, "Is it a state or national function?" That's what balanced competition is all about. Even with aggressive state action and some structural change, it will take a number of years for proper balance to be restored. There is no quick fix or silver bullet. Sixty years of centralization will not be undone overnight.

A new era in society with new governance needs

The present arrangement of centralized control at the federal level, with programs administered by huge bureaucracies, is not positioning our country for growth and prosperity in the next century. It is somewhat ironic and is an enormous tribute to the inspired work of our country's founders that the form of government they instituted more than 200 years ago — a national government with limited, but pre-eminent duties, and state and local governments charged with all other functions — remains the best form of government in the new high-tech era we are entering. Our country will be well-served by a return to that form of government. We might call it "Information Age Federalism."

Successful organizations everywhere are de-centralizing and downsizing. Bureaucracies are being dismantled across the world. Futurist John Naisbitt said, "In one of the major turnarounds in my lifetime, we have moved from 'economies of scale' to 'diseconomies of scale;' from bigger is better to bigger is inefficient, costly, wastefully bureaucratic, inflexible and now, disastrous" (John Naisbitt, Global Paradox William Morrow & Company, Inc., New York 1994). He added that the almost perfect metaphor for the movement from bureaucracies of every kind to small, autonomous units, is the shift from mainframe computers to PCs, networked together. "Whether president or CEO, if you are an old mainframe thinker, you are no longer relevant."

Centralized, bureaucratized government — one huge mainframe — is obsolete. In modern government, the deployment of power must shift from vertical to horizontal; from hierarchy to networking; from central government to states and citizens. As Naisbitt says, politics must begin to re-emerge as the engine of individualism.

Futurist Alvin Toffler said, "The diversity and complexity of Third Wave (Information Age) society blow the circuits of highly centralized organizations. Concentrating power at the top was, and still is, a classic Second Wave (Industrial Age) way to try to solve problems" (Alvin Toffler, Creating a New Civilization: The Politics of the Third Wave The Progress & Freedom Foundation, Washington, D.C., 1994). Overcentralization puts too many decisional eggs in one basket, said Toffler. The result is decision overload. "Thus, in Washington today Congress and the White House are racing, trying to make too many decisions about too many fast-changing, complex things they know less and less about." Leaders and citizens at local levels have better information and can respond faster to both crises and opportunities. In this necessary decentralizing effort, Toffler said, "The private sector is charging ahead on a supersonic jet. The public sector hasn't even unloaded its bags at the airport yet." It is necessary, Toffler said, to "move a vast amount of decision-making downward from the national level. There is no possibility of restoring sense, order and management

efficiency to government without a substantial devolution of power. We need to divide the decision load and shift a significant part of it downward."

It is not possible, Toffler said, for a society to de-massify economic activity, communications and other crucial processes without also being compelled to decentralize government decision-making as well. However, "nowhere is obsolescence more advanced or more dangerous than in our political life. And in no field today do we find less imagination, less experimentation, less willingness to contemplate fundamental change. The decisive struggle today is between those who try to prop up and preserve industrial society and those who are ready to advance beyond it. This is the super-struggle for tomorrow."

But even as the world's successful business leaders decentralize and move power to the lowest possible point in the organization, our national government grows ever bigger and more bureaucratic. It is outdated and old-fashioned. It is not suited for the fast-paced, high-tech, global marketplace we are entering.

Conclusion

This process is reasoned; it is careful. It relies on the good sense and patriotism of governors, state legislators and local government officials from across this country. This effort is bipartisan and free from special-interest group influence.

The process outlined in this paper gives state and local leaders a plan. It gives them a "big gear" to ultimately solve many of the lesser problems they encounter with the federal government. They can do more than just complain and talk. They can act. They are the only ones who will work to restore balanced competition in our federal system. Congress never will. The bureaucracy never will. The courts never will. The president never will. But state leaders working closely with their citizens will.

REVIEW & OUTLOOK

Federalism, Too

The eyes of the nation will be on the new GOP Congress when it opens for business tomorrow. However, as this drama unfolds, bear in mind that for all the focus on Washington, redistributing power and authority away from Washington is the goal of many of this new generation of Republicans. Both Newt Gingrich and Bill Bennett have urged the freshmen House Members to read the Federalist Papers to gain a better understanding of the proper balance between the federal and state governments. The nation's governors, however, aren't waiting for the Members to crack that book.

Led by Republican Mike Leavitt of Utah and Democrat Ben Nelson of Nebraska, the governors are talking about convening a "Conference of the States," which would debate specific ideas on how to correct the imbalance in power between Washington and the states.

The conference would then formally petition Congress to vote on its suggestions. While the petition wouldn't be binding, Congress would likely respond. To reject a reasoned appeal from the states would send a message that Congress is unwilling to listen. Such arrogance would become an instant political issue in every state in the 1996 elections.

How would the conference work? First, each legislature would designate four legislators and the governor as delegates. When a majority of states agreed to participate, the conference would be convened for a limited debate on long-term, structural changes that would enhance federalism. Specific proposals would be submitted in the form of a "States' Petition."

Among the ideas that Congress might be asked to consider are some Constitutional amendments. The Supreme Court has ruled that states and local governments must defend against federal encroachments by lobbying Congress rather than relying on the federal courts to protect their rights. The Court saw the states as just another special interest group, not as a co-equal Constitutional partner. A sentence clarifying the Court's duties could be added to the 10th Amendment, which reserves power not delegated to the federal government to the states or the people.

Another possible amendment was proposed in 1950 by then-Governor

Bruce Babbitt of Arizona. He suggested giving two-thirds of state legislatures the power to sunset any federal law, except those dealing with defense and foreign policy. Mr. Babbitt is now President Clinton's Interior Secretary, and is under fire for overstepping the boundaries of federal power. It would be interesting to know if he still has the concerns over that power he expressed as a governor.

Another amendment in the air would add a clause to Article V of the Constitution and give the states another way to propose Constitutional amendments other than the unworkable and never-used Constitutional convention. Three-fourths of the states could be given the power to propose an amendment to the Constitution that would become valid within two years unless Congress rejected it.

Even governors who have substantive reservations about such amendments are nonetheless enthusiastic about a Conference of the States. "We need a national debate on the balance of powers," Governor-elect Tom Ridge of Pennsylvania told us recently. "I served in Congress for 12 years, and we trod on the rights of states every day. That will change only when they speak with a united voice."

States' rights earned a bad reputation when they were used to justify a lack of progress on civil rights. Today such concerns are much less valid, but states continue to be restricted. In an earlier era, states seemed "laboratories of democracy" to Supreme Court Justice Louis Brandeis. "Denial of the right to experiment may be fraught with serious consequences to the nation," he warned some 60 years ago. "A single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."

Several states are serious about holding a Conference of the States, and if all goes smoothly it could be held as early as the fall of 1995. We're well aware of the long-stated dangers of opening up this subject, but that caution has to be set against the extraordinary encroachments Congress made against the states over the past 30 years. No such imbalance was intended 200 years ago. The new Congress should be open to efforts to smooth the transfer of public responsibilities out of Washington.

David S. Broder

Federalism In a State of Ferment

At its simplest, it's three women representing local, state and national government forging a compact to let programs be judged by human results, not bureaucratic formulas. At a deeper level, it's a law that would try to stop Washington politicians from handing other people the bill for ideas dreamed up on the Potomac. At its most radical, it could bring back to Philadelphia next year a modern-day version of the Constitutional Convention of 1787.

All these things happening at once is a sure sign that federalism issues are back on the national agenda in a serious way for the first time in a dozen years. In 1982, President Reagan proposed a "New Federalism" initiative that he hoped would start a systematic devolution of power from Washington to the states.

That proposal went nowhere. But last week, two former governors, Lamar Alexander (R) of Tennessee and Sen. Bob Graham (D-Fla.), were independently promoting variants on the Reagan plan. Both see it as a way to respond to the anti-Washington message of the 1994 election. Alexander has put the proposal at the center of his campaign for the Republican presidential nomination. Graham argues that an "aggressive" effort to decentralize programs "is the best road for the president to take back to being the centrist Bill Clinton of the '92 campaign."

The administration is trying. At the beginning of last week, Vice President Gore officiated at a cross-country satellite conference in which Secretary of Health and Human Services Donna Shalala signed an agreement with Oregon Gov. Barbara Roberts, Portland Mayor Vera Katz and others to ease federal regulations on some programs and accept state-defined "benchmarks" as a gauge of success.

But even as such flexibility is added to the existing system, the federalism debate is moving boldly on to much broader and more basic questions.

A bill to bar the federal government from imposing any mandate for which it does not provide funds is the No. 1 item on the 1995 agenda of the new Republican Senate. Early passage by Congress is likely.

On a second front, Republican governors met at midweek with the incoming Republican leaders of the House and Senate, seeking a guarantee that their budgets will not be victimized as Congress drives to reduce federal spending. The governors know that the proposed balanced-budget constitutional amendment could be a disaster for the states if some future Congress decides to end red ink in Washington by shifting costs downward to states and cities. On a bipartisan basis, they made that same point to President Clinton—and received a sympathetic hearing.

The boldest step of all—which has drawn amazingly little notice—is the effort endorsed last weekend by the Council of State Governments to call a Conference of the States—first cousin to a Constitutional Convention—next year.

Utah Gov. Michael O. Leavitt (R), its chief promoter, and his partner, Nebraska Gov. Ben Nelson (D), say the conference would develop a package of statutes and constitutional amendments to "correct the balance" between the states and Washington.

The call for the conference—soon to be endorsed by the leadership of the National Governors' Association and the National Conference of State Legislatures—says that "over many years, the federal government has dramatically expanded the scope of its power and pre-empted state government authority and increasingly has treated states as administrative subdivisions or as special-interest groups, rather than as coequal partners."

Instead of complaining, the governors and legislatures want to come to Washington with the power to bargain. The project is on a fast track. Leavitt and Nelson hope to see legislatures approve resolutions of participation in January and name their bipartisan delegations of governors and legislative leaders. They want conference sessions in late spring, summer and the autumn of 1995, with the final session planned for Philadelphia's Independence Hall, site of the original Constitutional Convention. There, they hope to approve a States' Petition to Congress, which could be voted on by individual legislatures early in 1996 and presented in Washington, so it becomes a major point of debate in the presidential and congressional election that year.

