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Subject New comment on REG 2014-05 submitted by Olson, William

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For the reasons set out in the attached Statement, Free Speech Coalition, Free Speech Defense and Education Fund, and U.S. Justice Foundation urge that the petition for rulemaking be denied.

Comments provided by :  
Olson, William

**BEFORE THE FEDERAL ELECTION COMMISSION**

In re: )  
Notice of Availability of a Petition ) Notice 2014-09  
for Rulemaking, Federal Office )  
(Federal Register, August 31, 2007) )

**FREE SPEECH COALITION, INC.,  
FREE SPEECH DEFENSE AND EDUCATION FUND, INC., AND  
UNITED STATES JUSTICE FOUNDATION  
STATEMENT ON THE PETITION FOR RULEMAKING ON  
FEDERAL OFFICE (79 Fed. Reg. 59459)  
(November 3, 2014)**

The **Free Speech Coalition, Inc.** (“FSC”), founded in 1993, and tax-exempt under section 501(c)(4) of the Internal Revenue Code (“IRC”), is a nonpartisan group of ideologically diverse nonprofit organizations and the for-profit organizations which help them raise funds and implement programs. FSC’s purpose is to help protect the First Amendment rights of those organizations through the reduction or elimination of excessive federal, state, and local regulatory burdens which have been placed on the exercise of those rights.

**The Free Speech Defense and Education Fund, Inc.** (“FSDEF”), established in 1996, is the education and litigation sister organization of FSC. FSDEF is tax-exempt under IRC section 501(c)(3). It seeks to protect human and civil rights secured by law, study and research such rights, and educate its members, the public, and government officials concerning such rights by various means, including publishing papers, conducting educational programs, and supporting public interest litigation.

**United States Justice Foundation** (“USJF”) is tax-exempt under IRC section 501(c)(3). It is an educational and legal action organization dedicated to instruct, inform, and educate the public on significant legal issues.

## INTRODUCTION

On August 28, 2014, the Federal Election Commission (“FEC”) received a “Petition for Amendment of Rule, Title 11 §100.4” from an organization called National Convention PBC, which the FEC is treating as a petition for rulemaking. Thereafter, the FEC unanimously approved the publication of the Notice of Availability in the Federal Register, which was published on October 2, 2014. *See* 79 Fed. Reg. 59459. The Notice of Availability set a deadline for public comments on November 3, 2014.

## ARGUMENT

### **I. The Clear Definition of “Federal Office” Is Set By Statute and Cannot Be Modified By the FEC.**

The Petition for Rulemaking asks the Commission to amend 11 C.F.R. § 100.4 to add the following language to the definition of “federal office”: “or Delegate to a constitutional convention for proposing amendments to the Constitution of the United States.” The Petition does not cite any provision of the Federal Election Campaign Act to establish that the FEC has statutory authority for expanding the statutory definition of “federal office.”

Currently, the FEC’s definition reads as follows:

*Federal office* means the office of President or Vice President of the United States, Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States.  
[11 C.F.R. § 100.4.]

This definition is fully congruous with (and almost parrots) the language of the statute:

(3) The term “Federal office” means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress. [52 U.S.C. § 30101(3).]

Certainly, the FEC has a duty to interpret its governing statute, and may promulgate regulations clarifying ambiguities. However, “[i]f 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.” *See Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). Here, section 30101(3) clearly defines “federal office,” and the FEC would not enjoy any judicial deference for any definition that varies from the statute.

Furthermore, as further expression of Congress’s intent, the Federal Election Campaign Act originally defined “election” to include “the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States.” *See* Pub. L. No. 92-225, Section 301(a). That portion of the definition for “election” was repealed by the amendments of 1974.<sup>1</sup> *See* Pub. L. No. 93-443, Section 201(a)(2). Clearly, Congress did not want FECA to govern or the FEC to regulate the selection of delegates to a constitutional convention called by the states.

None of the authorities cited by petitioner changes this view. The American Bar Association’s report is merely a statement of belief of the ABA’s special committee, not a substantive interpretation of applicable law. Likewise, petitioner cites 18 U.S.C. § 601, which is a federal crime, but does not establish new authority for the FEC or changes in the definitions under which it operates.

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<sup>1</sup> Strangely, petitioner does not propose an amendment to the FEC’s definition of “election” in 11 C.F.R. § 100.2 to include the election of delegates to a constitutional convention, but that definition relies on the definition of “federal office.”

## **II. The Manner By Which Delegates Are Selected to Serve on a State Convention As Contemplated by Article V of the U.S. Constitution Is Governed by State, Not Federal, Law.**

Article V of the U.S. Constitution specifies that one of the methods of proposing amendments to the Constitution is “The Congress ... on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments....” Since Article V does not make the selection of state delegates to a constitutional convention a matter of federal law, then the selection of such state delegates would be expected to be governed by state law.

The Petition assumes that delegates to a constitutional convention are federal officeholders because “amending the United States Constitution is a federal action.” This assumption is in error. Presidential Electors casting their votes for President of the United States perform a federal function under Article II, but the selection of Presidential Electors is governed by state law. So also would be the election of delegates to an Article V constitutional convention.

The U.S. Supreme Court held in Ray v. Blair, 343 U.S. 214 (1952), that the “Presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector [voters] who votes for a congressmen. They act by authority of the state that in turn receives its authority from the Federal Constitution.” Ray at 224-25. Delegates to a constitutional convention are similarly situated — as state officers performing a federal function — but that federal function does not convert their office into a federal one.

### **III. The Proposed Amendment Would Create Unnecessary Confusion and Administrative Burden for Individuals and Groups Involved in Promoting or Opposing a Convention of the States or Selection of Specific Delegates.**

Throughout our nation's history, various states have applied to Congress for a convention for proposing constitutional amendments. The petition states that, currently, "five States ... have passed legislation providing for the Office of Convention Delegate...." Petition, p. 1. If the petitioner's proposal were adopted, organizations such as the petitioner's apparently would be required to register with and report to the FEC. Its communications concerning the selection of specific candidates as delegates to a convention would presumably be independent expenditures.

Such additional reporting requirements would increase the cost for organizations to either oppose or support particular individuals to be considered as delegates to a constitutional convention. Furthermore, this additional cost could not be justified, as the expansion of FEC jurisdiction to include delegates would not serve the primary purpose of FECA, which is to prevent corruption or the appearance of corruption in the financing of elections of the President, Vice-President, and members of Congress.

The apparent impetus for the petition in question is to ensure that delegates to a constitutional convention are chosen by popular vote. However, granting this petition, and adopting the amendment as proposed, would not accomplish this goal, for the simple reason that the states could ignore or override any definition the FEC might choose to adopt.

### **CONCLUSION**

For the reasons set out above, the Petition for Rulemaking of National Convention PBC should be denied.

Respectfully submitted,

/s/  
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