Written by **Alias** on March 6, 1995

Con-Con Call: Beware Mike Leavitt's "Conference of the States"

Utah Governor Mike Leavitt seems to think the United States Constitution is obsolete. He has teamed up with Governor Ben Nelson of Nebraska to set in motion the mechanism for making fundamental changes to our constitutional structure. A good deal of groundwork has already been laid for what the two governors have labeled a "Conference of the States," clearly one of the most startling and revolutionary developments of our time.

Governors Leavitt and Nelson are supported (if not led) by the Council of State Governments and the National Governors' Association, in cooperation with two other organizations, the National Conference of State Legislatures and the U.S. Advisory Commission on Intergovernmental Relations. Through these organizations, elaborate plans have been devised in which these quasi-official groups have designated themselves "convenors" of a major conference to be held later this year, most likely in Philadelphia.

This extraordinary affair is intended to emulate the historic convention of 1787 that drafted the U.S. Constitution. But lest there be any real opposition to the smooth-running movement, the governors and their "convenors" carefully avoid referring to the Conference as a constitutional convention (con-con).

Decisive Opposition

For the past 200 years, efforts to call a federal convention have been firmly opposed by legal scholars and citizens alike. Although a con-con is a legal mechanism established by the Constitution, it is an amendatory process that cannot be limited or controlled.

In spite of assurances by Governor Leavitt that the Conference of the States will not be a con-con, he openly advocated one in his first position paper and in public statements. The *Salt Lake Tribune* for April 25, 1994 reported:

> On Thursday, the governor unveiled a proposal to gather support for an amendment to the U.S, Constitution giving states authority equal to the federal government's. He took his plan for an informal states' conference and a possible constitutional convention to the Western States Summit in Phoenix. The proposal is a manifesto that urges states to organize against their "subordinate

> status" under the current federal system.

Leavitt's speech was not well received by the audience. Here is the reaction of one state representative, Utah's Met Johnson, as quoted by the *Salt Lake Tribune*: "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.... This is about the federal government regulating us into oblivion, and when he talked about that constitutional convention stuff, he made a lot of Westerners really angry."

While a lot of Westerners were indeed angry and concerned, apparently no one at the intergovernmental level objected to the governor's con-con plan, which is to be presented to an unsuspecting public, not as a con-con, but as a Conference of the States. After the Western States Summit meeting, the *Salt Lake Tribune* reported that "Leavitt also said he has rewritten his position paper, deleting any reference to a constitutional convention, which he said had been misconstrued."

Although Mike Leavitt has toned down his speeches, his carefully written plan still comprises every ingredient needed to harness the powers of a federal convention. The choice of language makes the Conference seem harmless to many state legislators who have been quick to pass "Resolutions of Participation" that are being introduced in one state after another.

A constitutional convention is a meeting authorized by the several states and comprised of delegates appointed by their legislatures for the purpose of considering and adopting amendments to the federal Constitution. To avoid being presumptive concerning the role of this new convocation, we hereby quote from the "Action Plan" of the governors:

> A Conference of the States would enable State representatives to consider, refine and adopt proposals for structural change in our federal system.

So isn't that the essence of a federal convention? Essence or not, the organizers are quick to deny they are hosting a constitutional convention, or even laying the groundwork for one. We agree that their conference is certainly not being called pursuant to Article V of the Constitution, which, in addition to defining the procedure that authorizes Congress to initiate amendments, establishes an alternate route (circumventing Congress) for state-initiated amendments. Yet, neither was the Convention of 1787 called according to the established rules of the day. The original 13 states ignored the amendment process established in the Articles of Confederation. The delegates who attended the 1787 convention were vested with power by their state legislatures, power that extended far beyond their constitutional mandate.

Power of a Free People

Records of the 1787 Convention are clear about the consolidated authority of the states and the power the states vested in their delegates. New Jersey's William Patterson objected to the course the Convention was taking and said:

> We are met here as the deputies of 13 independent, sovereign states, for federal purposes. Can we consolidate their sovereignty and form one nation, and annihilate the sovereignties of our states who have sent us here for other purposes?