The sponsors are thinking of bold, even radical, steps to "correct" what they see as the imbalance of power that gives Congress and the federal courts domination over state government. They talk of allowing states to initiate constitutional amendments, rather than simply ratifying them. They contemplate "sunsetting" or, in effect, nullifying federal statutes by action of two-thirds of the states.

They know this whole proposal will stir up controversy. "What could be better," Leavitt asks, "than to make the 1996 political year the occasion for another great debate on the issues that fascinated Jefferson and Madison

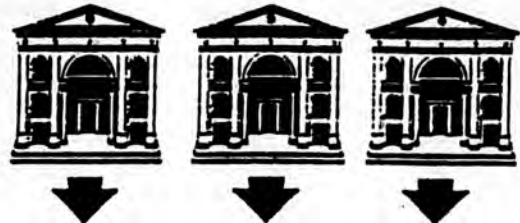
Conference of the States

Proposed by the Council of State Governments

Pictorial Summary

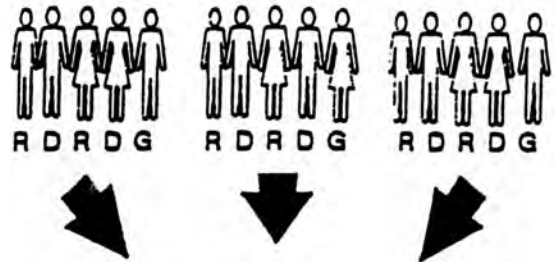
Step 1:

- Each state legislature adopts a Resolution of Participation
- Each legislature appoints a bipartisan delegation of four legislators and the Governor to attend the Conference of the States



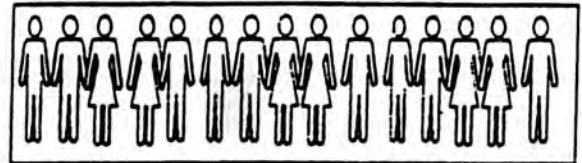
Step 2:

- When a significant majority of states have passed the Resolution of Participation, the Council of State Governments will convene bipartisan incorporators appointed by legislative leadership in the participating states



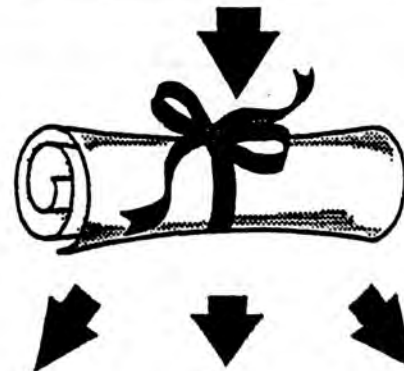
Step 3:

- The Conference of the States is held
- Solutions to restore balance are discussed, refined and voted upon



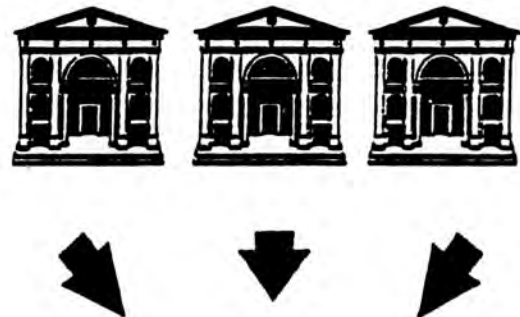
Step 4:

- The product of the Conference of States is a document, a new instrument in American democracy called a "States' Petition"
- The States' Petition constitutes the highest form of communication between the states and Congress



Step 5:

- The States' Petition is carried back by delegates to their respective state legislatures for approval.
- States' Petition items which involve constitutional amendments require approval of a constitutional majority of state legislatures



Step 6:

- The States' Petition is presented to Congress
- Ignoring a constitutional majority of states would signal an arrogance on the part of Congress—an arrogance the States and the American people would find intolerable



UPDATED RESOLUTION LANGUAGE

First paragraph reflects changes in delegation size

RESOLUTION OF PARTICIPATION IN A CONFERENCE OF THE STATES

[Whereas clauses to be provided by individual states]

The following language needs to be incorporated into each state's resolution:

Now, Therefore, Be It Resolved:

That the following be adopted:

(1) A delegation not to exceed seven voting persons from the State of _____, shall be appointed to represent the State of _____ at a Conference of the States for the purposes described in Section (2) to be convened as provided in Section (3). The delegation shall not exceed seven voting persons as follows: (a) the governor or, if the governor does not wish to be a member of the delegation then a constitutional officer selected by the governor; and (b) a number of legislators not to exceed six; three from each house, of which at least one shall be from each major political party selected by the presiding officer of that house. Each presiding officer may designate two alternate legislator delegates, one from each party, who have voting privileges in the absence of the primary delegates.

(2) The delegates of The Conference of the States will propose, debate and vote on elements of an action plan to restore checks and balances between states and the national government. Measures agreed upon will be formalized in an instrument called a States' Petition and returned to the delegation's state for consideration by the entire legislature.

(3) The Conference of the States shall be convened under the §501(c)3 auspices of The Council of State Governments in cooperation with the National Governors' Association and the National Conference of State Legislatures no later than 270 days after at least 26 legislatures adopt a resolution of participation.

(4) Prior to the official convening of The Conference of the States the steering committee will draft:

- (a) the governance structure and procedural rules for the Conference;
- (b) the process for receiving rebalancing proposals; and
- (c) the financial and administrative functions of the Conference, including The Council of State Governments as fiscal agent.

(5) The bylaws shall:

- (a) conform to the provisions of this resolution;
- (b) specify that each state delegation shall have one vote at the Conference; and
- (c) specify that the Conference agenda be limited to fundamental, structural, long-term reforms.

(6) Upon the official convening of The Conference of the States, the State delegations will vote upon and approve the Conference governing structure, operating rules and bylaws.

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 28, 1995

SUBJECT: Conference of the States (HJR 20)

TO: Representative Barnes, Chair House Special Committee on World Trade and State/Federal Relations

FROM: Tamara Brandt Cook *TBC*
Director of Legal Services

HJR 20 calls for the convening of a Conference of the States under the auspices of the Council of State Governments and for the appointment of a delegation to represent Alaska at that conference. You have provided me with a copy of an "Alert" and asked me to respond. As I understand the contents of the "Alert," it is asserted that the Conference of the States will amount to Constitutional Convention.

Under Article V of the United State Constitution, a constitutional convention is called by Congress "... on the application of the legislatures of two thirds of the several states. . . ." HJR 20 itself does not call for a constitutional convention. It is not even addressed to Congress. While it is possible that the question of trying to persuade state legislatures to call for a constitutional convention could be considered during the Conference of the States, the conference itself does not amount to a constitutional convention because it was not called by Congress and the required number of states have not applied to Congress for a convention.

TBC:klb
95-105.klb

(Adopted: January 11, 1995)

**The American Legislative Exchange Council
Conference of the States Endorsement Resolution**

WHEREAS, The 10th Amendment to the Constitution of the United States reads as follows:
"The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" and

WHEREAS, The 10th Amendment defines the total scope of federal power as being that specifically granted by the United States Constitution and no more; and

WHEREAS, The scope of federal power defined by the 10th Amendment means that the federal government was created by the states, with specifically delineated powers; and

WHEREAS, State authority has been eroded primarily by four developments: (1) Federal assumption of powers reserved to the states under the 10th Amendment; (2) Interpretations of the "commerce clause" which go beyond any reasonable conception, and in effect authorize federal pre-emption with respect to any issue for which some faint or circuitous connection can be made to interstate commerce; (3) By threat of withholding, withdrawing, or diverting federal funds to coerce compliance with federal policies; (4) Failure on the part of the states to challenge federal intrusions and by endorsing federal usurpation by seeking additional federal funding and acceptance of federal delegation of power; and

WHEREAS, Numerous resolutions have been forwarded to the federal government by individual states with little response or result from Congress or the U.S. Government; and

WHEREAS, A combined effort of the fifty state legislatures would communicate to Congress and the U.S. Government the broad opposition that exists to federal usurpation of state authority and also, provide an opportunity for states legislators to collectively propose constructive remedies to restore state sovereignty under the 10th Amendment to the U.S. Constitution.

 **NOW THEREFORE BE IT RESOLVED**, that the American Legislative Exchange Council (ALEC), a membership organization representing both Republican and Democratic state legislators, endorses the concept of the *Conference of the States*.

BE IT FURTHER RESOLVED, that copies of this resolution be distributed to the ALEC membership and the *Conference of the States* Steering Committee members.

Position Statement

HJR 20

The Knowles Administration supports House Joint Resolution 20, relating to unfunded federal mandates and the Conference of the States. The Conference of the States, which is supported by this resolution, has received broad interest and support among the states as a forum for addressing the balance of state and federal powers.

For Alaska, one of the key issues in our relationship with the federal government is not just the funding of federal mandates, but also the flexibility to tailor our government services to meet the unique needs of our state. In many areas — including welfare reform, education, environmental protection and health care — Alaska could benefit from greater freedom to design our own solutions, rather than being required to follow rigid requirements dictated by Washington.

The Administration looks forward to working with the Legislature in presenting a unified Alaska position on the balance of state and federal powers at the Conference of the States.

Ban on unfunded mandates is first step

By TOM FINK

The U.S. House and the U.S. Senate have each passed their own versions of the unfunded mandates act. The versions aren't much different. In the normal course of events, the differences will be reconciled in a final bill and signed by the president before the end of the month.

If it turns out to be the first step towards a prohibition of unfunded mandates by the federal government, the unfunded mandates act will drastically change and improve our government structure.

This legislation is a big step forward, but by itself, it does not go far enough.

The bills passed by the House and Senate are quite limited. They only affect future legislation and leave all the existing unfunded mandates in force.

The legislation provides that if a federal government agency estimate of the cost of any proposed federal law exceeds \$50 million to state and local governments, the law will not be effective unless there is a separate vote by Congress imposing the additional costs.

Further, the final bill will end up exempting some federal laws from the unfunded mandates prohibition, such as the American Disabilities Act.

I was very much involved in the unfunded mandate campaign as mayor of Anchorage. Our proposal and the one basically supported by the U.S. Conference of Mayors was very simple. It said that any federal law which places a cost on the state or local government can be ignored by state and local government unless it is fully funded by the federal government.

