

Lack of Rules Stops AVC Movement Cold

By Bill Walker

With the release of a [public statement](#) on July 19, 2017 by Congressman Jared Polis (D-CO) and [a radio interview on Colorado station KGNU](#) on July 20, 2017 of FOAVC supporters Dan Marks, Evan Ravitz and myself began work with Congressman Polis and other members of Congress to introduce and adopt congressional bicameral rules necessary for the calling of an Article V Convention. The bottom line: no rules, no count, no call.

Without procedural rules in place no convention call will ever be issued by Congress irrespective of whether state applications contain identical language, address the same subject or are counted numerically regardless of subject and language because no process exists for Congress to count the applications and issue the convention call.

In a recent telephone conference call with House Parliamentarian Tom Wickham, Congressman Polis, members of his staff and FOAVC supporters, Mr. Wickham confirmed because Article V requires Congress to call a convention, rather than either house of Congress, formal bicameral rules are required in order for Congress to issue a convention call. Without these rules in place, according to Mr. Wickham, Congress cannot count applications or issue a convention call as no formal parliamentary procedure exists for Congress to do so. This lack of procedure is the single reason Congress has never called the required conventions mandated by the state applications.

Bicameral rules are rules identical in language in both chambers of Congress used to address constitutional issues which Congress, collectively, is required to perform. Until 1876 Congress had formal bicameral rules but abandoned them in favor of “informal agreements.” The bicameral rules did not include a formal procedure for calling an Article V convention. Mr. Wickham explained because a convention call is a formal procedure consisting of formally counting state applications to determine two thirds of the states have applied, then drafting an official convention call based on the count of those applications, a formal rule process identical in both houses of Congress is required.

On July 17, 2017 Congressman Polis [sent a letter](#) to Mr. Wickham outlining the highlights of the phone conversation and requesting a written response from Mr. Wickham confirming what was stated in the conversation. Mr. Wickham [responded on September 6, 2017](#) describing the present situation in Congress and noting “There is currently no procedure in the House to tabulate the applications.” The same holds true for the United States Senate. Following receipt of the letter Congressman Polis indicated he will be working with other members of Congress to bring about the necessary rules.

Presently, work is focused [on drafting the text of the proposed rules](#) as well as weighing various options on how the proposal can be presented in the House and Senate. While rare, [there is recent precedent for the House](#) changing its standing rules in mid-term rather than at the beginning of each session as is customary. [Senate Rule V](#) permits a change in Senate rules to be presented to the Senate with a one day written notice by a senator.

The 2017 House Practice Guide, a manual explaining House rules, precedents and procedures of the House written by Mr. Wickham, states the bicameral rules required by the Constitution appear to be a [privileged business of the House](#) meaning it is an issue that can “supersede or interrupt other matters...pending before the House.”

One approach being considered to introducing the proposed bicameral rule to the House is having a member of Congress rise on the House floor and notes the [39 state applications](#) already on record from the [House Judiciary Committee](#) count of state applications. The congressman would then state the evidence of 39 applications recorded by the committee shows applications by the states for a convention call exceeds the required two thirds requirement of Article V.

The congressman would then cite the record of the House from [May 5, 1789](#) showing the House has no option, debate or vote in the matter, request the applications be taken up from the table and note while Congress is required to call a convention no procedure exists for Congress to do so. He would then raise the parliamentary question with the Speaker of the House under House rules permitting parliamentary inquiry of the chair by a member of the House as how the House will proceed to satisfy its mandatory constitutional obligation in compliance with its collective oath of office. In the discussion the congressman would cite the privileged business portion of the House rules as the basis for requesting bicameral rules implementing a formal procedure for counting applications and issuing a convention call are immediately considered by the House.

