January 19, 2014

Dear Mr. Somers,

First of all thank you for allowing me the opportunity to comment on your research into resolving the question posed by Dan Marks’ letter. As this letter is being transmitted as an email I am sending it without documentation attached but instead relying on links to explain and prove the statements I will make. Basically I intend to address the issue of same subject application including the fact that such standard has been satisfied, the question of whether Congress can enact legislation regarding the regulation of an Article V Convention, the issue of “rescission” of applications already submitted by the states to Congress for a convention call and finally prove the fact that no actual action is required of Congress in the form of new legislation or rule in order for Congress to call a convention.

As you recall from the text of Mr. Marks letter he requested the official “count” of applications currently recognized by Congress. It should be obvious from the beginning that a clear lapse of responsibility by Congress has occurred. The reasons are irrelevant. The Constitution mandates Congress call a convention if the states apply. The terms of this mandate will be discussed later. There is no question however Congress is therefore responsible for tabulating the applications submitted by the states and therefore be in the position at all times to have a “count” of applications so as to fulfill its constitutional responsibility. This has obviously not been done as the clerk, or anyone else for that matter in a position of responsibility, can answer Mr. Marks question. This fact, as I’m sure you are aware, was admitted to by Mr. Kirk Boyle, Legal Counsel for the Clerk’s office.

It is self-evident Congress as mandated by the Constitution and oaths of office are required to effect constitutional requirements placed on it by the Constitution. Hence, a method of count must be established or employed if such means already exist. A call must be issued if that count shows or demonstrates that having satisfied the terms of the Constitution mandating when Congress shall call, such terms presently exist. The Supreme Court has ruled repeatedly on this point: Congress must call if the states apply. I can provide you specific citations if you desire but suffice to say no reputable scholar asserts Congress has any choice in this regard.

In an email to me Mr. Marks indicated to me consideration was being given to legislation or rules being established to “count” the applications based on amendment subject of the application. In addition rescissions of applications by the states are to be counted. While this may sound all well and good based on previous proposed legislation, the fact is such an action is unconstitutional as well as just plain wrong.
I would like to first direct your attention to the last three pages of material sent you by Mr. Marks. This is the Virginia application of 1789. Following that is a very important discussion by members of Congress in the House dealing with that application. What was decided at that time has been carried out by the House since then. As you are aware since no count is available, there has not been another official action by the House (or Senate for that matter which followed the House in its decision) since then. Therefore it is of more than passing interest as it demonstrates not only the intention of the Founders as several of them by then were members of Congress but Congress as well.

I have for your convenience reproduced the portion in question and will refer to it as I proceed. The first point that needs to be made is the comment by Congressman Boudinot who points out that, “According to the terms of the Constitution, the business cannot be taken up until a certain number of States have concurred in similar applications.” Boudinot then continues, “...we had better let it remain on the files of the House until the proper number of applications come forward.” It cannot be more emphasized that Congress understood a convention call was based, not on amendment subject, but on a pure count of applying states. This fact has been affirmed by the Supreme Court repeatedly who when discussing Article V has never in over 230 years of rulings even once referred to amendment subject as the basis of decision for when Congress must call a convention. Indeed as I will point out shortly, the court has explicitly and repeatedly made it clear a convention call is based on nothing more than a simple numeric count of the applying states.
Were this all in this example, I would concede some question might still remain but there is still more. It was suggested by Mr. Bland the application be referred to a committee, in this case, the entire House, just as Mr. Boyle suggested Mr. Marks’ letter with 43 applications be referred to the Judiciary Committee. In other words Mr. Bland suggested allowing a House committee to decide on the matter just as you are doing at this time.