We, as mayors, argued the fairness concept. Congress shouldn't be able to say it is doing good things while making subordinate governments pay the cost.

We said there was no accountability on the part of Congress from such actions. We said that many federal laws apply very well in some regions of the country, but don't apply in other regions.

We said these laws made local government spend tax money on lower priorities.

To the extent that we have a federal law or constitutional amendment denying the federal government the power to impose costly legislation on state and local



Fink

governments, the power of governance will shift to local and state governments.

The federal government certainly does not have the money to pay for all the laws that it passes. If Congress attempted to increase federal taxes to the level necessary to fund those mandates, the public would elect a new Congress because the increase would be so large.

Some people in the United States greatly fear unfunded mandates legislation. These generally are people who believe that government has all the answers. These are the people who feel that the citizens will not make good decisions on a local or state basis. They really believe that people only make decisions based upon what is in the best interest of society as a whole.

These are people who have been able to change the structure of our government through the use of the courts and our federal Congress. They have successfully promoted federal laws that do not represent the will of the public in general.

If the federal government can't pass laws without funding them, we will approach a much more representative form of government.

Anyone who has been in government



knows that local government is most responsive to the wishes of its constituency. The state government is the next most responsive. The federal government is the least responsive.

Congress is so far away, we can't track what the members are doing. We just cannot understand why federal lawmakers pass the laws that they do. When we quiz them, we are given examples where in they voted on "our side."

It is only occasionally, such as in the last November elections, that the public

gets so fed up that it creates a huge upheaval. The public said in November, *inter alia*, we don't want Congress deciding what we should spend our

money on. Let local and state government decide for what our taxes are spent. We have more control over our state and municipal governments.

To the extent that you have any influence over your senators or your congressman, please encourage them to approve in final form an unfunded mandate bill that prohibits all unfunded mandates.

Businessman Tom Fink is a former speaker of the Alaska House and mayor of Anchorage.

Anchorage Daily News 3/19/95

Let's join states in effort to alter Constitution

The latest plot to overthrow the Constitution of the United States involves all 50 of the nation's governors, spearheaded by Republican Mike Leavitt, governor of the hotbed of Bolshevism — Utah. In Alaska, the leading conspirator is the notoriously left-wing subversive, Rep. Ramona Barnes.

On a vote of 33 to 6, the state House recently passed HJR20, sponsored by Barnes, East Anchorage Trotskyite Eldon Mulder and fellow travelers Ben Grussendorf of Sitka and Richard Foster of Nome. The bill calls for Alaska's participation in a Conference of the States.

At the conference, governors and delegations of state legislatures will meet to draft a petition to the U.S. Congress. Promoters of this event want to pressure Congress to pass an amendment to the U.S. Constitution that would set up a new way to amend it. The new procedure would allow state legislatures to propose amendments, giving Congress the power to ratify. This essentially reverses the method by which all amendments have been approved up to now.

According to the John Birch Society, the Conference of the States is a conspiracy. Once assembled, the governors and state legislators will transform themselves into a constitutional convention, a la



**FRITZ
PETTYJOHN**

Philadelphia in 1787. They will demand that Congress recognize their status and will then proceed to repeal the Bill of Rights, make atheism the state religion, replace the Goddess of Liberty with Madonna, etc.

The courts will not intervene because in the past they have given Congress wide latitude in determining if, in fact, constitutional amendments have been ratified properly by the states.

To allay such fears, our state House amended HJR20 to specifically state that Alaska's participation in the conference is in no way to be construed as calling for a constitutional convention.

No matter! Consumed with a lust for power, the delegates to the Conference of the States will, we are assured, ignore all such constraints in their rush to revolutionize our government and society.

If you think this is all silly, you're right — but it may not be without consequence.

About 20 years ago, a group of people led by Lew Uhler of California concluded Congress was eventually going to bankrupt this country. To stop it, a balanced budget amendment was needed. But how to force Congress to pass such an amendment?

The answer was to be Article V petitions for a constitutional convention. If two-thirds, or 34, of the state legislatures pass resolutions demanding a constitutional convention, Congress would be forced to issue such a call.

The Uhler strategy was not to actually have such a convention. Rather, the threat of a convention would be used to pressure Congress to pass a balanced budget amendment.

It almost worked. By 1982, about 30 states had passed Article V resolutions and momentum for a balanced budget amendment was building. Congress came within a few votes of passing it, so the campaign for more Article V resolutions continued. Led by the late Democratic Sen. Bob Ziegler of Ketchikan, Alaska became the 32nd state to pass one. Congress was getting nervous, and a balanced budget amendment seemed within grasp. Missouri, as I recall, was poised to be state No. 33. All was going

according to plan.

And then along came Phyllis Schlafly and the Birchers. They decided the campaign for the balanced budget amendment was actually a plot to hold a constitutional convention at which American sovereignty would be ceded to the Soviet Union. A few credulous state legislators in Alabama and Florida were talked into repealing those state's Article V resolutions (in league with liberal Democrats who simply opposed a balanced budget amendment).

The tide was turned. Instead of having 32, going on 33, states calling for a limited convention, Uhler was reduced to 30. The pressure was off Congress and was never applied again. The balanced budget amendment was put on the back burner, and here we are, a couple of trillion dollars of debt later.

The lesson here is that the politics of hallucination is more than merely amusing.

The idea of a Conference of the States is timely, fully in keeping with the Excellent Great American Devolution (EGAD, to Ms. Schlafly). Let's hope our state Senate follows the House in getting the Great Land involved.

□ Fritz Pettyjohn, an Anchorage lawyer, served in both the state Senate and House of Representatives.

THOMAS N. SCARBOROUGH
1676 TAROKA DRIVE
FAIRBANKS, ALASKA 99709
(907) 479-3412

RECEIVED
MAR 10 1995

March 8, 1995

Representative Ramona Barnes
State Capitol - Room 403
Juneau, Alaska 99801-1182

Re: Conference of the States

Dear Rep. Barnes:

Attached is information concerning the Conference of the States. A quick review will show that this is a back door method by those supporting ONE WORLD GOVERNMENT to amend our US Constitution. The Conference of the States is a 501C3 non profit corporation. I do not think there is any legal way for a corporation of any kind that should be attempting to reorganize the relationship between the Federal Government and the States.

I recommend that CSHJR 20 and HJR 21 both be placed in file 13. There is no way that we can allow our US Constitution to be destroyed by Gov. Mike Leavitt.

I suggest that the Unfunded Mandates issue be handled much in the same manner as Colorado and Montana. This should be accomplished by legislation and not a resolution.

I have access to considerable resources on the above issues. Please let me know if I can be of help to you.

Sincerely,


Thomas N. Scarborough

P.S. I am not a member of the John Birch Society, but they got the correct message.

Alert★Alert★Alert★Alert★Alert

Fact sheet for State Legislators regarding a resolution promoting a "Conference of the States"

The Council of State Governments (CSG), a private organization, and Utah's Governor Mike Leavitt are promoting a resolution calling for a national "Conference of the States."

PLEASE STUDY THE MEASURE CAREFULLY AND BEWARE ITS DANGERS!

Its passage would authorize a series of three extraordinary developments:

1. The formal calling of a convocation of the states is tantamount to, and in possession of, the process essential to a constitutional convention.
2. The formalized appointment of certified delegates empowered to vote at this federal convocation.
3. Resolutions which become legal instruments authorizing the delegates to deliberate, propose, and adopt long-term fundamental structural changes in the U.S. Constitution.

To put it more bluntly, the proposed resolution, if passed by at least 26 state legislatures, would concentrate sovereign powers in one place under the same revolutionary force that created our federal government in 1787!

It would not become merely an informal discussion of the state-federal relationship, or simply a forum for asserting the 10th Amendment rights of the states. This resolution would concentrate the sovereign powers of the people, through their state-appointed delegates, in a de facto constitutional convention — *without actually calling it one.*

Although there is need for the states to handle their own affairs without federal intervention, there is absolutely no popular support for a constitutional convention.

Passage of this resolution would amount to a misrepresentation of the people in your state. They have not prevailed upon you to amend the basic law of the land. Rather, most people who even know about it see the "conference" as only an assertion of state powers already guaranteed by the U.S. Constitution, which you have taken an oath to defend.

Please consider the following important points:

1. This resolution would circumvent the proper route for proposing amendments to the Constitution as established under Article V. Proposals must be submitted to Congress, and Congress is not obliged to call an amendment-empowered conference unless or until two-thirds (34) of the states apply for one.

More 

2. The name of the convocation is of no consequence. It would authorize the consolidation of sovereign powers whether termed a constitutional convention or not.
3. Earlier proposals submitted by Governor Leavitt and the CSG did not attempt to conceal the goal of a constitutional convention, but publicly called for one (see below).
4. The Constitution is not flawed. It does not permit federal welfare-state programs, whether funded or unfunded.
5. The Constitution guarantees freedom for the states to carry out all powers not prohibited by the Constitution and not delegated by it to the federal government. Enforcement of the 10th Amendment does not require more constitutional amendments.
6. A concurrence of the states in rejecting all unconstitutional federal programs could be accomplished by telephone. It would not need a formal resolution of any convention-empowered delegates.
7. If the majority of states pass this resolution and the conference takes place, media coverage would likely endorse the proceedings. This could create, after the fact, a majority of people favorable to the ratification of harmful amendments that would legalize the social welfare activities which are now carried out only by usurpation.

A closer look at the chief promoters of the "Conference":

In a speech in Arizona last April, Governor Michael Leavitt said he was considering a plan to call a constitutional convention. This upset his audience, and members of the Utah legislature. State Representative Met Johnson said:

Mike got all wild and weird on us with this constitutional-convention speech in Phoenix. The Constitution isn't broken; we don't want to open it up. When Michael started talking about that, we just put our heads in our mashed potatoes and groaned, "oh no."

— Salt Lake Tribune, April 25, 1994, Page 1A

It would appear that Governor Leavitt and the CSG have merely reworded their call for a constitutional convention to make passage of these state resolutions seem harmless.

In September of 1989 the CSG recommended that the following words be added to the Tenth Amendment:

Whether a power is one reserved to the states or to the people, shall be decided by the Courts.

