October 15, 2014

Mr. Adav Noti
Acting Associate General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: ***Response to Petition for Rulemaking to Amend 11 C.F.R. § 100.4***

Dear Mr. Noti,

On behalf of The Convention of States Project,[1] I hereby request that the FEC dismiss the Petition for Rulemaking to amend 11 C.F.R. § 100.4, which was published in Notice 2014-09. The Petition's requested amendment is beyond the scope of the FEC's statutory authority and rests upon a fundamentally flawed understanding of the role of delegates to a convention under Article V of the United States Constitution.

I. THE FEC LACKS AUTHORITY TO EXTEND THE DEFINITION OF "FEDERAL OFFICE" TO COVER DELEGATES TO AN ARTICLE V CONVENTION.

The definition of "federal office" set forth in 11 C.F.R. § 100.4, which the Petitioner seeks to amend, is a mere restatement of the definition established by Congress in 2 U.S.C. § 431(3). The FEC, which acts according to a congressional delegation of power, has no authority to alter this definition.

As the Supreme Court has explained, the first consideration for evaluating the legality of any administrative agency action is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Further, an administrative agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal quotations omitted).

[1] The Convention of States Project is a nationwide, grassroots initiative of Citizens for Self-Governance, advocating for an Article V Convention to limit the power of the federal government.

The FEC was formed by Congress to administer the Federal Election Campaign Act (FECA). As part of this initial legislation, Congress defined the term "federal office," and its definition does not include delegates to an Article V convention (for good reasons that will be discussed below). 2 U.S.C. § 431(3). The administrative structure established by Congress does not give the FEC authority to regulate Article V convention delegates, and it certainly does not give the FEC authority to rewrite the very legislation that created it and sets the scope of its authority.

Congress's decision not to include is the end of the matter. Petitioner's request that the FEC broaden or otherwise amend this definition is nothing more than a request for the FEC to perform an *ultra vires* agency action. If Petitioner seeks to expand the scope of authority granted by FECA, the proper avenue is congressional legislation, not agency action. Though, as demonstrated below, even Congress itself does not have constitutional authority to control or regulate Article V convention delegates.

II. THE FEDERAL GOVERNMENT'S ASSERTION OF AUTHORITY OVER ARTICLE V CONVENTION DELEGATES WOULD BE UNCONSTITUTIONAL BASED ON THE HISTORICAL PRACTICE UNDERPINNING ARTICLE V.

Contrary to Petitioner's claim that there is a "clear requirement of election" for delegates, the text of Article V is silent with regard to how delegates are selected and controlled. The silence of Article V, however, does not give Congress, or the FEC, unbridled discretion to act. According to the Supreme Court, where the text of Article V is silent, historical practice controls. *See, e.g.*, *Hollingsworth*, 3 U.S. 381 (looking to historical practice to determine whether the Eleventh Amendment had been properly adopted); *Leser*, 258 U.S. 130 (same with the Nineteenth Amendment). Historical practice overwhelmingly indicates that Article V convention delegates are appointed and controlled by the state legislatures, not Congress or federal agencies.

A. Historical Practice Indicates That State Legislatures, Not Congress, Possess Authority to Appoint and Regulate Convention Delegates.

In the century leading up to American independence in 1776, there were at least twenty multi-state conventions. Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 Fla. L. Rev. 615, 620 (2013). In the decade between the Declaration of Independence in 1776 and the Constitutional Convention in 1787, there were ten more. *Id.*

Procedures at these conventions were remarkably uniform, particularly when it came to the appointment and instruction of delegates. *See generally id.* Delegates were not popularly elected, nor

were they appointed by Congress or another super-colonial body. At these conventions "the nearly-universal procedure was for the state legislatures to determine the method of selecting commissioners [i.e. delegates]. (Exceptions were limited to instances when the selection had to be made during legislative recess)." Robert G. Natelson, *A Compendium for Lawyers and Legislative Drafters* 48 (2d ed. 2014). *See generally* Natelson, *Conventions*, *supra*. This practice continued at the numerous multi-state conventions held after the adoption of the Constitution as well. Natelson, *Compendium*, *supra*, at 48-49. The state legislatures could, and sometimes did, confer the selection of delegates on another state entity, such as the governor or a special committee, Natelson, *Compendium*, *supra* at 48-49, but ultimate authority over the delegates always rested with the state legislatures. Thus, while the people are certainly represented in the Article V process, it is only in a corporate or indirect sense, through either Congress or the state legislatures. *See Dodge v. Woolsey*, 59 U.S. 331, 348 (1856).

State appointment of convention delegates also carries certain implications for proceedings at the convention itself. For instance, as representatives of the state legislatures, delegates have always conducted business on a one-state, one-vote basis. Natelson, *Compendium*, *supra*, at 63-64; *see also* Natelson, *Conventions*, *supra*, at 666. Also, in order to verify their authority to participate in the convention, delegates were required to display commissions issued by their respective state legislatures. *E.g., id.* at 631, 636, 638, 658, 663, 679, 687.

