ASL Proposes Somewhat Usable Rules for Convention

By Bill Walker

There are five steps in the Article V Convention process needed to bring about a convention. The first step is "Why"—why should a convention be held? State legislatures determine the "why" by submitting applications for convention consideration. The second step is "How" — how are the operational aspects of the convention to be addressed? The third step is, "When"—when will Congress call the convention based on applications submitted during the "Why" step? The fourth step is "Who"—who is elected to represent the people at the convention? The "Who" step serves as the referendum portion of the process as the people consider candidate and amendment issues represented by the candidates and vote on whether the issue will receive the delegate support required to pass out of the convention. Finally comes "What"—what will be proposed by the convention for possible ratification by the states?

Recent events have shown we are into the "How" stage of the process. The House Judiciary Committee is collecting what amounts to the first official list of applications. It is close at arriving at the first set of applications from two thirds of the several states required to cause a convention call. Congressman Messer of Indiana has proposed legislation to create the first official list of applications taken from the National Archives. Finally, several groups and individuals (including myself) have proposed operational rules for the convention.

Groups proposing their own versions of convention rules include ALEC (American Legislative Exchange Council), ASL (Assembly of State Legislatures) and COS (Convention of States). The COS rules were written by Robert Natelson ("widely acknowledged to be the country's leading scholar on the Constitution's amendment procedure") and is based on an ancient convention held in 1861. The COS proposal is particularly interesting as the convention on which the proposed rules are based, was not in fact an Article V Convention. Rather, as shown by an official statement of the convention, that convention lacked authority to propose any amendment. Instead any proposal made at the 1861 convention was to be submitted to Congress, who in turn, would decide whether to propose the convention's recommendation. Thus unlike a true Article V Convention Congress had review power over the 1861 convention proposals. An article discussing the COS/Natelson proposal in more detail is available. I also have proposed a set of convention rules incorporated into a proposed call submitted to Congress.

Except for my proposal, all of these proposals have a common error. None have any official procedure in their rules regarding the transmission of a proposed amendment to Congress in order to begin the required ratification process though the ASL proposal at least makes a stab at it in its rules. Even Natelson's proposal lacks this basic requirement. Natelson has no excuse for this oversight. In a recent ALEC Report (page 13), Natelson states, "Because Congress must choose a mode of ratification however, the convention should officially transmit the proposal to Congress." In short none of these proposals address the primary function of a convention—to propose an amendment and send it along to begin the ratification process.

An examination of the ALEC proposal shows it to be entirely deficient. It consists of two sections. The first section deals with the convention call and features the authority of the convention to expel any delegate (called commissioners) if they propose (or apparently even discuss any amendment "outside the subject call of the Convention." What neglected in the rules of course is that Article V clearly assigns the call to Congress, not the states. In short, the rules are unconstitutional as they do not recognize the power of the call is assigned to Congress by the Constitution, not the states.

The second section of the ALEC rules deal with voting and quorum for the convention. The rules call for the quorum to be set by "a majority of states attending the convention." The rules require voting by state with each state delegation having one vote. The rules require a majority vote for the passage of any amendment proposal. That's it. Any other question that might arise is not addressed by the ALEC rules, such as who pays for the convention, how long it remains in session, how does it receive and process applications from the states, how does it go about electing or appointing officers are simply left unanswered.

An examination of these "rules" clearly shows they reflect the ALEC position that everything shall be pre-determined by an unspecified cabal of state legislators and ALEC prior to the convention. Hence as the convention really does nothing but serve as a rubber stamp for the ALEC proposals, convention rules are really not necessary. It is sufficient to state the rules are obviously totally inadequate and unconstitutional. The convention delegates and members of Congress are the only two groups of citizens charged by the Constitution to propose amendments to the Constitution. Under the terms of equal protection, they must be treated equally. Thus, if Congress is required to vote on an amendment by a two-thirds majority so is the convention meaning any vote must be by two-thirds of the state delegations (as no state can have any more say about proposing amendment than any other state), not by majority.