This incredible proposal, the transfer of state power to the federal Courts, should sound a clear alarm to any legislator who thinks that the Leavitt-CSG "Conference of the States" is intended to "restore balance to the state-federal relationship."

CONSTITUTIONISTS NETWORKING CENTER

442 E 1250 RD., BALDWIN KS 66006

(913) 594-3367

Feb. 8, 1995

EVAN MECHAM (AZ) - CHAIR.

WALTER MYERS (KS) - EXEC. DIR.

JUDGE (RET) J. J. BOESEL (OH)

SEN. DON ROGERS (CA)

DR. GREG DIXON (IN)

JIM THOMAS (IN)

JOE STUMPH (UT)

JOHN VOSS (CO)

HONORABLE STATE LEGISLATORS, GOVERNORS AND MEMBERS OF CONGRESS:

As you know, President Clinton recently bypassed Congress and unilaterally bailed out speculators in the Mexican peso. It's self evident that this act was unconstitutional as our Constitution doesn't authorize Presidents to redistribute our money to other nations via foreign aid, bailouts, etc. Such acts by President Clinton and his predecessors generates a question: where have they found the power to take such unconstitutional actions?

If required to cite their authority, I suspect they would claim it's in the Emergency Powers provided Presidents by Title 12, USC 95 (b). U.S. Senate Report #93-549 says: *"This vast range of powers, taken together, confer enough authority to rule the country without reference to normal constitutional processes."*

Informed government watchers know these "Emergency Powers" transformed the U.S. into a Constitutional dictatorship. And after more than 60 years under Emergency Powers, few believe any President will ever terminate them. This belief is further substantiated by PL 313 dated 4-14-52 wherein the federal government admitted to the unconstitutionality of the UN Charter by saying: *"Whereas the existing state of war.... and the termination thereof...would render certain statutory provisions inoperative" and "Whereas some of these statutory provisions are needed to insure the...capacity of the United States to support the United Nations,...it is desirable to extend these statutory provisions."*

In November 1994, our Republican Governors unanimously adopted THE WILLIAMSBURG RESOLVE. It states: *"The founders of our Republic...did not pledge their lives, fortunes and sacred honor to achieve independence from an oppressive monarchy...only to surrender their liberties to an all-powerful central government on these shores."* In it, they pledged to restore *"to the States and the people the prerogatives and freedoms guaranteed to them under the Constitution."* Also, Gov. Leavitt of Utah has proposed a Conference of the States (COS) as *"an effort that will restore balance in the federal system."*

For the Republican Governors pledge or Gov. Leavitt's desire to become reality, the Emergency Powers must be terminated and government returned to within the limits prescribed by the Constitution; the goal of CNC. This will restore the proper "balance in the federal system," restore *"to the States and the people the prerogatives and freedoms guaranteed to them under the Constitution,"* and help calm the social unrest building in our Nation.

By having a formal delegation from each state, a COS has the potential of becoming a Constitutional Convention (ConCon); something those promoting the *NEW WORLD ORDER* have long advocated and made known that its target will be our precious Constitution. CNC therefore suggests that states not send a formal delegation to the COS, rescind any legislation they've passed to this effect, and that 38 or more of them or Congress act to terminate the Emergency Powers. This approach will reduce the risk of a ConCon and satisfy the Governors desire and pledge. Anyone desiring more information on Emergency Powers can contact the undersigned at 913-594-3367 or Dr. Gene Schroder at 719-787-9958.

Sincerely,


WALTER L. MYERS
Exec. Dir.

upon precedents established by the Founding Fathers at the time of our nation's birth. It is also powerful because it provides a "big gear" to address this problem, focusing on fundamental, structural change, rather than fussing around with a lot of smaller gears – the day to day issues that frustrate state and local governments. Turning the "big gear" will get the smaller gears spinning, resolving most of the federal-state conflicts on specific issues.

This plan has nothing to do with political partisanship. It is not a Republican or a Democratic plan. And it is motivated by much more than political ideology. While restoring proper balance in the federal system, important for maximum personal liberty, it is also important for reasons of efficiency, cost-effectiveness and global competitiveness. The present arrangement of centralized control at the federal level, with programs administered by huge, inefficient, out-of-touch bureaucracies, is not positioning our country for growth and prosperity in the next century. Unfunded federal mandates rob states of innovation

capital. Successful organizations are decentralizing and downsizing. Bureaucracies are being dismantled across the world. Futurist John Naisbitt said, "In one of the major turnarounds in my lifetime, we have moved from 'economies of scale' to 'diseconomies of scale; from bigger is better to bigger is inefficient, costly, wastefully bureaucratic, inflexible and now, disastrous." He added that the almost perfect metaphor for the movement from bureaucracies of every kind to small, autonomous units, is the shift from the

mainframe computer to PCs, networked together. "Whether president or CEO, if you are an old mainframe thinker, you are no longer relevant."

The idea that a central government – one huge mainframe – is the most important part of governance is obsolete. The deployment of power must shift from the central government to states and individuals. From vertical to horizontal; from hierarchy to networking. As Naisbitt says, politics must begin to re-emerge as the engine of individualism.

But even as the world's successful business leaders decentralize and move power to the lowest possible point in the organization, our national government grows ever bigger and more bureaucratic. It is outdated and old-fashioned. It is not suited for the fast-paced, high-tech, global marketplace we are entering. There is a much better way.

It should also be said from the outset that the supporters of this plan believe in a strong central government, as outlined in the Constitution. This is not an attempt to destroy the federal government, or to make states the

dominant players in our system. The intent is simply to restore a proper balance.

❖ History ❖ How We Got Where We Are

It is fascinating to note that the problem we confront today regarding balance in the federal system is similar to what the Founding Fathers of this country faced more than 200 years ago with regard to the Articles of Confederation – only just

A free government is a complicated piece of machinery, the nice and exact adjustment of whose springs, wheels, and weights, is not yet well comprehended by the artists of the age, and still less by the people.

—John Adams to Thomas Jefferson, May 19, 1821.

Conference of the States

❖ An Action Plan to Restore Balance in the Federal System ❖

By Michael O. Leavitt
Governor of Utah

Whenever state and local officials get together, a great sport is made of bashing the federal government.

In the last several months, the rhetoric has become especially heated over unfunded mandates forced upon state/local leaders by paternalistic federal officials. Outrage and anger are displayed at meetings of the National Governors' Association, the National Conference of State Legislatures, the National Association of Counties, and the National League of Cities and Towns. State and local leaders are close to open rebellion.

But the reality is that despite all the talk . . . there's very little real action or real improvement.

Other than the psychological value of blowing off some steam and commiserating with one's peers, very little progress has emerged from

such meetings. Speeches are made, resolutions are passed, lists of grievances are aired. But the federal bureaucracy, the Congress, and the president go right on consolidating power, usurping local authority, and viewing states as mere administrative units of the federal government.

A wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned -- this is the sum of good government.

--Thomas Jefferson

State and local leaders have plenty of desire to do something about this matter. They have lots of energy, significant intellectual capacity. Hundreds of articles and many books have been written about federalism and states' rights, decrying centralization of power and the loss of flexibility at state and local levels. But like the weather, everyone talks about the erosion of states' rights . . . no one really does anything about it.

What has been lacking in all the talk is a real PLAN, a real PROCESS, to really do something . . . to actually engage in an effort that will restore balance in the federal system. States must take the initiative. Relying on the goodwill of the president (of whatever party), the Congress, the bureaucracy, or the courts to restore proper balance is so naive as to be laughable.

The purpose of this paper is to offer ideas for a PLAN. The message here is that the time of hoping, begging and waiting has

ended. The time for action has come. It is time to re-establish states as major constitutional players.

This paper outlines a simple, but powerful, process for states to retake the initiative, to take control of their own destinies, to assume their rightful roles, to return proper authority, flexibility and stature to the states. It is powerful because it relies

the states and the national government, and to prevent domination by any branch of government, the Constitution created what Madison called a "compound republic," with power split between two levels – national and state – and then split again among three branches of government at both levels. "Hence, a double security arises to the rights of the people," said Madison. The new Constitution, along with the Bill of Rights, gave superior power in limited areas to the national government, but reserved all other authority to the states. It intended to keep most everyday governmental functions at the level closest to the people.

The Constitution established a balanced competition among levels and branches of government. The people are protected only when those levels and branches are willing and able to compete. If a level or branch is unwilling or unable to compete, power will be concentrated improperly and the rights of the people will be endangered. The Articles of Confederation failed because power was concentrated in states and the national government was unable to compete.

The 10th Amendment

reserved all non-delegated and non-prohibited power to the states or to the people, clearly reserving a major role for state and local officials. One

of Madison's arguments demonstrating that states had clear authority in the federal system, and that the proposed Constitution truly divided power, was that the states were the political units by which the people would approve it.

As we know so well, over many years the original intent of the founders has been

eroded and the national government has consolidated power and authority, while states have lost power. Some of the erosion has been the states' own fault. Citizens during the Progressive Era sought major social and economic reforms. States were slow to respond, so reforms occurred at the national level, led by the presidencies of Republican Theodore Roosevelt and Democrat Woodrow Wilson. State primacy was eroded. Misconduct by industry prompted unprecedented national intervention in economic affairs and a new willingness by the American people to look to Washington, rather than to state capitols, for protection against domestic threats to health and safety.

Any last resistance to an expanding national role was overwhelmed by President Roosevelt's vast responses to the Great Depression and World War II. National dollars pumped life into the economy and states surrendered autonomy in exchange for assistance. The states' reluctance to act on environmental regulation and civil rights matters further allowed the national government to usurp state prerogatives. Lyndon Johnson's Great Society constituted another giant

leap in the growth of the federal government. The states did not resist, and the age of fiscal federalism began. Richard Nixon's revenue sharing program is an example.

Governors and mayors were happy to receive a flood of federal dollars, even if accompanied by burdensome paperwork and regulation.

All of this happened in relatively small increments and for seemingly good purposes. In many cases, it was the fault of state and local governments, which did

The powers not delegated to the United State by the Constitution, nor prohibited by it to the states, are reserved to the State respectively, or to the people.

– Article X of the Bill of Rights
(10th Amendment to the Constitution)

the reverse. Then, the national government was too weak and the states too strong. Today, the national government is too powerful and the states too weak.