Annihilation of state sovereignty, of course, did not occur; but other purposes most certainly did. The main point is that the 1787 Convention possessed that power, and the delegates exercised it. Is the consolidation of that power being attempted again in 1995 by Governor Leavitt and his Conference of the States? A realistic assessment indicates that a convention-empowered conference is exactly what is envisioned. But while the product of the Convention of 1787 turned out to be the most nearly perfect

form of government yet devised, the result this time could be disastrous.

But what about the fact that Article V of the Constitution requires that two-thirds of the states apply for a convention in order for one to be called? The Conference of the States seeks only a majority of 51 percent. Again, the organizers of the planned Conference have obviously done their homework. History shows that a quorum of 51 percent was the minimum needed some 200 years ago to consider, propose, and adopt amendments to the federal system. Thus, our Founders met in Philadelphia and opened the Convention on May 25, 1787 with only seven (a simple majority) of the 13 states represented. That is precisely the minimum percentage wanted by the governors and convenors in the process that is now under way.

The name of the summit to be held this year in Philadelphia — whether it is called a conference, convention, convocation, assembly, discussion, deliberation, or whatever — is of no consequence. But the *process* by which it is being set in motion, the formal appointment of its delegates, and the legal instruments that authorize it, amount to far more than a friendly meeting of state leaders. The organizers have latched onto a principle that is not well known by our citizenry: the consolidation and mobilization of the power inherent in a free people. Congress reaffirmed this principle in an extensive joint resolution in 1935: "The government of the United States is not a concession to the people from some one higher up. It is the creation and the creature of the people themselves, as absolute sovereigns." This concentration of collective right, formally assembled, portends the most serious of consequences.

Those inherent powers of the people when consolidated are superior in every respect to government. In 1911 Senator Weldon Heyburn of Idaho sounded a warning while debating the matter on the floor of the Senate: "When the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution, and they can repeal the provision that limits the right of amendment. They can repeal every section of it because they are the peers of the people who made it."

"It is not a constitutional convention," Governor Leavitt now insists. But his assurance inspires little confidence after one reads the position papers of the intergovernmental groups he belongs to. In order to demonstrate the audacious nature of their "Action Plan for Balanced Competition in the Federal System," we print here their own summary of the grand scheme, with bracketed numbers and bold type added for emphasis:

> [1.] **We propose a process that would consolidate** and focus **state** power. This process would culminate in an historic event called a *Conference of the States*.
>
> [2.] **In each state legislature, a Resolution** of Participation in a Conference of the States **will be filed** during the 1995 legislative session. **The resolution authorizes the appointment of a** bi-partisan, five-person **delegation** of legislators and the governor from each state to attend.
>
> [3.] **When a** significant **majority of the states have passed Resolutions** of Participation, a legal entity called the Conference of the States, Inc., **will be formed by the delegates from each state**, acting as incorporators. The incorporators will also organize and establish rules, assuring that **each state** delegation **receives one vote**.
>
> [4.] The actual Conference of the States would then be held, perhaps in a city with historic significance such as Philadelphia or Annapolis. **At the Conference, delegations would consider, refine and vote on** ways of **correcting** the imbalance in **the federal system. Any item**

receiving the support of the state delegations would become part of a new instrument of American democracy called a *States' Petition*. The States' Petition would be, in effect, **the** action **plan emerging from the Conference of the States. It would constitute the highest form of formal communication between the states and 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 it would have no force of law or binding authority. But it must not be ignored or taken lightly because it symbolizes to the states a test of their relevance. Ignoring the petitions would signal to the states an intolerable arrogance on the part of Congress.

[5.] The States' Petition **would then be taken back to the states for approval by each state legislature**. If the Petition included **constitutional amendments,** those amendments would **require approval by a super-majority of state legislatures** to continue as a part of the States' Petition.

[6.] Armed with the final States' Petition, the representatives of each state would then gather in Washington to present the Petition and formally request that Congress respond.

