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What's Wrong with "The Conference of the States"?

Similar resolutions calling for a "Conference of the States" (COS) have been passed this year in at least fourteen State Legislatures from Arizona to Virginia, defeated in more than twelve State Legislatures, and are pending in most other State Legislatures.

This simultaneous action in nearly fifty State Legislatures did not happen by accident. The idea was proposed by the Council of State Governments, and the national campaign to get the resolutions adopted is spearheaded by Governors Mike Leavitt of Utah and Ben Nelson of Nebraska. The action is also endorsed by the National Governors' Association, the National Conference of State Legislatures, and the American Legislative Exchange Council.

Despite such prestigious sponsorship, COS has had almost no national media coverage. COS resolutions won speedy approval in the first states that considered them (often without any hearings and by voice vote), but the momentum slowed dramatically after states began to investigate and debate the issue.

COS presents itself as "An Action Plan To Restore Balance in the Federal System." The purported object of the Conference is to "compete for power in the federal system." Its initial acceptance by State Legislatures was due to the fact that it appeared to be a proposal to raise public consciousness about the importance of states' rights within our federal system and to stop federal encroachment on states' powers. This motive found eager support among state legislators who have become increasingly resentful against "unfunded mandates," *i.e.*, federal laws that impose mandates on the states but provide no money to pay for them, thereby requiring states to raise taxes in order to meet newly-imposed federal obligations.

The Council of State Governments (a non-official, private, 501(c)(3) organization) published a six-step plan by which COS was expected to move through the State Legislatures and become a reality in 1995.

Step 1: Each State Legislature will pass a "Resolution of Participation" providing for that state's participation in the Conference of the States. Each State Legislature will appoint a bipartisan delegation consisting of four or more legislators plus the governor.

Step 2: After a "significant majority of states" has passed the Resolution of Participation, the Council of State Governments will "convene" the "incorporators" of a new legal entity called "The Conference of the States Inc." The incorporators will establish the rules for the Conference on the basis of each state delegation having one vote.

Step 3: The Conference of the States will be held in "a city with historic significance." Philadelphia is the favorite site (drawing the obvious parallel with the Constitutional Convention of 1787 at which the United States Constitution was written). Supporters originally expected the Conference of the States to be convened in Independence Hall in Philadelphia in October 1995, but Conference plans have become less definite as State Legislatures started to reject the COS resolutions. The purpose of this Conference is for delegates to "consider, refine and vote on ways of correcting the imbalance in the federal system."

Step 4: The Conference would produce "a new instrument of American democracy called a **States' Petition**, which would be "the action plan emerging from the Conference of the States." COS asserts that the States' Petition "constitutes the highest form of formal communication between the states and the Congress."

Step 5: The States' Petition would be carried back by delegates to their respective State Legislatures for approval.

Step 6: The delegates from each state would gather in Washington to present the States' Petition to Congress and formally request Congress to respond.

COS's Agenda for Structural Change

If and when the Conference of States convenes, what will be the agenda of what its sponsors call "a powerful plan"? What will be the particulars in this new document called the States' Petition that is supposed to demand Congressional action? The answer to this question is the principal reason why COS resolutions have been defeated in so many State Legislatures.

The December 20, 1994 COS Concept Paper states that the agenda of the Conference will be "basic, structural change" and "fundamental reform." COS literature repeatedly uses such rhetoric as "broad, fundamental, structural, long-term reforms," "fundamental, structural, long-term rebalancing," and "changed framework."

COS literature makes it clear that what its sponsors seek is not *policy* changes (*e.g.*, a prohibition against unfunded mandates), but "basic," "fundamental," "structural" changes in our form of government. COS sponsors want to achieve structural changes through "process amendments," an expression which COS defines as allowing the states to make changes in the U.S. Constitution. The December 20, 1994 COS Concept Paper lists only three "process amendments."