It is vitally important to see how the Founding Fathers solved the problems of the weak Confederation. Some of what occurred then can help guide us today in restoring balance in the federal system.

The 13 states were, in effect, nearly autonomous countries under the Articles of Confederation. They had all the power. The Confederation Congress had little power. The Congress could not require the states to carry out any of its decisions. Every bill that Congress passed had to be approved by nine of the 13 states. There was no national military; no ability to regulate foreign trade or commerce among the states; no ability to resolve arguments over state boundaries; no power of taxation unless all 13 states agreed; and no common currency. Attendance at the Confederation Congress was poor.

George Washington sadly described the national government as a "rope of sand" and observed that "the Confederation appears to me to be a shadow without substance."

Something had to be done, but where would the political will come from to strengthen the national government? Who would initiate such a bold move? Each state legislature clung tenaciously to its power. Members of the Confederation Congress had no mandate or desire to begin such a movement. They might lose their jobs. It would take courageous people of good will to instigate changes.

The first break came at the instigation of James Madison and the Virginia Legislature. They called for a conference of states (remember that term) to consider common interests in commercial regulations. Only five states responded, and the major result of the conference was a report asking that all states send delegates to another meeting in Philadelphia on the second Monday of the following May. Little did anyone know that that invitation would be the thunderbolt that would lead to the birth of our present federal government.

One by one, the states accepted the invitation. Once seven states had agreed, the Confederation Congress acknowledged what was happening and tried to minimize the impact by officially recognizing it. However, the Congress tried to limit the convention's authority by stating that it would meet "for the sole and express purpose of revising the Articles of Confederation."

As we all know, the delegates to the great Constitutional Convention in 1787 in Philadelphia did much more than that. They threw out the Articles of

Confederation and drafted a new constitution. Among others, two issues were important in that debate: 1) large states versus small states; and 2) national

government versus states' rights.

To balance the interests of large and small states, the delegates produced a brilliant solution, today referred to as the Great Compromise. It gave each state equal representation in the Senate, with representation in the House determined by population. To balance power between

It appears to me, then little short of a miracle, that the Delegates from so many different States (which States you know are also different from each other), in their manners, circumstances, and prejudices, should unite in forming a system of national Government . . .

—George Washington to Lafayette, Feb. 7, 1788

Constitutional Tools (or the threat of constitutional action)

The drafters of the Constitution sensed that times would change. They knew adjustments would be necessary. They provided a process for change and gave tools to the states to restore balance in the system. While states have never used this particular tool, it is important to recognize that it exists and is available if balance can be restored in no other way. This tool is precious for states. It gives them high status in the federal system and provides a check on the federal government.

❖ Conference of the States ❖

Public support, legal standing, and constitutional options are potentially powerful tools, but to date have been little used. Individual states constitute good government because they represent dispersed power. While that quality has virtue as a principle of governance, it makes competing with a monolithic force like the federal government difficult.

In order to challenge for their rightful role, states require a rallying event, a means of consolidating their power. It should be a process less disruptive than calling a constitutional convention, but one that demands results and response . . . a call to action.

History maps the way. When James Madison and others could see that the national/state relationship was out of balance in 1786, they called for an informal, grassroots conference of leaders from each state. The result of that meeting was a call for a formal convention, which resulted in the drafting of the Constitution and our present form of government.

Today, we propose a five-part plan:

1. Each state will send a delegation, presumably legislators and governors, to a "Conference of the States." To validate its participation, each state should pass a resolution in its Legislature authorizing an official delegation. States unable to pass resolutions could be represented by members of the Legislature willing to come on their own as a delegation. The conference would have rules defining how it operates.

2. At the informal "Conference of the States," one narrow purpose would be undertaken -- to develop an agenda or action plan to restore balance between the states and the national government. The action plan would consist of legal strategies and carefully crafted amendments to the U.S. Constitution.

3. If 75 percent of the state delegations to the "Conference of States" supported a resolution containing a proposed constitutional amendment, the members would take the proposals back to their

states for presentation to their Legislatures.

4. The Legislatures would then act. If 75 percent of the

Legislatures of this country formally endorsed a constitutional amendment, the "Conference of States" would ask Congress to certify the amendment. With so many states providing support, it is likely that Congress would give heed. One must suppose that any proposal that survived the careful consideration and scrutiny by that many legislatures must be good and badly needed public policy. If approved by Congress, any amendment would still have to be ratified by three-fourths of the states.

Were we directed from Washington when to sow and when to reap, we should soon want bread.
--Thomas Jefferson

All of this happened in relatively small increments and for seemingly good purposes. In many cases, it was the fault of state and local governments, which did not respond promptly to serious problems or were willing to give up autonomy for federal dollars.

Whatever the reasons, the pendulum has swung too far. The federal government now has too much power, is too unresponsive and bureaucratic, and too expensive. The system is simply not working. States are no longer competitive forces able to act as a balance to the federal government. Instead of being a full-fledged counterbalance to federal dominance, states are being treated and viewed like administrative units of the federal government. The protections offered by the Miracle of Philadelphia are significantly eroded. Thus, the federal government is running huge deficits, is over-regulating states and citizens, is imposing one-size-fits-all requirements that make no sense, is out-of-touch with local concerns, and is engaging in the new dishonesty in government -- unfunded mandates.

The solution is to restore competition in the system by returning to the kind of balance intended by

the founders. States must obtain more leverage so they can compete for power. But how?

❖ The Plan ❖ How to Restore Balance in the System

First, a dose of reality. Congress will not fix this. Congress has every incentive to continue the trend toward centralization.

The federal bureaucracy has even less incentive than Congress to return authority to the states. Even if a president is so inclined to try to reverse the trend, he is limited by the Congress and the bureaucracy. And we cannot depend on the courts. The federal courts have generally not been friendly to the role of states over the past 60 years. The nationalist philosophy has prevailed. We simply cannot expect the federal government to voluntarily give up power.

Just as in the days of James Madison, if proper balance and competition are to be restored, the states will have to do it. States are the only players left that constitutionally have a place at the table. It is the proper role of states to bring balance by competing for power.

States have three tools to restore balance: public support, legal tools, and constitutional tools.

Public Support

Citizens generally support the states on this issue. They distrust Washington and the federal government. Voters have been prone to elect outsiders as president, like

Jimmy Carter, Ronald Reagan and Bill Clinton (all former state governors). More candidates for offices at all levels of government should be recruited who want to

bring balance back to the system. An army of governors, states legislators, mayors, county officials, members of Congress and even presidential candidates could have an impact. But the process will, again, be slow. More is required.

Legal Tools

States have not been aggressive enough in asserting claims under the Constitution, protecting their role. Many of the most

I like a little rebellion now and then. The spirit of resistance to government is so valuable on occasion that I wish it to be always kept alive.
--Thomas Jefferson to Abigail Adams

Those three amendments, taken together, would turn the pendulum back toward the states and allow states to compete in the system.

❖ Conclusion ❖

This process is reasoned; it is careful. It relies on the good sense and patriotism of governors, state legislators and local government officials from across this country. This effort is non-partisan and free from special interest group influence.

The process outlined in this paper gives state and local leaders a plan. It gives them a "big gear" to ultimately solve many of the lesser problems they encounter with the federal government. They can do more than just complain and talk. They can act. They are the only ones who will work to restore balance in our federal system. Congress never will. The bureaucracy never will. The courts never will. The president never will. But state leaders will.

4. The Legislatures would then act. If, say, 75 percent of the Legislatures of this country formally endorsed the action plan, the "Conference of States" would then ask Congress to act. With so many states providing support, it is likely that Congress would give heed. One must suppose that any proposal that survived the careful consideration and scrutiny by that many legislatures must be good and badly needed public policy. If approved by Congress, any constitutional amendment would still have to be ratified by three-fourths of the states.

5. If Congress refused to consider or pass the amendments, the states would have the option themselves of calling a constitutional convention to consider the amendments. This threat would provide the leverage that has been missing in state dealings with the federal government. It would make states a competitive force to be reckoned with. It would act as a counterbalance to the arrogance of the Congress. Supporters of this proposal hope and believe that such dire action as calling a constitutional convention would not be necessary. But the threat must exist to motivate Congress to act. The

Constitution provides for this action by states as a check on the federal government, to force progress when Congress refuses to act. It must be assumed that a gathering of delegates appointed by at least two-thirds of the states would be just as responsible and careful as is the Congress, which has the authority at any time to propose constitutional amendments.

❖Public Support❖

Besides potential constitutional action, the agenda established by the Conference of States would also ignite a national political debate that no candidate for Congress, for president, for governor, or for any state legislative race could avoid. All would be forced to take positions on federalism issues, and this matter of federal/state balance could become the pre-eminent political issue of the day, again providing leverage and making states more competitive. The agenda would also provide a rallying point for citizens who are frustrated and who want responsible change.

The informal "Conference of the States" is a key and important element of this plan. Its purpose must be clearly defined and focused on broad, fundamental actions that would restore careful balance to the federal/state relationship. The Conference must not be allowed to become sidetracked on specific issues supported or opposed by any number of special interest groups. It

must not be captured by the left or the right or any single group. It must not become a forum for pro-abortion or anti-abortion, or pro-gun control or

anti-gun control groups who might want amendments of their own. There are hundreds of causes that people would like to address with constitutional amendments. The Conference is not a forum for such discussions. It must remain focused on the fundamental issue of providing leverage and bringing balance to federal/state relationships.