Hence, from the days of its earliest operation, the state-driven nature of Article V has been reflected by an appropriate vocabulary. The first ever state application under Article V applied for a "convention of the states." *See, e.g.*, 1 Annals of Cong. 258-59 (J. Gales ed. 1834) (H.R., May 5, 1789) (reproducing the text of the first filed Article V application from the state of Virginia). Subsequent state applications used similar language. *See, e.g.*, H.R. Journal, 1st Cong., 1st Sess. 29-30 (May 6, 1789). Even the Supreme itself has called an Article V convention "a convention of the states." *Smith v. Union Bank*, 30 U.S. 518, 528 (1831).

The conclusion of all of this is that historical practice dictates that the state legislatures appoint and control delegates to an Article V convention, not Congress or federal agencies. Given the silence of the text, and the reliance of the Supreme Court on historical practice when interpreting the procedures of Article V, any attempt by Congress to assume or delegate authority over convention delegates would almost certainly be struck down as unconstitutional.

B. An Article V Convention Was Intended to Be a State-Driven Process that Could Bypass Congress.

The text and structure of Article V flow from this history. Though Article V is silent with regard to the appointment and regulation of delegates, the text makes it clear that the convention process, unlike

the congressional method of amendment, is state-driven: when two-thirds of the states apply, Congress "shall call a convention." As Alexander Hamilton indicated in *Federalist No. 85*, "The words of this article are peremptory. The Congress '*shall* call a convention.' Nothing in this particular is left to discretion." Purely from the structure of the text, it appears that Congress and the states were each intended to have their own method of proposing amendments. Indeed, James Madison said as much in *Federalist No. 43* ("[The Constitution] equally enables the general and state governments, to originate the amendment of errors . . . .").

This reading of Article V is further bolstered by discussions held at the drafting convention. James Madison's notes from the Constitutional Convention give a full account of the proceedings leading to the final draft of Article V. 2 *The Records of the Federal Convention of 1787*, at 629-30 (Max Farrand ed. 1911). According to these notes, George Mason strenuously objected to a proposal that only gave Congress authority to propose amendments. As Madison records:

> Col. Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.

Id. Responding to Mason's concerns, Gouverneur Morris and Elbridge Gerry "moved to amend the article, so as to require a convention on application of two thirds of the states." *Id.* The motion passed unanimously. *Id.* at 630.

Article V was intended to give both Congress and the states a means of proposing amendments. It is therefore appropriate that the states, rather than the federal government, should control the convention process. Congress thus properly excluded convention delegates from the definition of "federal official" in 2 U.S.C. § 431(3). To have done otherwise, would have been unconstitutional in light of the intent, structure, and text of Article V.

C. Contrary to the Petitioner's Suggestion, the States Are Completely Equipped to Trigger an Article V Convention.

Petitioner asserts that "The ambiguity in the term 'federal office' is retarding the states from promulgating appropriate enabling statutes" and that "without enabling statutes, the States lack the capacity to carry the Convention into execution." But it is very clear from the text of Article V that Congress is constitutionally obligated to call a convention upon receiving applications from two-thirds of the states, currently thirty-four. There is no constitutional prerequisite for states to have delegate

selection rules in place before they apply for a convention nor before Congress fulfills its mandatory duty to "call" the convention, once triggered.

Petitioner also reaches the odd conclusion that Congress has never called a convention on the 400 past convention applications because of the absence of enabling legislation on the part of the states. The much more plausible, and constitutional, explanation of Congress's inaction is that two-thirds of the states have never applied for a convention on the same topic. The requirement that Congress aggregate only those applications that are on the same subject is well-established in history, *see* Natelson, *Conventions*, *supra*, and in existing scholarship. *See, e.g.*, Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 Const. Comm. 53 (2012).

Moreover, the states are clearly not dependent on Congress or the FEC to trigger the Article V process or enact enabling legislation, as evidenced by the fact that most state are actively putting in place legislation to facilitate an Article V convention. Over a hundred state legislators representing thirty-three states meet together semiannually at The Assembly of State Legislatures to put just these sorts of rules in place. *See The Assembly of State Legislatures*, http://theassemblyofstatelegislatures.org/ (last visited Oct. 29, 2014). Contrary to the Petitioner's assertion, the reason an Article V convention has never been held is because thirty-four states have never applied for a convention on the same topic; it is certainly not because the states are waiting for the FEC to broaden the definition of "Federal Office."

III. STATE LAWS PRESCRIBING APPOINTMENT OF ARTICLE V CONVENTION DELEGATES DO NOT VIOLATE FEDERAL CRIMINAL LAW.

Petitioner's assertion that statutes prescribing modes of delegate selection other than popular election violate 18 U.S.C. § 601 is far-fetched and cannot be seriously maintained. In addition to the fact that this reading of the statute flies in the face of existing Supreme Court precedent, *Dodge*, 59 U.S. at 348, it is also patently implausible based on the language used in the statute.

Conclusion

The Petition to amend 11 C.F.R. § 100.4 should be dismissed without further action, because the FEC lacks authority to broaden the definition of "federal office" established by Congress, and because even if the FEC had authority to do so, the amendment requested by the petitioner is unconstitutional in light of historic practice and Supreme Court precedent.

Please feel free to contact my office at (540) 441-7227 if you have further questions about this matter.

Sincerely,

Michael Farris, J.D., LL.M.
Director, Convention of States Project
Member of the Bars of the District of Columbia and Washington State