The first and most important is a plan to change our method of amending the U.S. Constitution. COS proponents assert that our amending process in Article V has proven unworkable. *On the contrary*, Article V works splendidly. The U.S. Constitution has been amended 27 times in the traditional way, *i.e.*, passage by two-thirds of each House of Congress followed by ratification by three-fourths of the states. Proposed constitutional amendments failed when they did not enjoy a national consensus (*e.g.*, the so-called Equal Rights Amendment).

The alternate method of changing the U.S. Constitution authorized in Article V, *i.e.*, the calling of a new Constitutional Convention (colloquially referred to as a Con Con), has never been used because the American people don't want one, and they have demanded that their state legislators vote **no** on resolutions to call a Con Con. During the last twelve years, the advocates of calling an Article V Con Con have suffered defeats in state after state, from New Jersey to Montana.

COS wants to make it easier to amend the U.S. Constitution by changing Article V so that three-fourths of State Legislatures could propose an amendment to the Constitution that would become valid unless, within two years, the U.S. Congress rejected the amendment by a two-thirds vote in both Houses. If Article V were so amended, a new constitutional amendment could then move quietly through the states toward ratification before the American people were even aware it was happening — just as the COS legislation is now rapidly moving through State Legislatures without any national publicity.

The second "process amendment" (this one proposed by former Governor Bruce Babbitt) would gives two-thirds of the states the power to "sunset" any federal law except those dealing with defense and foreign affairs.

The third "process amendment" (proposed by the Council of State Governments) is to add a sentence to the Tenth Amendment giving the courts the responsibility to adjudicate the boundaries between national and state authority.

It is not believable that the COS sponsors would go to so much effort and expense to put on a Conference merely to discuss those three items. In any event, the COS demand for "structural" changes through "process amendments" is so open-ended that the Conference could and would consider many other changes not revealed in current COS literature. For example, the COS Concept Paper cites futurist Alvin Toffler's *Creating a New Civilization: The Politics of the Third Wave* as a guide for "restoring sense, order and management efficiency to government."

COS literature does not mention the Committee on the Constitutional System (CCS), but CCS for years has been publishing papers and holding conferences to promote structural changes in our government. CCS wants to eliminate the Separation of Powers design of the U.S. Constitution and replace it with something like a parliamentary system. CCS's board of directors includes some of the most prominent names in U.S. policymaking, including Lloyd Cutler and Robert S. McNamara. COS and CCS aims are highly compatible: CCS has called for a Convocation of States "to make recommendations to achieve a more cooperative, equitable, efficient, accountable, and responsive federal system."

It should be noted that COS literature reveals no plans to consider any constitutional amendment against unfunded or funded mandates imposed by Congress on the states. Yet, *that* is the argument used to persuade State Legislatures to adopt COS resolutions. Could COS be a bait-and-switch scheme?

Questions About the Six-Step Plan

Is this COS plan just a group of politicians getting together for a conference to discuss innovative ideas for improving the functioning of government? **Or**, is COS really a plan to bring about major changes in our form of government that will have legal effect? Let's take a close look at the curious and contradictory description of how the Conference of the States will function. It's all laid out in materials published by the Council of State Governments, the self-appointed convener of the Conference.

a) The Council's literature states that COS will produce a result that "has no force of law or binding authority." If this is true, why have the Council of State Governments and Governor Leavitt done so many things that appear designed to give COS the force of law and binding authority? If the sole purpose were to have a conference to discuss states' rights and unfunded mandates, there would be no need for *Step 1*'s requirement that every State Legislature pass an official "Resolution of Participation" or pass legislation authorizing "delegates" to attend on behalf of the state. National meetings and conferences attended by Governors and state legislators take place every year without any legislative action.