The Conference must not attempt to swing the pendulum too far in the other direction by proposing too much authority for the

*The world is governed too much.
--Once the motto of the Boston Globe
I confess the motto of the "Globe" newspaper is so
attractive to me that I can seldom find much appetite
to read what is below in its columns.
--Ralph Waldo Emerson*

Unfunded Mandates

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. — The 10th Amendment

The Untold Story

- **Alexandria, Virginia:** "Alexandria [VA] had a nationally acclaimed program for using local taxicab companies to transport disabled persons door-to-door to any local destination at city expense. However, after implementing a mandated requirement to modify local buses to permit access for the disabled, the city could not afford to provide the taxicab service. As a result, those using wheelchairs now have to get to and from bus stops that can be some distance from their homes and destinations" (GAO, 4/5/94).
 - **Adams County, Pennsylvania:** "Rather than comply with strict federal water testing requirements, Adams County, PA commissioners are considering a cheaper option—buying and passing out bottled water to residents" (Rep. William Goodling (R-PA) testimony, 5/18/94).
 - **Anchorage, Alaska:** "In Anchorage, Alaska, the city fathers had to ask local fish-processing plants to dump fish entrails into the city sewer system so the city would have some pollution to remove. Why? Because current law requires a certain percentage reduction in contaminants even from water that is already very clean. So Anchorage's only alternative would have been to build a new \$135-million sewage treatment plant capable of finding and removing low levels of organic wastes from the city's normally very clean sewage inflow" (*Washington Post*, 1/15/95).
 - **Arizona:** "[O]fficials in Arizona cities such as Tucson and Phoenix say studies of storm water runoff, required by the Environmental Protection Agency, are a waste of millions of dollars in arid regions where waterbeds are dry most of the year" (*CQ*, 12/31/94).
 - **Aurora, Colorado:** "Aurora, Colorado ... calculates that it will have to repair some 28,000 curbs in order to comply with the 1990 Americans with Disabilities Act (ADA) at an average cost of \$1,500 per curb" (Heritage Foundation, 12/94).
- 

- **Welch, West Virginia:** The town of Welch, West Virginia (pop. 3,500) has been told federal regulations require the municipal government to "spend between \$16 million and \$22 million to build a new treatment plant and sewer lines up and down hills to serve all of the town's homes and businesses" (*Washington Times*, 12/1/93).
- **Atlanta, Idaho:** "[T]he mountain community of Atlanta, Idaho — population about 50 — has to comply with the same water quality standards as the city of Atlanta, Ga., and its population of 375,000. Meeting the standards isn't the issue, but both systems must conduct the same water quality tests. Needless the say, a \$1,500 quarterly test can be absorbed by a large city, but it can break the bank for the town of Atlanta, Idaho" (Sen. Dirk Kempthorne, *Washington Times*, 8/28/94).
- **Columbia, Mississippi:** "The town of Columbia, Mississippi, is nearing completion of a \$20 million EPA cleanup project. Soil tests turned up traces of compounds the federal government defines as hazardous, though the amount discovered was only about two ounces per ton of soil. Some experts say the best way to solve the problem was to spread a layer of cleaner soil on top of the contaminated soil at a cost of only \$1 million, but the EPA insisted on the most expensive solution, which was to dig up more than 12,500 tons of soil and haul it away. *EPA's goal: to make the dirt so safe that a human could eat half a teaspoon every month for 70 years and not get cancer*" (Heritage Foundation, *Issues '94*, 1994). [emphasis added]
- **Phoenix, Arizona:** "New water quality standards were designed in Phoenix with humid watersheds in mind, like the Potomac basin, but are inappropriate for desert areas. Phoenix is required to 'protect aquatic organisms that cannot exist' in the dry river bed into which its wastewater treatment plants discharge effluent" (Center for the Study of American Business, 1993).
- **Los Angeles, California:** "The city of Los Angeles 'must expend hundreds of millions of dollars to treat water being discharged into the Los Angeles River so that the fish ... can have purer water than humans'" (Center for the Study of American Business, 1993).
- **Palm Springs, California:** "The Endangered Species Act required the city to pay \$5,000 to an environmental consultant to search for desert tortoises in dry desert washes which faraway Washington bureaucrats define as 'navigable waterways' under the Clean Water Act's wetlands regulations. No such tortoises were found" (Center for the Study of American Business, 1993).
- **Garden City, Michigan:** "The city has spent over \$250,000 over the past three years removing petroleum-contaminated soil so that an asphalt parking lot could be put on top of the soil. Asphalt, of course, is a petroleum product" (Center for the Study of American Business, 1993).

- **Columbus, Ohio:** "[A] Columbus, Ohio, Health Department official cited regulation of the herbicide atrazine, used widely on cornfields, as an example of the costliness of scientific uncertainty in federal Safe Drinking Water Act regulations. According to this official, because atrazine has been determined to be a potential carcinogen, EPA limits atrazine in drinking water to a maximum yearly average of 3 parts per billion. The Columbus official questioned the scientific basis for this limit and suggested that 'at this level an adult would have to ingest about 3,000 gallons of contaminated water per day to be at risk.' The Columbus official further noted that although the city's typical levels are far below 3 parts per billion, the city may be required to install costly EPA-specified technology for atrazine removal" (GAO, 4/5/94).
- "Under the Safe Drinking Water Act ... every water system in the nation is required to monitor for the herbicide used on pineapples, which are grown only in Hawaii, unless a specific waiver is attained. The waiver is expensive and difficult for the water system, and expensive again for the state, which has to judge the merits of the waiver application and tailor its program accordingly" (National Governors' Association, 10/18/93).

Cost Estimates

- "According to the EPA, complying with its rules costs the nation \$140 billion in 1994, about 2.2 percent of our Gross Domestic Product" (*Washington Post*, 1/15/95).
- "California officials calculate that in order to comply with federal paperwork requirements mandated by the federal Nursing Home Reform Law of 1987, the state will have to increase Medicaid spending by between \$400 million and \$800 million" (Heritage Foundation, 7/31/92).
- "In 1980, [Mayor] Koch estimated the cost of converting the [subway] system to conform to federal mandates at \$1.3 billion over 30 years, plus at least \$50 million in operating expenses" (Heritage Foundation, 7/31/92).
- "Michigan estimated that its spending would rise from \$39.6 million to \$136.9 million (a 245-percent increase) over the 6-year period 1990 to 1995 due to federal Medicaid mandates" (GAO, 4/5/94).
- "A 1991 Columbus, Ohio, study of federal and state mandates estimated that compliance with existing environmental mandates alone would cost Columbus \$1.1 billion over the next 10 years and consume nearly one-fourth of the city's budget by 1996." (GAO, 4/5/94).

- "A Chicago study estimated that between 1992 and 1995, the city would spend over \$319 million on unfunded federal and state environmental mandates" (GAO, 4/5/94).
- "The city of San Diego was recently fined \$500,000 by the EPA, made to pay \$2.5 million for a water conservation program, and forced to spend \$2.5 billion for secondary sewage treatment capacity" (Center for the Study of American Business, 1993).
- "Anchorage, Alaska, estimated federal environmental regulations would cost it over \$429 million over the 10-year period 1991 to 2000" (GAO, 4/5/94).
- "A 1990 EPA study ... estimates that total costs of environmental mandates (from all levels of government) to State and local governments will rise (in constant 1986 dollars) from \$22.2 billion in 1987 to \$37.1 billion by the year 2000—a real increase of 67 percent. According to the Vice President's National Performance Review report on the EPA, this figure when adjusted for inflation reaches close to \$44 billion on an annual basis by the year 2000" (*Congressional Record*, 1/9/95).
- "Sen. Hank Brown, Colorado Republican and member of the Budget Committee, said unfunded mandates are expected to eat up more than 22 percent of his state's general fund this year" (*Washington Times*, 1/6/95).
- "Between 1983 and 1990 alone, the Congressional Budget Office estimates, new federal regulations cost states and localities up to \$12.7 billion" (*Wall Street Journal*, 1/9/95).
- "Gould estimates that federal mandates cost California \$8 billion annually, mostly from implementing regulations attached to environmental and health and welfare legislation" (*Washington Post*, 1/9/95).
- "A survey commissioned by the U.S. Conference of Mayors last year asserted that 10 selected federal mandates cost cities \$6.4 billion in 1993 and will cost \$53.9 billion over the next four years" (*Washington Post*, 1/9/95).
- "The 'motor voter' law, which took effect January 1, has imposed such heavy costs that 13 states are refusing to implement it—and at least one, California, is suing the federal government, alleging that this mandate violates the 10th Amendment" (*Wall Street Journal*, 1/9/95).
- "Environmental activities alone, the EPA estimates, will swallow 30% of state and local government revenues by the year 2000" (*Wall Street Journal*, 1/9/95).

- "Required state spending on Medicaid increased to 17% of all state spending for fiscal 1992, up from 10% just five years earlier. In Los Angeles, thanks to federal mandates, wastewater treatment costs rose from \$202 million in 1986 to \$838 million in 1993" (Americans for Tax Reform, 1994).
- "The 1987 amendments to the Clean Water Act requiring local governments to rebuild wastewater treatment plants to federal standards, are the single most burdensome mandate imposed by the federal government. The federal government authorized \$18 billion to help municipalities. But federal assistance to the states for this program is due to expire at the end of this fiscal year. The Congressional Research Service, citing Environmental Protection Agency and local studies, estimates that at least \$83 billion in additional capital expenditures are needed to bring all the nation's wastewater treatment plants into compliance with EPA standards" (Americans for Tax Reform citing the U.S. Senate Republican Policy Committee, 10/93).
- Approximately \$30 to \$40 billion is spent annually by state and local governments to comply with EPA dictates (House Republican Conference, 2/1/94).
- "The so-called 1993 'Motor Voter' Act authorized almost no compensation to state governments for the more than \$100 million in cost it will impose over five years" (Americans for Tax Reform citing *The Wall Street Journal*, 8/18/93).

Unfunded Business Mandates

- "Regulators ordered a Kansas City bank to install a Braille keypad, costing \$5,000, on its drive-through automatic teller machine. Steve Mauer, the bank's lawyer, emphasized, 'Keep in mind this is a drive-through we're talking about.' As I see it, the only way this regulation makes sense is if it's a police entrapment scheme to arrest blind drivers" (Walter Williams, *Washington Times*, 1/12/95).

ON THE FLOOR

In the House

Environmental policy

Curbing unfunded mandates

H.R. 11: Unfunded Mandate Reform Act of 1995.

Floor action: Scheduled to resume Monday. House Majority Leader Richard K. Armey (R-Texas) said last Friday that the Republican leadership is aiming for a final vote Tuesday. But there are numerous amendments still pending, and Democrats likely would have to agree to limit debate on their amendments if that schedule is to be met.

The House is operating under an open rule that allows members to bring up any amendments they choose.

The House began work on the bill Jan. 19 and continued consideration last week, pausing Wednesday and Thursday to take up the balanced budget amendment to the Constitution (H.J. Res. 1).