The COS proposed rules are more detailed but equally useless. The rules do note that an Article V Convention is not a legislative body, its only constitutional duty and authority being that of proposing amendments. The rules call for "election" of a president, vice president and so forth. The word "commissioners" is again used throughout the proposed rules. The problem is as COS believes everything is to be pre-determined, doesn't it stand to reason that any "election" of any officer will also be equally rigged? Given that COS believes the states have the right to arrest delegates (commissioners) if they fail to obey "instructions" from the legislature, it is hardly a giant step to assume those behind COS would rig the election of convention officers so as maintain absolute control of the convention.

The COS rules, which closely follow the rules of the failed 1861 convention, spend several pages addressing the regulation of speech by the various convention delegates (commissioners). The fact is all parliamentary references leave such determinations to either the chairman or a vote of the membership to address. There is no need for these rules unless the person writing them was somehow obsessed with repeating failed history. The proposed COS rules clearly are intended to further the agenda of COS. Even the names of the proposed committees for the convention reflect this political agenda (fiscal restraints, federal jurisdiction and term limits).

While lip service is paid to the idea of open debate, this obviously is merely window dressing. With a felony rap hanging over any "commissioner" who dares to discuss anything outside the prescribed program or fails to follow "instructions" from his state legislature, the smart thing to do only speak after consulting a lawyer. This, coupled with the massive limits on length of speech, limits on the number of times a "commissioner" may speak as well as a rule (Rule 18) which states, "A commissioner may be called to order by another commissioners, as well as by the president, and may be allowed to explain his or her conduct or any expressions supposed to be reprehensible" makes the idea of "free speech" and "open debate" at any convention held under COS rules laughable. The American people deserve better than these rules allow. They deserve a convention where the real problems facing the nation can be addressed, discussed, debated and hopefully resolved. This is generally known as the American system of government and features (surprise!) open debate. None of this is possible if every time someone opens their mouth at the convention they can be called on the carpet for "reprehensible" expression by someone who just happens to disagree with what they are saying. These rules should be carefully stored in the nearest round file along with those of ALEC.

Finally is the ASL proposal which at least has some redeeming qualities. For one thing it is very detailed and much of what is proposed (obviously as the name implies) is based on various state legislative procedures found in most state legislatures. It should come as no surprise then that the rules closely resemble those found in any typical state legislature.

The rules do have some good features. For example the proposed rules address the issue of creating rules for the convention and establish a procedure whereby once the rules for a convention are established they remain in effect until changed by the next convention thus eliminating the necessity of each convention being required to start at ground zero regarding operational rules.

Unlike the COS and ALEC proposals the ASL proposals lay out the duties of the various convention officers. The rules address the issue of vacancy in the office of convention president and vice president.

The proposal begins to go off track however when it comes to the rules regarding delegates. As with members of Congress, a delegate elected by the people will receive a certificate of election intended to be presented to the body to which the delegate is to serve. The rules provide for processing this certification similar to the process used by Congress. However the rules ignore the Constitution in that challenge to the certificates is allowed. The Supreme Court in Powell v McCormack determined only those qualifications specified in the Constitution for members of Congress could be used to deny a person elected to the office to be denied his seat. As stated, members of Congress and delegates form a legal class. Therefore Powell says unless a delegate does not meet the standards set by the Constitution, he cannot be denied his elected seat at the convention. The ASL rule is unconstitutional.

The same applies for the "recall authority" allowing state legislatures to "recall" delegates. The Supreme Court has ruled delegates must be elected. There is no authority granting the states to recall any federally elected official. The convention is clearly federal, not state. It addresses amending the federal Constitution. The authority granted it is contained in the federal

Constitution. The Court has ruled states operate under the federal Constitution when involved in the federal amendment process. Thus the ASL rule is unconstitutional.