James Madison, author of Article V disagreed and stated he “doubted the propriety of committing it, because it would seem to imply that the House had a right to deliberate upon the subject. This he believe was not the case until two-thirds of the State legislatures concurred in such application and then it is out of the power of Congress to decline complying...” Mr. Madison then quoted Article V and said, “From hence it must appear that Congress have no deliberative power on this occasion. He then said, “The most respectful and constitutional mode of performing our duty will be, to let it be entered on the minutes, and remain upon the files of the House until similar applications come to hand from TWO-THIRDS of the States.” Please note Mr. Somers that the author of Article V did not refer to amendment subject or that Congress had the right even to place the matter in a committee.

Mr. Boudinot then added in the following, “enough had been said to convince gentlemen that it was improper to commit—for what purpose can it be done? What can the committee report? The application is to call a new convention. Now in this case, there is nothing left for us to do, but to call one when two thirds of the State Legislatures apply FOR THAT PURPOSE.” Here Boudinot makes it clear the purpose of an application is to cause Congress to call the convention.
The matter is not finished yet. Mr. Huntington “thought it proper to let the application remain on the table; it can be called up with others when enough are presented to MAKE TWO-THIRDS OF THE WHOLE STATES. There would an evident impropriety in committing, because it would argue a right in the House to deliberate, and, consequently, a power to procrastinate the measure applied for.”

Finally came Mr. Page, who “thought it the best way to enter the application at large upon the Journals, and do the same by all that came in, until sufficient were made to obtain their object, and let the original be deposited in the archives of Congress.”

Finally there is this notation, “Whereupon, it was ordered to be entered at length on the Journals, and the original to be placed on the files of Congress.” As I’ve already said Mr. Somers, this practice has been followed by Congress ever since with the applications being printed in whatever record was kept by Congress, currently the Congressional Record, and the application placed in the files of Congress. A simple read of any of the modern applications shows for many years that means placing the applications in the files of the Judiciary Committee who, obviously has done nothing but file them away.

As I’ve already noted, the Supreme Court has, in its rulings, agreed with the conclusions of Congress, that Congress shall act to call based on the numeric count of states rather than any amendment subject contained within the application. Beyond all this is obvious reason why James Madison and the courts made this designation: the application subject is for a **convention to decide and determine not Congress. Congress has no constitutional business in this regard as the states are directing these applications to a convention to deal with the amendment subject raised in them.** The only concern for Congress as expressed by the members of Congress and the courts is how many states are asking for a convention call. Therefore subject matter is of no consequence and obviously cannot be used as a basis for determining whether or not a convention is called.

Beyond this Mr. Somers is the fact that a simple examination of the 746 applications from 49 states shows the states has satisfied the “same subject” standard three times with three different amendment issues. In other words, even if same subject were correct, Congress is still obligated to call a convention. The three subjects are: repeal of income tax, apportionment and balanced budget. This is arrived at by adding the applications in which the states list no subject (usually called “general” applications) with the specific subject of any application. Obviously the “general” applications cannot be ignored in this bogus scenario as the state in question is willing to consider all amendment subjects. Thus when added to the subjects cited above, 39 states have applied for income tax repeal, 38 for apportionment and 36 for balanced budget. **Again same subject is a bogus scenario as it presents Congress**
the opportunity to refuse to call a convention when the matter is “peremptory” upon Congress. Peremptory as I’m sure you are aware means “absolute, no option” etc. As this is an email I will dwell on this point but can provide documentation in the form of court rulings and so forth which state Congress must call and has no option.

Now to the issue of rescission of applications which the Congress made clear was and is not in the power of Congress. Obviously if Congress has such power it could “decline” to call. Therefore rescissions cannot be considered and therefore cannot be used to “count” applications. There is more however on this subject. The action of the 1789 House was to place the application in the “Journal” at which time it became part of that Journal, or in fact, part of the federal record required of Congress by expressed text of the Constitution. In short, when submitted by the states and recorded in the Congressional Record or earlier journals of Congress, the application transforms from a state record to a federal record.