House Republican leaders have been frustrated with the pace of action on the bill. GOP lawmakers have unified to defeat Democratic amendments to exempt various programs from the restrictions set up by the bill. But there still are more than 30 exemption amendments pending, and the House, which is considering amendments to the bill section by section, has not even proceeded to Title I.

On Friday, after 10 full days of debate and amendments, the Senate finally completed work on its companion measure (S. 1, S. Rpts. 104-1 and 104-2), voting 86-10 for approval. Over those 10 days, by Senate Majority Leader Robert Dole's (R-Kan.) count, senators submitted 211 amendments, 68 of which were actually proposed and 44 of which required roll-call votes.

Both bills are enthusiastically supported by major state and local government organizations. Halting the growth of federal requirements unaccompanied by federal dollars is a top priority of state and local officials, who long have chafed at Congress' penchant for establishing new programs and then mandating that states and localities administer them.

Much of local officials' ire is aimed at federal environmental laws, such as the Safe Drinking Water Act and the Clean Air Act, which place significant responsibilities on states and municipalities.

The bill also has the support of the U.S. Chamber of Commerce and other business groups.

Environmental groups and other public interest organizations oppose the measure and have pressed to have future bills dealing with public health, interstate pollution and other issues exempted from the unfunded mandates bill's restrictions. Environmentalists argue that the bill would erode federal standards designed to protect public health and the environment.

Bill: The bill, introduced by House Government Reform Committee Chairman William F. Clinger Jr. (R-Pa.), would require a Congressional Budget Office analysis for any legisla-

tion that would impose net costs on state and local governments of more than \$50 million in a given year.

Any legislation — including floor amendments — imposing unfunded mandates costing more than \$50 million then would be subject to a point of order against consideration unless a majority of members in both houses voted separately to waive the rule. An exception would be provided for bills addressing constitutional or civil rights, national security, emergencies or treaty obligations.

Bills proposing new mandates on state and local governments would be in order on the floor if they included provisions to pay for their implementation. Bills that merely authorize funding would be fully enforceable only in years that congressional appropriations were provided to pay for them.

The measure would apply only to new legislation and not existing laws. It also would not affect bills reauthorizing existing statutes if those reauthorizations do not add costly new requirements on states and localities.

In addition, the bill would not apply to proposed mandates on the private sector, except to require a CBO analysis when these requirements surpass \$100 million a year. (For more bill details, see Jan. 16 *Weekly Bulletin*, p. A1.)

Last week: House Republicans, joined by some Democrats, defeated amendments to exempt various types of legislation from the proposed restrictions on mandates.

Among these was an amendment offered Jan. 23 by Rep. David E. Skaggs (D-Colo.) to exempt bills dealing with air pollution control. The House also turned back an amendment by Rep. Gene Green (D-Texas) to exempt bills addressing licensing and construction of nuclear reactors, and the disposal of nuclear waste. An amendment by Rep. John M. Spratt Jr. (D-S.C.) to keep the bill from applying to measures dealing with toxic, hazardous or radioactive waste disposal also was voted down.

On Jan. 24, the House rejected an amendment by Rep. Carolyn B. Maloney (D-N.Y.) to exempt bills designed to protect the health of children, which effectively would have shielded some environmental laws.

Amendments: Exemption amendments filed, but not yet offered, include language by Rep. Cardiss Collins (D-Ill.) to shield drinking water bills and by Rep. Robert A. Borski (D-Pa.) to protect bills meant to control water pollution that causes serious human health problems. Rep. Frank Pallone Jr. (D-N.J.) also has an amendment that would exclude bills pertaining "to the coastal waters of the United States."

In addition, Skaggs has filed an amendment that would remove lawmakers' ability to challenge bills on the floor with a point of order.

Other pending amendments would direct CBO to consider the benefits of proposed mandates, in addition to the costs, when analyzing legislation.

Democrats also are seeking changes to prevent federal agencies and Congress from being taken to court to enforce the

ON THE HOUSE

measure's provisions. Currently, the bill is silent on the issue of judicial review, and some members are concerned the lack of language will open up agency actions to frivolous legal challenges.

Rep. Paul E. Kanjorski (D-Pa.) has filed an amendment that would have the bill expire on Jan. 3, 2000. Democrats want to provide a "sunset" date for the measure to make sure Congress reviews how it is working.

Other amendments would address concerns about the potentially negative impact the bill would have on private businesses, such as waste disposal firms, that compete with municipalities. (For more details on pending amendments, see Jan. 23 *Weekly Bulletin*, p. A3.) H. Rpt. 104-1, parts I and II. — Steve Daniels

To: Rep Ramona Barnes

From: Patriot Party

RE: Conference of States

No pages to follow: 14

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2-17-95

THE DENVER POST

LEGISLATURE '95

Foes fear convention could undermine U.S.

By Steve Lipsher
Denver Post Capitol Bureau

Alarmed by the potential for completely rewriting the U.S. Constitution, a horde of angry people packed a House committee yesterday to protest a resolution that would send delegates to a conference of states.

"There actually exist dangers in the resolution and the conference," said Peter LePiscopo, a constitutional law attorney from San Diego. "While the conference of the states convenes in Philadelphia, it can apply to Congress for a constitutional convention. . . . If the train starts running down the track, there is no way to stop it."

The first of 33 witnesses to testify before the House Judiciary Committee against Senate Joint Resolution 9, LePiscopo warned that by passing a legislative resolution, Colorado's delegation would be considered official — grounds for a constitutional convention.

The committee hearing, highly unusual for a resolution, was prompted by public outcry after the Senate pushed the measure through quickly. Spurred by conservative talk-radio

hosts, dozens of people lent their voices to the fight, and scores more besieged legislators with phone calls.

The resolution, by Senate Majority Leader Jeff Wells, R-Colorado Springs, and House Majority Leader Tim Foster, R-Grand Junction, was intended to let Colorado formally send a delegation to the conference this summer.

As part of a recent conservative push to assert states' rights, the conference then would discuss issues important to all 50 states and come up with a unified voice to Congress, Foster said.

"There are a number of issues we need to ask Congress to speak to. The balanced-budget amendment, if it goes through this time, would be one of those. . . . Rather than whining one state at a time, we could do it this way."

He argued that the intent was not to push a constitutional convention, and that it couldn't become one under the provisions of the Constitution.

But opponents argued the measure irrevocably could become a "con-con," and the states would have access to the full U.S. Constitution.

At the extreme end of the spectrum, some opponents

fear the delegates are part of a conspiracy that would completely rewrite the Constitution and form a socialistic "one-world government."

Others believe a constitutional convention would simply add abortion and take away gun rights from the Constitution, or the converse.

"We don't want to leave a loaded gun on the living room table," said Tim Kern, a business teacher and conservative radio talk-show host. "You can't leave the tools around for people to play with."

Although testimony stretched into the night, the committee planned no action on the measure yesterday.

The chairman, Republican Rep. Joanne Adkins from Parker, made it clear to those suspicious of legislators that she would announce and publish the date of the final vote well in advance.

"A constitutional convention," Foster told the group, "is a no-holds-barred kind of meeting. That makes me blanch a little bit, too."



Tim Foster

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March 3, 1995

OPINION LETTER RE: CONFERENCE OF THE STATES

To: **HONORABLE MEMBERS OF THE CALIFORNIA SENATE &
ASSEMBLY**

I have been requested by Senators Lewis and Rogers to prepare an opinion letter regarding The Conference of the States.

I. THE PROCEDURE FOR AMENDING THE U.S. CONSTITUTION:

It is worth reviewing the amendment procedure set forth in Article V of the U.S. Constitution in order to insure the proper context is established for analyzing the matters addressed in this opinion.

Article V establishes a two step process for amending the U.S. Constitution:

1. Methods of proposing amendments; and
2. Procedures for ratifying amendments.

Proposing Amendments:

Article V provides two methods for proposing amendments: (1) by two-thirds vote of both houses of Congress; or (2) on application of the Legislatures of two-thirds of the States to Congress to call a constitutional convention. My research indicates that all amendments made thus far have been pursuant to the first method and that no amendment has been proposed by a constitutional convention.

Ratifying Proposed Amendments:

Article V provides that proposed amendments can only become effective by either of two procedures: (1) by ratification of the Legislatures of three-fourths of the States; or (2) by conventions of three-fourths of the States. It is in Congress' sole discretion to decide which method of ratification is required. Both methods of ratification, by Legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

II. THE CONFERENCE OF THE STATES:

The Conference of the States has been proposed by the Council of State Governments (the "Council"), whereby legislatures of the States adopt resolutions that commit them to participate in the Conference of the States. The purported object of the Council and The Conference of the States is to "*enhance excellence in state government through leadership*" and "*compete for power in the federal system.*"¹ The Council also contends that the Conference of the States will produce a result that "*has no force of law or binding authority.*"

In a Pictorial Summary the Council provides an overview of the six steps that comprise convening and conducting the Conference of the States. The following is a brief summary and critique of each of those six steps.

Step 1: Each state legislature passes a "*Resolution of Participation,*" which provides that a state will participate in a Conference of the States. In addition, each state legislature is to appoint a bipartisan delegation of four legislators (presumably two from each house, assuming a bi-cameral legislature) and the governor.

This step immediately raises the question: why must each state take legislative action (i.e., pass a *Resolution of Participation*) in order to attend a Conference that does not result in anything that has the "*force of law or binding authority?*" As will be demonstrated below, it is my opinion that the Conference of the States is intended to result in something that will have legal effect.

¹ See "The Conference of the States An Action Plan For Balanced Competition in the Federal System" and "The Council of State Governments Fact Sheet."

Step 2: After a "significant" majority of states have passed *Resolutions of Participation* a Conference of the States will be held in an "historical city" such as Philadelphia. The term "significant" majority means, in reality, a constitutional majority, to wit: two-thirds of the States. This is made clear in Step 6. The question then becomes: Why must a constitutional majority of states pass *Resolutions of Participation*? It is my opinion that the answer is simple: if constitutional action is decided upon at the Conference of the States, then there will be the necessary constitutional majority present to take such action.

For all practical purposes once a constitutional majority of states have passed *Resolutions of Participation* the remaining states will want to be represented at the Conference. Accordingly, it is my opinion that all states will pass *Resolutions of Participation* and attend the Conference, thus presenting a number of states that exceed a constitutional majority.

Step 3: The Conference of the States is held and solutions to problems are "discussed, refined, and voted upon."