Convention Call

A reading of the bold type tells it all: This whole effort, labeled a "conference," is in reality a call for a constitutional convention. The "Action Plan" does indeed circumvent the constitutional process of Article V, but it very cleverly incorporates every ingredient necessary for a free people to change their form of government. Although in defiance of existing constitutional procedures, the organizers apply a process based on the principle embodied in Paragraph 1: A free people are sovereign, and when acting through their state they can consolidate that power and reform their government. This principle was inherent in the founding of our nation and is obviously well understood by the designers of this dangerous plan.

Disclaimers woven carefully into the Action Plan, such as the assurance in Paragraph 4 that "it would have no force of law," are unwoven by the fact that a majority of the states are required to pass formal legislation, as in Paragraph 2, authorizing the meeting and appointing official delegates to attend the affair. There would be no need for legal instruments from the states if a delegation of legislators wanted to attend a conference that "would have no force of law."

We could sympathize with enthusiastic public servants who seek only to build the attendance of their meetings. But in this program there will be no meeting at all until (or unless) a majority attends, as required in Paragraph 3. But if there were no pervasive reason for a majority to be there, the conference date could be set now, immediately. There would be no need to wait until 26 states are locked in. If only 49 percent attended, who would really care?

But the organizers do care, and it is of crucial importance to them because that majority will certify the power they seek in their convention, just as stated by South Carolina delegate Charles Pinckney at the Constitutional Convention of 1787: "The assent of a given number of the States shall be sufficient to invest them and to bind the Union as fully as if they had been confirmed by the Legislatures of all the States."

Paragraph 3 embodies another important precedent set by the first Convention: The establishment of a one-state, one-vote rule.

In Paragraph 4 we find the convening of a deliberative body, the core element of a convention,

authorized to consider, refine, and vote on ways of "correcting" the federal system. System corrections are made only at the convention level. Here the organizers are referring to the process of making fundamental, structural, constitutional changes in the federal system. As Paragraph 4 states, virtually all of the position papers of this movement refer to "correcting the imbalance in the federal system."

Violations by the federal government require nothing more than enforcement. States can assist in this enforcement by refusing to accept federal funding of unconstitutional programs and by refusing to implement unconstitutional unfunded mandates. But structural problems in the federal system, if they exist, can be corrected only by amendment, and, of course, that is what the Conference of the States is all about. In essence, the organizers' plan adheres to the Article V convention role of "proposing amendments." But their creation of a "new instrument," which they call a "States' Petition," is nothing more than the final document produced by the convention (that is, the "conference"). They modestly grant that their petition is "the highest form of formal communication between the states and Congress." Yet if the scheme is actually carried out and amendments are adopted, it would be far more than a mere "communication." It would be the highest form of sovereign power that could be exercised by the states over Congress and over the entire federal government.

Document of Amendments

What the organizers call a States' Petition will in reality be the instrument that contains the amendments to be added to the Constitution. It is difficult to find any reason for contriving a new term for this document except to imply that "there ain't nobody here but just us petitioners." Paragraph 5, in essence, defines the ratification process. The certified document of amendments (or their States' Petition) is to be sent to the states for approval by a super-majority. If acting under Article V they would need the approval of three-fourths of the states. But then, inasmuch as this whole promotion relies on brass and audacity, the organizers would likely settle for whatever number of states seem inclined to ratify. In the previous constitution (the Articles of Confederation) a ratification of amendments was required by all 13 of the states. A precedent was set, however, when the Convention lowered the necessary ratification from 13 to nine states (three-fourths of the states).

Madison's notes on the 1787 Convention express the consternation of at least one delegate who opposed reducing the number of states needed for ratification:

> Mr. [Elbridge] Gerry urged the indecency and pernicious tendency of dissolving in so slight a manner, the solemn obligations of the articles of confederation. If nine out of thirteen can dissolve the compact, six out of nine will be just as able to dissolve the new one hereafter.

Perhaps the organizers hope that those state legislators who, for the past 20 years, have steadfastly refused to call a convention, may not recognize the serious implications of this new effort. One way to obfuscate its convention-like process would be for the con-con advocates to use a lot of newly contrived terms — terms which appear harmless to starry-eyed state legislators, but which are clear to the intergovernmental cabal pushing through the process.