The Tenth Amendment prohibits the states from influencing or nullifying a federal record as the constitution assigns the power of keeping the record expressly to Congress. The text of the Tenth Amendment reads, “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.” Article 1, Section 5, Clause 3 clearly requires “each house” of Congress to keep a Journal of its proceedings and from time to time publish this Journal. As explained earlier in this Appendix, it was determined by Madison and other members of Congress to record all applications in the Journal, now known as the Congressional Record.

As the Tenth Amendment expressly assigns the “power” of keeping a journal to Congress meaning such power is excluded from the states and the people. Therefore any record entered into that record cannot be modified, nullified or otherwise affected by the states or by any subsequent action of the states unless Congress accepts the principle states have the right to nullify federal record. All actions of Congress, whether they are a record of a state application or the creation of a federal law, ultimately, are federal record. If the principle of nullification of federal record by the states for one type of record is valid, then that principle, particularly given the courts have expressly and repeatedly ruled the states operate under the federal constitution, must extend to all federal records meaning the states can nullify federal law as well for whatever the reason the state wishes. Obviously such power in the states would weaken the federal government beyond repair which is why the federal courts have rejected nullification.

Now as to Congress passing legislation to “regulate” a convention as to subject the convention will consider, appointing its officers, delegates and so forth. The Constitution gives no such authority to Congress to regulate a convention.
Indeed a simple reading of the records of the convention make it clear the
convention was to be a separate branch of government assigned its own duties
and independent of the other three branches except as designated by the
Constitution. Hence, the convention can only propose amendments. The
results of a convention are subject to the same review process as any proposal
made by Congress and so forth.

This “so forth” matter includes the 14th Amendment and its equal protection
clause. Again, as this is an email I will not go into great detail here except to
point out the courts have ruled that discrimination cannot be applied unless
there is a reasonable basis for doing so either by Congress or the states. In
sum, the convention is identical to Congress in the amendment process.
Therefore there is no basis for discrimination. I can provide reference if you
desire of several articles and court rulings on this matter if you desire. In sum,
the basic principle of equality mandated by the 14th Amendment satisfies all
questions that legislation would attempt to answer by other means and which
would struck down if attempted as such attempt would be a violation of the
14th Amendment equal protection clause.

However the matter does not end there. The courts have ruled long since that
Congress has no authority to propose legislation in the first place. As I’m sure
you are aware there is no “regulate an Article V Convention” or similar
language in Article I of the Constitution. Therefore if such power to legislate
existed it must be obtained by use of the “necessary and proper” clause.
The clause consists primarily of two parts. The first allows Congress to pass
legislation “necessary and proper” to enforce the “foregoing” powers while the
second portion allows Congress to pass legislation regarding “all other powers
vested by this Constitution in the Government of the United States, or in any
Department or Officer thereof.”

The Supreme Court dealt with the first portion of the clause in 1798 in
Hollingsworth v Virginia, 3 U.S. 378 where the court observed that “And the
case of amendments is evidently a substantive act, unconnected with the
ordinary business of legislation and not within the policy, or terms, of
investing the President with a qualified negative on the acts and
resolutions of Congress.” Later the court added, “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.” Obviously if legislation is passed by Congress the Constitution
mandates it must be reviewed by the president before it becomes laws.
Hollingsworth makes it clear that the president cannot review such legislation
as his power of review is not extended by the Constitution to review any part of
the “proposition, or adoption, of amendments to the Constitution.” Just as
obviously legislation intended to regulate a convention in any means clearly
deals with the “proposition” of amendment especially it is attempts to regulate:
(1) amendment subjects to be discussed
(2) the appointment of delegates
(3) reserving a veto power to Congress in the form of review of any amendment proposed by the convention
(4) appointment of officers of the convention

The list is endless but clearly the intention would be to regulate the proposition of amendment by a convention which the court said was unconstitutional as the president cannot review such legislation. What about the second portion of the “necessary and proper clause” relating to “all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”—can this provision be used by Congress as the basis to pass legislation? The courts have said no.