First, the use of the term "Conference" is troubling because it is my opinion that the Council was careful not to use the term "convention." In the context in which the Conference of States is being convened, the term "conference" is synonymous with "convention." This is true because the Constitutional Convention of 1787 was comprised of a group of delegates who were sent by the legislatures of the several States to propose recommendations to Congress regarding amending the Articles of Confederation.

Second, there is no precise agenda prior to convening the Conference; nor are there any restraints on the subject matters that can be raised at the Conference. Although the Council makes an oblique reference to the balance of power between the States and federal government, for all practical purposes any problem can be framed in those terms. Accordingly, it is probable, if not inevitable, that the Conference will raise, debate, and vote on issues never contemplated or debated by legislatures that passed *Resolutions of Participation*.

Third, the Conference will make its own rules and procedures, which were not approved by the legislatures.

Fourth, and most alarming, there is no guarantee that the Conference will not make "application" to Congress to call a constitutional convention. As mentioned above, there is no case law concerning the second method of proposing amendments to the Constitution. If the Conference decides that it wants to turn itself into a constitutional convention it need only make "application" to Congress. As will be discussed below, the Supreme Court has interpreted Article V to place

complete discretion in Congress when the amendment procedures set forth in Article V are invoked. Furthermore, and as will be discussed below, there is Supreme Court authority to support the proposition that the courts will not intervene in or interfere with the amendment process. If the Conference decides to become a constitutional convention that action might not be reviewable by the courts; thus no way to stop it once commenced.

Step 4: The Conference of the States will produce a written document entitled: "*States' Petition*." The Council indicates that the *Petition* is "*a new instrument in American democracy*" and "*constitutes the highest form of communication between the states and Congress.*"

Presently, the highest form of communication between the States and the Congress is an "application" to convene a constitutional convention (see Article V). Does the Council mean to say that the *Petition* would be supreme to Article V? or, more likely, does it mean to say that the *Petition* is tantamount to an "application" to Congress pursuant to Article V? Whichever is the case, the Council is not being honest with its use of terms, nor with its intentions.

Step 5: A copy of the *Petition* is taken back by the delegates to their respective legislatures for approval, including ones that contain constitutional amendments. As mentioned above in Step 2, the document produced by the Conference clearly contemplates one that has "force of law" and "binding authority." In our constitutional form of government, there is nothing with greater force of law or binding authority than the Constitution and its amendments.

Step 6: After passed by a constitutional majority (i.e., two-thirds) of the legislatures of the States, the *Petition* is presented to Congress. Here the Council declares that "*ignoring a constitutional majority of states would signal an arrogance on the part of Congress.*" It is obvious that one consequence of the Conference can be a *Petition* that calls for a constitutional convention. Thus if the Conference does not convert itself into a constitutional convention during Step 3, it can still accomplish that end in Step 6.

III. DANGERS OF THE CONFERENCE OF STATES:

The predominate danger mentioned above is that in Step 3 the Conference will decide to make "application" to Congress to convert itself into a constitutional convention. Alternatively, there is a danger that the *Petition* will serve as an "application" to Congress to call a constitutional convention.

The hidden danger of all of this is raised by the question: what is the remedy if any of these events takes place? The answer to this question proves most disturbing. In order to completely understand the import of the Conference of the States, a review of U.S. Supreme Court decisions interpreting Article V is necessary. It is important to again note that all Supreme Court decisions have dealt exclusively with the first method of proposing an amendment (i.e., the Congress proposes the amendment); whereas no case has addressed the situation where the Legislatures of the several States have made application to Congress to call a constitutional convention.

The first controversy over Article V occurred rather early in our history with the adoption of the Eleventh Amendment. In the case of *Hollingsworth v. Virginia*, 378 U.S. (Dall.) 378 (1798), the issue was: when Congress proposes an amendment must the president of the United States provide approval? The Supreme Court answered this question in the negative, reasoning that Article V is not a typical piece of legislation coming within Article I's law making power but rather is a specific procedure to amend the Constitution:

"There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution."

The next controversy occurred with ratification of the 18th Amendment, which concerned prohibition. In 1917 Congress passed a joint resolution proposing the prohibition amendment. In its resolution, Congress included a proviso that the amendment must be ratified by the necessary number of states within seven years. The controversy arose in the case of *Hawke v. Smith*, 253 U.S. 221 (1920), which concerned an Ohio statute that submitted approval of constitutional amendments to the people of Ohio through the referendum process. The Supreme Court concluded that Article V required approval of amendments not by the people directly but by three-fourths of either the legislatures of the several States or of conventions of the several States.

Another example of Congress' discretion under Article V is illustrated in *Dillon v. Gloss*, 256 U.S. 368 (1921)(the 18th Amendment), where the Supreme

Court held that Congress has complete discretion under Article V to fix specific time limits for ratification of proposed amendments.

The case that provides the Conference of States with the tools by which to harness the amendment process is *Coleman v. Miller*, 307 U.S. 433 (1939). In June, 1924, Congress proposed an amendment to the Constitution known as the Child Labor Amendment. In January, 1925, the Kansas Legislature passed a resolution rejecting that amendment. Twelve years later in January, 1937, the Kansas Senate re-introduced the amendment. Twenty senators voted in favor, and a like number voted against. The tie was broken by the lieutenant governor, who voted in favor of the amendment, which was subsequently passed by the Kansas House of Representatives.

A suit was filed in the Kansas Supreme Court by the twenty senators who voted against the amendment and members of the House of Representatives requesting the court to nullify the endorsement of the amendment. The senators and representatives contended that the lieutenant governor was not part of the Kansas Legislature for Article V purposes and, therefore, he could not cast the tie-breaking vote; that the previous rejection in 1925 served to kill the amendment in the state of Kansas; and that the amendment was not ratified in a reasonable time (i.e., the thirteen year hiatus between Congress' proposing and Kansas' ratification of the amendment). The Kansas Supreme Court would not nullify the approval of the amendment. The senators and representatives sought review in the U.S. Supreme Court.

In *Coleman* the Supreme Court concluded that the dispute was political in nature and, therefore, the courts should not interfere. Specifically, the Supreme Court concluded that:

"The previous rejection [in 1924 and subsequent ratification in 1937] should be regarded as a political question pertaining to the political departments, with ultimate authority in Congress in the exercise of its control over the promulgation of the adoption of the amendment."

In short, in *Coleman* the Supreme Court concluded that if there was any impropriety in the manner in which a state ratified an amendment the remedy rests not in the courts but in Congress. In other words, if there is some perceived or actual irregularity in the proposal or ratification process the objections can be raised only in Congress. Accordingly, the hidden danger of the Conference of States is that if the Conference decides to convert itself into a constitutional convention or to treat the *Petition* as an "application" to Congress, then pursuant to *Coleman* the Conference's actions cannot be challenged in court (i.e., it cannot be stopped).

The political question doctrine is designed to remove controversies from the courts that are purely political in nature. It is my opinion that the Conference of the States and the methods used to facilitate it would be interpreted to be political in nature thus shielding it from judicial scrutiny. What follows are possible scenarios that might occur.

Scenario One: During Step 3, the Conference decides that it wants to make "application" to Congress to call a constitutional convention. Congress has two choices: one, it could determine that the Conference has no authority to make "application" under Article V; or two, it could accept the "application" and call a constitutional convention, whereby the Conference could be converted into such a convention. It appears that pursuant to *Coleman* Congress would be exercising its political discretion and exclusive power under Article V. Accordingly, no judicial review could be sought.

This is not far fetched if one recalls that the delegates sent to Philadelphia in 1787 went there with strict guidelines to consider only amendments to the Articles of Confederation. Once convened, however, the delegates converted into a constitutional convention, tossed the Articles of Confederation, and drafted a new document. It is my opinion that what occurred in Philadelphia from May through September, 1787, was guided by Divine Providence and will not occur again in the history of this Country. Accordingly, a constitutional convention must be avoided.

Scenario Two: Upon completion of Step 4, the Conference could send the *Petition* to the Congress as an "application." Similar to Scenario One, Congress would have complete discretion under Article V to decide upon accepting or rejecting the *Petition* as an "application."

Scenario Threc: In Step 6, the *Petition* is transmitted to the Congress. Similar to Scenario Two, Congress could accept the *Petition* as an "application" and call a convention.

One might argue that limiting provisions in the "*Resolution of Participation*" could serve to provide a basis for a court challenge. While this might work, it should not be considered 100% fail safe because *Coleman* could be applied to prevent a court challenge.

IV. RECOMMENDATIONS:

Based on the foregoing the following recommendations are made.

First, state legislatures should not pass any resolution to send any delegates to a Conference of the States. This is the only way to insure that a constitutional convention is not convened. This is not to say that a self-appointed delegation, which is not sponsored by the state legislature, cannot attend or visit the Conference of the States but rather state legislatures should not provide any legislative sanction to any delegation to the Conference of the States.

Second, there is nothing that prevents a state from debating certain proposed amendments within its own legislature and thus providing those amendments to its own congressional delegation for introduction in Congress. If it is desired, then the safest way to amend the Constitution is through the first method outlined in Article V (i.e., whereby the U.S. Congress proposes the amendment). This procedure insures that there will be no run-a-way convention that results in altering the foundation of our constitutional form of government.

Third, if any state legislature is resolved in sending delegates to attend the Conference of the States then I recommend that the following limiting language be inserted into the "Resolution of Participation"

" **RESOLVED**, that California's participation in any Conference of the States shall in no way be interpreted or construed to be consent by the State of California to be an application to Congress under the amendment procedure set forth in Article V of the Constitution of the United States.

BE IT FURTHER RESOLVED, that California's participation in any Conference of the States shall in no way be interpreted or construed to be for the purpose of amending or proposing amendments to the Constitution of the United States."

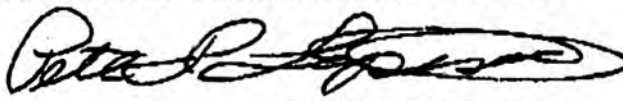
If I were a California legislator I would vote for the First Recommendation and not for Senate Concurrent Resolution 9.

Dated: March 3, 1995.

Respectfully submitted,

LAW OFFICES OF PETER D. LEPISCOPO

By:


Pete Lepiscopo