COS sponsors have built a formidable paper trail that can be used later to assert that COS does have legal effect. This paper trail includes official legislative action to authorize each state's participation in the COS, and official legislative action naming "delegates" to represent each state in the COS. These state delegations appear to be legally em-

powered to take whatever action the majority decides at the COS Conference so that their decisions will, indeed, have the "force of law."

b) *Step 3* makes clear that the agenda of the Conference will be wide open. The delegates will vote on "solutions to restore balance," language that virtually assures that the COS will discuss and vote on issues never contemplated by the State Legislatures that sent the delegates. Furthermore, no rules of procedure are decided in advance except that each state will have one vote.

c) COS supporters seem to believe that their anticipated product, the "States' Petition," is of landmark, constitutional importance. *Step 6* proudly proclaims: "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." If it will be "intolerable" for Congress to refuse to obey the decisions of the Conference of the States, what action will the states then take? This doesn't sound like the language of something that is not expected to have legal or binding effect.

d) *Step 5* calls for the States' Petition to be approved by the respective State Legislatures. What is the significance of the statement in *Step 5* that "States' Petition items which involve constitutional amendments require approval of a constitutional majority of state legislatures"? If the items in the States' Petition are merely helpful suggestions that have "no force of law or binding authority," how can COS "require" that they be passed by a "constitutional majority"?

And what is a "constitutional" majority? For the purpose of approving amendments to the U.S. Constitution, a constitutional majority of states is three-fourths. Are COS sponsors saying that "States' Petition items" are actually constitutional amendments that would be valid if "approved" by a "constitutional majority" of State Legislatures (even though they never went through Congress)? COS has made it clear that its principal goal is to change the procedure by which the U.S. Constitution is amended. Is *Step 5* a devious way to circumvent the Article V amendment process (under which proposed amendments go from Congress to the states) — and instead use an extra-constitutional procedure to take amendments directly from the Conference of the States to State Legislatures?

Can COS Become a Con Con?

e) What is the significance of the demand in *Step 2* that the Resolutions of Participation must be passed by a "significant majority" of the states? What is a "significant" majority? If COS were merely a meeting to discuss states' rights ideas, it wouldn't matter whether a majority of states was present or not, and it certainly wouldn't matter whether a "significant" majority was present. There must be a significant reason why COS sponsors want a "significant" majority present at the Conference.

COS materials do not define "significant" but, because COS is so eager to change the amending process, it is reasonable to infer that this use of "significant" means two-thirds. Article V states that two-thirds is the majority of states required to call a new Constitutional Convention (Con Con). As State Legislatures began to defeat COS resolutions, COS sponsors began to say that they would incorporate COS as soon as COS is passed by 26 states, and that states may attend the Conference even if they don't pass the COS resolution.

Recent statements by Governor Leavitt stoutly deny that COS is a plan to call a Constitutional Convention, but his earlier statements clearly raise this possibility. The May 17, 1994 version of Governor Leavitt's COS position states: "If Congress refused to consider or pass the [constitutional] amendments [demanded by the States' Petition], the states would have the option themselves of calling a Constitutional Convention to consider the amendments. Supporters of this [COS] 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."

When anyone issues a threat, we must consider the possibility that he means what he says. We must recognize the possibility that COS can plunge us into a new Constitutional Convention. A Con Con could come about in two ways.

(1) The Conference of the States could declare itself a Constitutional Convention. With officially elected delegates, officially empowered by legislation passed by their own State Legislatures, the Conference could take on a life of its own and transmute the "Conference" into a "Convention." After all, COS sponsors have already manifested remarkable arrogance in saying that it would be "intolerable" for Congress to fail to obey the demands of the States' Petition.

Indeed, COS sponsors repeatedly compare their plan to the writing of the United States Constitution in 1787. COS sponsors assert that the problems our nation faces today are "similar" to those the Founding Fathers faced then.

(2) The Conference of the States could pass a resolution making "application" to Congress to call a new Constitutional Convention. If the "significant majority" (two-thirds) of states was present, and those states were represented by officially elected delegates officially empowered to represent their states, it certainly could be argued that a COS resolution meets the Article V requirement that, if two-thirds of the states request it, Congress "shall call a Convention for proposing Amendments." Article V uses the mandatory "shall" and the plural of "Amendments."

What a clever way to bypass the cumbersome requirement that 34 State Legislatures pass Con Con resolutions! Several pressure groups have been working for years to persuade 34 States to pass such resolutions, and they have failed. Their effort peaked in 1983 when the 32nd state (Missouri) passed a Con Con resolution. Since then, Con Con resolutions have been consistently defeated because the American people don't like politicians tampering with our Constitution.