In United States v Sprague, 282 U.S. 716 (1931), the court stated that while Congress has been delegated choice of ratification mode by Article V, “The fifth article does not purport to delegate any governmental power to the United States, nor to withhold any from it.” Therefore the court removed the second part of the necessary and proper clause as the basis of legislation for Congress in regards to Article V. In the same decision the court added the following, “The United States asserts that article 5 is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true. ... The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or ADDITION.” Thus the court not only eliminated the necessary and proper clause but made it clear that unless expressed in the in the text of the Constitution, no addition was permitted meaning there are no implied powers either for Congress (and thus no basis for legislation) and the states. Thus, Congress is simply mandated to call a convention and as described by Madison in the above material supplied in his latter, with no “debate, vote or committee” on the part of Congress.

But how is the process to be carried out? It would seem apparent at first glance a committee must be formed or employed to decide how to “count” the applications and from that stance then decide the method of counting and so forth. But both the courts and the Founders says this is not permitted, i.e., that such action on the part of Congress would be unconstitutional. Yet the matter must be attended to. The most obvious answer would be to simply “count” Mr. Marks applications, call the convention and be done with the matter as clearly he has produced over 34 applications from 34 states, the number required by the Constitution to cause a convention call. But what of the 712 applications—what becomes of them? Are they simply ignored? No. Each set of 34 applications from 34 states mandates a convention call and to
do that mandates Congress establish a system whereby a tally, a count of applying states is known.

The fact is no legislation or new action is required on the part of Congress as it has already passed all needed rules of procedure for the matter to be resolved. These may be found in the Rules of House.

The first part of the solution is found in Rule 22(j) of the House Rules which specify that “In addition to any other reports required by the Speaker...the clerk shall report to the Committee on House Administration...” The term “clerk” refers to the Clerk of the House.

The obvious authority of this rule means that the Speaker of the House may request at any time any report that Speaker desires. Moreover Rule 22(k) mandates the Clerk “fully cooperate...with administrative operations.”

Therefore if the Speaker of the House desires a report on the “count” of applications submitted by the states for a convention call he merely picks up his phone, contacts the clerk and requests such a report be generated. The clerk
already empowered by Rule 2(j) (k) therefore has all authority necessary to proceed to gather the information and report the Speaker. Obviously the purpose of the report would be for the speaker to in turn report to the House and Senate that a sufficient number of applications have been received to cause Congress to call a convention. By this means then there would be "no vote, no debate and no committee" involved in the process yet the Constitution is satisfied.

Rule 7 also applies in the process. The clerk is required by that rule to archive all records of all committees, including subcommittees. I assume in this that this process is done in an orderly manner meaning that all the papers, records and so forth of the various House and Senate committees are not simply scooped up by the Clerk, thrown into a garbage sack, hauled over to the National Archivists and dumped on the floor with instructions to "stick" them someplace. Instead, as with any records archiving and I have checked with the National Archives on this point, the records are stored carefully and catalogued for future reference and use. As I noted earlier the applications have been referred to the House Judiciary Committee for many years and before that placed in the Journal with the original stored on file. There has to be a record of that filing and the clerk is responsible for it. If a special category has not be designated by the clerk to record state applications, it is clear from the terms of Rule 7 the clerk has the authority to make such a category and, at the request of the Speaker of the House, go back into the archives, pull out the applications, place them in the new category and produce a report to the Speaker of the "count" of applications.

All of this may be accomplished without any new law or rule. It requires one phone call and the typing in by the Clerk of a new category for storing required archived records.

There is a great deal more I could discuss regarding the obligation of Congress and the convention call but I fear my email has grown very long and therefore I should end it at this point. If you have further questions please feel free to contact me at any time. Further, I suggest you take time to review all material at our website www.foavc.org which presents a great deal of material, all public record, which I feel you will find useful as this issue moves forward.

Thank you for your time.

Bill Walker