The Constitution mandates a convention call by Congress for each set of applications consisting of two thirds applications submitted by the state legislatures. [House Rule 29](#) mandates unless otherwise stated in the rules, Jefferson’s Manual is the ruling parliamentary authority. [Jefferson's Manual](#) is a manual of parliamentary procedure for Congress written by Thomas Jefferson in 1801. [A provision in the manual](#) states rules of Congress must be written to address matters “submitted to them [the houses of Congress] by the Constitution...and necessary toward their execution.” Therefore, according to Jefferson’s Manual the bicameral rules must exist as they are “necessary toward [the] execution of a constitutional provision. While the House recognizes the parliamentary authority of the manual, the Senate does not.

All members of Congress [take an oath of office](#) to “support,” or obey, the Constitution. Rejection of rules by Congress intended to cause obedience to a constitutional provision is a violation of oath of office. While more convoluted than House rules where Jefferson’s Manual clearly states the rules must be written to execute provisions of the Constitution, nevertheless Senate rules also allow for Senate enactment of bicameral rules.

Unlike the House, Senate rules [contain the text of Article V](#) transforming the constitutional provision into a Senate rule and permitting constitutional inquiries to be raised regarding Article V. While Senate rules have “[concurrent resolutions](#)” (“informal agreements” which took the place of bicameral rules) Senate rules specify concurrent resolutions have no force of law. They are therefore useless for a formal count of applications or convention call. Senate rules do have [parliamentary inquiry](#), [joint committees](#) and [privileged business](#) allowing for the same process used in the House to be used in the Senate to present bicameral rules.

Over the years many in Congress have said a convention call will be done only when a “tipping point,” [a term first used in 1959 to describe an event in social behavior](#), is reached. The term, as applied to a convention call, appears undefined. It certainly has nothing to do with either the political or the constitutional issues of a convention. Politically, as Congress is mandated to issue convention calls whenever the state legislatures apply, its members have 100% political cover. Any political criticism members may receive for issuing a convention call need only answered by quoting what the Founders stated; [Congress shall have no option, the convention call is peremptory](#). Congress is mandated by the Constitution to determine whether two thirds of the state legislatures have applied, and issue a convention call each time two thirds of the state legislatures apply. Congress cannot be blamed for any subsequent political consequences in a matter in which they have no choice.

While a convention call originates with state legislative applications [the courts](#), (referring to conventions as “deliberative assemblages representative of the people”) [federal law](#) (mandating convention delegates are elected) and the [records of the 1787 Federal Convention](#) (referring to conventions as “popular ratification” conventions) make it clear convention delegates are elected directly by the people and not controlled or appointed by state legislatures as some have proposed.

The courts have ruled [a convention is federal, not state](#), in nature. [Court rulings prohibit Congress from legislatively controlling a convention](#) as the President can have nothing to do with the “proposition or adaption of amendments.” Legislative control of convention agenda falls under this category meaning the applications and convention delegates set the agenda, not Congress. However, as with the 1787 Federal Convention, Congress is responsible for [financing](#) the operational aspects of a convention as it is for any part of the federal governmental system established by the Constitution.

Members of Congress [have brought the problem of the lack of formal process for a convention count and call to the attention of Congress](#) in the past. Presently [a bill](#) introduced by Congressman Luke Messer (R-IN) requiring the National Archives gather state applications from the archives for use by Congress remains in the House Judiciary Committee.

The failure of Congress to properly record state applications and promptly act on them resulted in snatching political defeat from the jaws of victory. [In 1979 when balanced budget supporter Senator Harry Byrd \(D-VA\)](#) recorded his 22 state applications for a balanced budget in the Congressional Record, [the actual count of applications for a balanced budget numbered 34](#). The count has since risen to 40 applying states. Had Senator Byrd known the correct number of applying states, he could have demanded a convention call based on those applications. However without a formal procedure to call the convention Congress could not have acted. As Byrd lacked the correct information and no process existed to call the convention the political moment was lost. Conservatives would achieved what many call the “Holy Grail” of conservatism—a balanced budget amendment—40 years ago. Nothing has really changed in the ensuing 40 years.