The ASL rules then address sessions of the convention which none of the other proposed rules address and will help provide a framework for the convention to operate. The rules address voting and unlike ALEC and COS recognize that any proposed amendment must be passed by a two-thirds vote of the state delegations (assuming a quorum). This is the exact same rule the Supreme Court has already ruled on nearly 100 years ago. The rules also permit a "committee of the whole" something used to great advantage in the 1787 convention.

The ASL rules address the issue of proposing amendments and specify a procedure for doing so, again something the other proposals do not address. The rules discuss decorum and debate. However, like the COS proposal, limits on how many times a delegate and state delegations can speak and for how long on a proposal or question. It would be better if, like Congress, the rules called for limits on debate by the convention when required rather than trying to pigeonhole debate into a period of time before it is known what is being discussed. The rules do permit for closure of debate but the process (written demand by 13 states) is clearly cumbersome and contrary to the usual parliamentary procedure of a simple motion.

The ASL rules establish several committees including a committee intended to submit an assessment to the various states for the costs of the convention. The fact is the convention has always been federal not state. In 1787 the convention sent the bill for its expenses to Congress, who paid the $1163.90 for the cost of writing the Constitution. The convention is not authorized by the Constitution to assess anything as this would be a form of taxation. The convention is only authorized to propose amendments, not act as a quasi-legislature and enact taxation on anyone or anything. Thus the provision is unconstitutional. Like the first convention, Congress will have to foot the bill.

The rules allow for a "Committee on Information, Submission and Address to the States and Congress." While the rules allow the committee to "recommend…as to the method of submission of the proposal(s) of the Convention to the various States after the adjournment of the Convention" the Constitution (and court rulings) make it quite clear Congress has the final and only say in the choice of mode of ratification. Thus any suggestion in the rules that the convention may directly submit a proposed amendment to the States and bypass Congress is unconstitutional.

Finally is the section entitled "Funding of the Constitution." Unlike the other proposals of COS and ALEC the rules attempt to at least address the pragmatic problem of finance. However they fail. As already discussed the convention has no constitutional authority to "assess" any state or states for the cost of the convention and historic record proves even the 1787 convention was financed by Congress. Further, the rules allow for "any accrued assets of the convention" to be distributed to a "qualified 501(c) (3) non-profit organization" at the close of the convention. Sorry but even in state law (not to mention federal law) public monies are returned to the treasury from whence they came. Disbursement to any other source is called fraud.

The rules recognize the right of so-called “rescissions” by the state legislatures. However federal criminal law prohibits federal officials from removing any federal record (including applications) thus making so-called “rescissions” not only impossible but a criminal offense. These same rules also purport to specify how applications are to be counted—by amendment subject. The language of Article V is explicit; applications are counted based on a numeric count of applying states. When two thirds of the several state legislatures apply (regardless of amendment subject as Article V has no such requirement) Congress must call a convention. Any ASL rules of the convention to the contrary are thus unconstitutional.

The rules make no sense in regards to a convention call. They mandate that the states shall deliver to Congress “a document of notification for a Call.” The problem is for this rule to have effect, a convention must have been called and the rules adopted (including this rule). Until such time as the rule is adopted, it has no legal effect. In sum, the rules regarding a convention call, as specified by the courts, are the domain of Congress under the political question rule. Hence, the states have no say in how the applications are counted save for the fact Congress is required to count them numerically without regard to subject matter, length of time the application has been submitted or any limiting language contained therein. In other words, all Congress is concerned with is how many states have applied.

The rest of the application is then forwarded to the convention for its disposal. While the ASL rules are not perfect by any means and still suffer from the unconstitutional notion that a convention is state in nature rather than federal, they are a lot better overall than the alternative proposals of ALEC, COS and Natelson. They are comprehensive enough to serve as a good starting point for a final version of the proposed rules for a convention. Naturally, the convention must have the authority to be the final judge about its own rules meaning ultimately the convention (and no one else) writes the convention rules. The general course going forward then would be to use the proposed ASL as a basic framework to be considered by the convention with the caveat that the rules must be altered to eliminate clearly unconstitutional provisions and other issues presently found in them.