Right now it is critically important to the Conference task force to get the Resolutions of Participation passed in at least 26 states as quickly as possible. It looks very much like a high-pressure power game because the resolutions are being thrown through statehouses like hardballs. Most are being passed on voice votes, are given little or no committee hearing, and are being steamrolled through the voting chambers.

The bodies of all the Resolutions of Participation are the same for all states; they typically begin with

the following statement of purpose:

> 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 and supporting [name of state]'s participation in such a Conference.

Shallow Understanding

Do the American people understand that their sovereign powers are set to be consolidated in an instrument that authorizes a private intergovernmental group to tinker with our federal system? And are the governors and state legislators so flattered by the national attention beckoned by this summit that they will vote for a Resolution of Participation without challenging it? Has no American official asked why he should vote for a measure that empowers a private group to serve as convenors of *any* kind of official meeting? Has no one questioned the provision that the Conference must be legally incorporated? Will 7,400 state legislators (or even half of that number) vote in favor of a measure that includes a clause stipulating that "at least twenty-six legislatures adopt this resolution without amendment"?

A vested interest in this measure runs rather conspicuously in the legislative leaders who have appointed themselves a seat at the Conference before the bills have even been introduced. Little do they comprehend the price our nation will pay if those short-sighted state legislators — and their pride-smitten governors — think they can fill the seats of Washington, Madison, or Hamilton at Independence Hall in Philadelphia.

Paragraph 6 is pure fluff. There is no need for a formal ceremony to present ratified amendments to Congress. A long-established rule holds that an amendment goes into effect on the day it is ratified by the legislature of the last necessary state. Two-hundred and fifty delegates need not appear in Washington and cower before Congress to obtain its acceptance of constitutional amendments that originate through the consolidated force of the states.

Considerable ingenuity has gone into selling this affair to the states. Those who want structural change in our system have positioned themselves so that they appear to be rallying around the banner of the Tenth Amendment. A virtual explosion of articles, editorials, and voices in praise of the Tenth Amendment have emanated from every clime and every persuasion. Establishment writers from George Will to David Broder have addressed the subject like tried and true "conservatives." Even President Clinton has joined in with the Tenth Amendment chorus.

Either by seizing the moment or by creating it, the Conference promoters have obtained an all-American launching pad for their upcoming extravaganza. To many Western leaders the Tenth Amendment means getting the federal government out of their pockets and off their backs, as well it should. But in the East and North, where welfare-state programs abound, the Tenth Amendment is often used as an argument for having the federal government pay for its unconstitutional mandates. In the South it often means the restoration of states' rights. Such multi-purpose meanings of the Tenth Amendment are facilitated by repetitious reference to a patently false notion that "imbalance" in the state-federal relationship is a terminal illness that afflicts our nation.

Restoring "Balance"

At a recent meeting of the Council of State Governments, Governor Mike Leavitt declared:

> 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 a proper role — in fact the obligation and stewardship — of states to be jealous and protective of their role and to fight for balance.

Surely Mr. Leavitt realizes that state and federal powers are purposely out of balance — and that the balance is tilted heavily in favor of the states — because our Founding Fathers planned it that way. The profound work of the Convention of 1787 gave only a few specified powers to the federal government, meaning that infinitely innumerable rights, powers, and privileges of the people remained at the state level. The United States Constitution, in its purest form, exemplifies the greatest imbalance in the history of human governance. Before the Constitution was ratified, Madison affirmed this planned imbalance in the state-federal relationship in *The Federalist Papers*, #45:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.

The Conference of the States meets every requirement for a constitutional convention even though it has not been called pursuant to Article V of the Constitution. It would have the legal force of a free people if its proposals were adopted. It would make no difference whether Congress approved or not, since the whole people are superior to all institutions of government and have authority over them.

But should the Conference of the States actually get under way and take on the Constitution, it is hard to know what this constitutional powerhouse would actually do. After initially coming out for a strong state role, Leavitt backed off from that position, as noted in the April 25, 1994 *Salt Lake Tribune*: "Explaining that he had 'migrated ideologically' from a position of state primacy, Leavitt said he now can 'more fully appreciate the need for a federal government role' in areas such as environment, air quality, public lands and rivers."