COS offers what could be an irresistible opportunity to

do an end-run around those defeats and use the 1995 Conference of the States to pass a Con Con resolution and assert that 34 states have triggered the Con Con call.

COS's own materials show that its sponsors are pondering the option of a Constitutional Convention. Any smart politician must know that the "structural" changes in our form of government demanded by COS and CCS would never pass in the traditional amendment method — they could come about only through a major redrafting of the U.S. Constitution, which could take place only at a new Constitutional Convention.

While denying that COS would itself be a Constitutional Convention, Ray Schepach, executive director of the National Governors' Association, admitted to the *Wall Street Journal* that "it could lead to a Constitutional Convention if the results of the Conference are ignored." The *Wall Street Journal* concluded that the COS Conference would be "a display of raw, constitutional power." When the Council of State Governments endorsed COS in 1994, journalist David Broder, who prides himself on having inside information, called COS a "first cousin to a Constitutional Convention."

The COS resolution introduced into the Texas Legislature demonstrates that some COS advocates are aggressively planning COS as a stepping stone to a Con Con. The Texas COS Resolution includes this language: "Resolved, That the Conference agenda extend also to common language to be used in state petitions to the United States Congress for a constitutional amendment convention under Article V of the United States Constitution, incorporating within that language the text of any amendments drafted by the Conference of the States for consideration by the constitutional amendment convention."

The Philadelphia City Council passed a resolution on March 16, 1995 stating that the City of Brotherly Love would be happy to host a Conference of the States, but, at the same time, calling on the Pennsylvania State Legislature to defeat the COS Resolution because "legislative authorization and appointment of official State delegates is not required for successful conferences and meetings and only serves to cause serious questions and concerns as to possible motivation and ultimate purposes of such appointments, including concerns of converting the Conference of the States into a Constitutional Convention."

The effort to mutate the Conference of the States into a Constitutional Convention was greatly enhanced by Senator Hank Brown's introduction of U.S. Senate resolution, S. Res. 82, on which hearings have already been held. This resolution states: "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."

This language is curious because no COS material even mentions having a Balanced Budget Amendment on the agenda! S. Res. 82 clearly ties COS to the Con Con that has been urged by the advocates of a Balanced Budget Amendment (BBA) for the last 20 years. The special-interest groups supporting a BBA have believed for some time that the only way they can get a BBA is through an Article V Con Con. Now they have latched on to the COS movement as a way of plunging us into a Constitutional Convention, and S. Res. 82 shows the relationship.

S. Res 82 also shows that the BBA advocates have given up on their argument that a Con Con would be strictly limited to just one issue (the BBA), and they are happy to ride on the shoulders of COS, which is working toward an unlimited Conference to consider many "process amendments."

The federal courts cannot be counted on to call a halt to what might appear to be unconstitutional procedures of the Conference of the States. Past Supreme Court decisions have held that the constitutional amendment process is a "political question" which the courts will not decide.

Is there an alternative plan for those who believe that federal power has encroached too much on the states? Yes! Our present Constitution gives us all the rights we need for states to reclaim their sovereignty. There is no need for a new Constitution, or even for amendments. We should reactivate the Tenth Amendment, exactly as James Madison wrote it. Tenth Amendment resolutions have been passed by more than a dozen State Legislatures, and implementing legislation has been introduced in several states.

Furthermore, if the Governors and state legislators are really sincere in their opposition to federal mandates, they can easily start by refusing to accept federal funds from Goals 2000, as Montana has already done. Rejecting federal supervision over public school curriculum would be the best way to start to assert state sovereignty, and it wouldn't require any conferences or constitutional chicanery.

The United States Constitution and the ingenious design of government it created have served us well for more than two centuries. We don't need a new Constitution or "structural" changes in our government. All those who care about preserving our great United States Constitution should tell their State Legislators to vote **no** on all COS and Con Con resolutions.

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