Byrd also either ignored or was unaware of the [1930 Senate count](#) of applications determining two thirds of the states had applied thus satisfying the terms of Article V. He could have cited

this record as the basis for a mandated convention call. The [present number of applications](#) from all 50 states is nearly 575, the state of Hawaii recently having submitted an application for a directly *elected* convention. The [first set of two thirds application by the state legislatures](#) was achieved in 1910. Presently, 11 convention calls are mandated.

Three other amendment subjects have also reached the two thirds requirement meaning a convention called on the basis of “same subject” actually requires *four* conventions calls. The Constitution mandates, however, that any convention call is based on a numeric count of applying states rather than by amendment subject contained in an application. Allowing Congress to “aggregate” applications based on subject matter means effectively Congress proposes the amendment rather than the convention as *Congress* would determine what subject or subjects are proposed (or not proposed). This is not the intent of the Constitution. The state legislatures are requesting *a convention* propose an amendment or amendments. Recognition of the fact Congress does not have authority to aggregate applications is demonstrated by the House Judiciary Committee list which only refers to state and date of the application and does not include subject matter.

The “tipping point” appears to be an excuse for Congress not to act. It may be based more on fear of not knowing what redress the people will implement, most likely against the federal government. Many affected by this fear a loss of political power. Naturally to preserve this, they oppose a convention. But which is more desirable, a series of peaceful conventions to constructively address the anger the American people have against their government and redress those grievances—or a civil war? The record shows every possible “tipping point” has been reached. Whether Congress will respond and obey the Constitution when the real reason why Congress has not called, a failure on its part to create the rules necessary to obey the Constitution, is presented remains to be seen. If not then the old adage will ultimately take place: those who will not allow change in government by evolution are bound to see it implemented by revolution.

One thing is for certain. Because of the requirement that formal rules must exist for a convention call to be issued, such proposals as some have advocated such as states having authority to “rescind” applications will have to be formally incorporated in the rules. In the case of rescissions, because at least [two federal criminal laws prohibit the rescissions](#) as no proof exists proving “rescissions” are legal or constitutional, Congress will be required to formally recognize states can mandate deletion of federal records. Whether the state legislatures will be content to only rescind applications instead of using their new found power to delete other federal records remains to be seen.

Other proposals such as [felony arrest of delegates](#), [exclusion of the American people from electoral delegate selection](#), political predetermination of convention agenda, limiting a convention to a single subject despite the Constitution mandating a “convention for proposing amendments”, not amendment, aggregation of applications by subject and [appointment of delegates as a political favor](#) to have affect, must be formalized in the rules together with nullification of current federal laws or constitutional language prohibiting these practices.

Those advocating these positions will be required to get Congress politically on board. This requires members of Congress to publicly support these positions and ultimately, to stand for reelection on this platform. This means advocates will issue public declarations favoring these positions and publicly lobby for them before Congress thus applying these positions in all 50 states. Members of Congress who agree with these advocates will have to advance the legislation described above and defend that decision before their electorates.

Most likely Congress will be most interested in the state laws that call for felony arrest of delegates who fail to follow “instructions” from a few select state legislators. Once the principle of state control of the amendment process is accepted in the congressional rules, these state laws can easily be extended by the states to include members of Congress as Congress also has power of amendment proposal. The speech and debate clause allows for felony arrest of members of Congress. The state laws then bring *both* modes of amendment proposal under the control of a few select state politicians. No doubt the prospect of possible felony arrest of members of Congress will be greeted in Congress with the enthusiasm it deserves.

Certainly members of Congress will also be interested in the policy of excluding the American people from a direct electoral voice in their own Constitution while these members simultaneously seek reelection from these same Americans. Basically those groups advocating this position will be asking members of Congress to favor a proposal which says to the American voter, “I don’t think you have the right to vote or have anything to say about your Constitution ...vote for me!” It should make for some very interesting politics.