Now that the wheels are set in motion for hundreds of state legislators to convene for the stated purpose of correcting the federal "imbalance," which cause will Leavitt embrace? Will he champion an increase or a decrease in federal powers? Please bear in mind that all federal powers are enumerated in the Constitution: Congress has 26 powers, the President has six, and the Supreme Court has only three.

So if the Conference takes powers from Washington, which of the enumerated (constitutional) powers will it take? Will the states take power over interstate commerce, the postal service, or the roads that connect the postal system? Will they take from Congress the power to coin money and regulate its value? Will the states deprive the federal government of the power to borrow money or to collect taxes? Is it likely that the states will take over the power to declare war and to raise and support armies? Will the states conduct foreign affairs, take command of the military forces, or assume the veto powers of the President?

These are vital questions, because — beyond these areas — the federal government has precious few powers. If the Conference is intent on making longterm structural change in the state-federal relationship, then it must either *reduce* or *increase* federal powers.

Although Governor Leavitt offers only vague ideas on "restoring balance" and the kind of changes he envisions for the Constitution, it is not difficult to understand the kind of structural changes advocated by the Council of State Governments. In 1989, for example, it endorsed amending the Tenth Amendment as follows: "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 court system, should sound an alarm to any legislator contemplating a Conference of the States hosted by the Council of State Governments or by anyone else at this perilous time in our history.

Judging by the motivation of various state leaders, the Conference organizers really don't want to assume any of the *proper* functions of the federal system. Logically then, they must want to formalize the unauthorized powers — that is, they must want to *certify, the unconstitutional powers of government, both state and federal*. They need a convention to do that. They need Resolutions of Participation and state-certified delegates to do that. They need the powers (pretended or otherwise) of a sovereign people to do that.

On the other hand, if the true goal of the organizers is to strip the federal government of its unauthorized powers, then a convention-empowered Conference of the States is not necessary. Accordingly, the resolutions being passed in the states have one main purpose and one only: to amend the Constitution to legalize that which is now unconstitutional; to usurp the undelegated powers of the people and delegate them to government.

The real motivation behind the Conference of the States is the very opposite of the avowed purpose, otherwise no high powered convocation would be needed. The states could announce their assertion of the Tenth Amendment in a telephone conference call, and divest themselves of federal usurpations by engaging only in those state-federal activities for which there is constitutional authority. The states, whether they meet or not, already possess the power to cast aside the unconstitutional shackles of the federal government. All the states need do to escape federal oppression is to send the federal checks back to Washington with the following explanation:

> We respectfully return checks paid out of the federal treasury for activities that the federal government has no constitutional authority to engage in or to impose upon the states as set forth in the Tenth Amendment of the Constitution of the United States.

Delegates from many states are signing on with the Conference because the federal government has mandated programs without providing the funding. Their intentions are quite clear: They want amendments that will force Uncle Sam to pay for their programs relating to welfare, the environment, health care, highways, land management, public school subsidies, poverty programs, housing, senior citizens, downtown parking, etc. Other than that, of course, they want the federal government to leave the states alone. Never mind that the mandates themselves should be eliminated.

If held, the Conference would likely adopt amendments that would make legal that which is now unconstitutional. Many states would probably agree to *increase* the power of the federal government by insisting that the federal government fund the programs it mandates.

Governor Mike Leavitt obviously realizes he made a tactical error in openly calling for a constitutional convention last year. But his ostensible retreat from that unpopular proposal, his mollification of those governors who want federal money for their own welfare-state programs, and his "ideological migration" in support of a greater role for the federal government, exemplify the consummate politician.

Insider Con

But these are not the Governor's first "migrations." In 1993 and 1994 he was one of eight state executives who participated in the National Education Goals Panel which helped compose the infamous *Goals 2000*. This is the program which has radically accelerated the unconstitutional federalization of

American education. Was the governor ignorant of his role in violation of the Tenth Amendment when he handed our children over to the feds? Is he really the anguished tribune of the Tenth Amendment, or is he instead a political opportunist, duly flattered and urged on by the intergovernmental crowd that has long sought radical changes in our form of government? The Utah governor has found a warm and willing reception among those who, since the 1960s, have worked to abolish the states and to establish in their place a federally managed regional government.

Leavitt exults that public sentiment is growing for the big summit at Philadelphia, but we disagree. On the contrary, *media* sentiment is growing. Or perhaps better stated, the managers of mass media see a perfect forum of pigeons preparing the way for *their* agenda. Editors and writers who have spent their lives scoffing at the Constitution are playing this game with all they can muster. The pages of our liberal papers are brim with flag-waving commentary on the "rebirth of America," and the "new role" of the states as masters of the federal monster. Cartoonists are outdoing themselves with the big foot of Uncle Sam shown as being thwarted by a sword-swinging little state. But the question persists: Why have the champions of big government suddenly discovered the Tenth Amendment?

We offer this answer: Because the call for the convention-empowered Conference conveniently sidesteps Article V, and the only final judge of the Conference's actions will be the people themselves. If the American people can be carried away in a false euphoria over this enormous fraud, they will ratify amendments that will tear apart the very fabric of republican government.

For the most part, Americans do not comprehend the constitutional role of their government or their responsibilities regarding it. Polls taken in recent years indicate an appalling ignorance of our system among the great majority of Americans. According to a national survey sponsored by the Hearst Corporation in 1987 (the bicentennial year of the U.S. Constitution), 45 percent of the respondents mistakenly believed that the Marxist principle, "From each according to his ability, to each according to his need," is found in the U.S. Constitution, 49 percent mistakenly believed that the President can "suspend the Constitution in time of war or national emergency," and 75 percent mistakenly believed that the Constitution guarantees "a free public education through high school."

The Conference of the States is most emphatically not a proposal of the people; it is a highly sophisticated, well-financed production that is being sold to state officials on a false premise and a deceitful promise.

Our immediate concern centers on the Resolutions of Participation being rushed through the statehouses of America. Every effort must be made to block them. Our nation's best informed citizens need to voice their opposition loudly and clearly. Governors and legislators who understand the Constitution and know it is not flawed must be willing to speak out in opposition to this elaborate plan to alter it. We must not permit the calling of a state-authorized Conference imbued with federal convention powers at this point in our history.

Comparing the Conventions

The following side-by-side comparison of state-originated alterations in the federal government shows the purposes and procedures of the proposed 1995 Conference of the States and the historic Constitutional Convention of 1787.

— 1995 — Conference of the States	— 1787 — Constitutional Convention
• **The problem:** Discord in the state/federal relationship and excessive federal power.	• **The problem:** Disunity between the states and insufficient federal enforcement power.
• **Purpose:** To consider and to propose changes in the state-federal relationship.	• **Purpose:** To consider and to propose changes in the state-federal relationship.
• **Considerations:** Structural and statutory changes.	• **Considerations:** Structural changes only.
• **Type of Convocation:** A deliberative body comprised of appointed delegates.	• **Type of Convocation:** A deliberative body comprised of appointed deputies.
• Conference authorized by formal resolutions of a majority of the states.	• Convention authorized by formal resolutions of a majority of the states.
• The states exceed their mandate under Article V and convene and adopt amendments without the consent of Congress.	• The states exceed their mandate in the Articles of Confederation and adopt a new form of government without the consent of the Continental Congress.
• Delegates appointed by the state legislatures.	• Deputies appointed by the state legislatures.
• A quorum to be comprised of 26 states (a simple majority). state legislatures.	• A quorum to be comprised of seven states (a simple majority).
• The Conference elects its own officers, organizes its committees, and makes its own rules and agenda.	• The convention elects its own officers, organizes its committees, and makes its own rules and agenda.
• Conference proposals are sent directly to the states.	• Convention proposals are presented to the Continental Congress.
• Amendment approval by a supermajority of the states.	• Amendment ratification by three-fourths of the states.

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