Comments on Proposal to Modify 11 CFR 100.4

FR Doc. 2014-23443

Bill Walker

November 10, 2014

The following are comments generally in favor of modifying 11 CFR 100.4 to include the office of delegate to a convention for proposing amendments to those offices already listed.

Contents

Introduction

I respectfully submit the following comments regarding the Petition for Rulemaking, Federal Register Document 2014—23443 filed 10/1/2014 at 8:45 a.m. and published as document 79 FR59459 published in the Federal Register Thursday, October 2, 2014. This petition by National Convention PBC requests the Federal Election Commission amend 11 CFR 100.4 to "include delegates to a constitutional convention in the definition of '"federal office."' The current regulation provides that "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." The petitioner requests the Commission amend 11 CFR 100.4 adding the language, "a Delegate to a constitutional convention for proposing amendments to the Constitution of the United States" so as to have 11 CFR 100.4 read, "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 or a Delegate to a constitutional convention for proposing amendments to the Constitution of the United States."

Regarding an Issue of Submission of Public Comments

I first attempted to submit my comment electronically regarding this issue to the FEC on 10/13/2014. The Internet site which supposedly invited public comments had several rules displayed regarding limitations on submission. The rules stated only three files were permitted to be uploaded and specified that no live links could be included in the comment itself. However, when I attempted to submit a comment, the site was inoperative. Thus no public comments could be submitted whatsoever. After some exploration of the FEC site in general I located the email address of the webmaster and a general information address and sent a letter of complaint requesting a response as to why the site was inoperative and further requesting because of this fact that the deadline for public comments should be extended in order to compensate for the time period that the site was inoperative. I specifically requested a response to my complaint which, to date, has been ignored by the FEC and the FEC webmaster.

My email stated:

> "Dear Sir,
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> On 10/13/2014 at 9:35 a.m. PDT I attempted to link to the "add comment" page regarding proposed rule FR Doc. 2014-23443. The site was either down or otherwise inoperable. I was thus denied my right to make public comment on this issue. As I cannot find a link to complain directly to the FEC I am including their general email address in this formal complaint. At the very least I believe because of this failure the comment time should be extended for at least a period of one day due to the fact the system has failed to provide public access for commenting. I request a response by the FEC, webmaster or supervisor regarding this issue. Thank you."

A few days later I again attempted to submit a comment to the FEC regarding this issue. At that time I discovered the site had apparently had been transferred to a new Internet site which permitted the uploading of ten files and made no comment regarding the use of live links in the comment. I believe these changes to be a form of discrimination by the FEC or employees within that agency against this proposed change to 11 CFR 100.4 in that (1) the original site established for comments (a) only allowed for the uploading of three files of evidentiary support, (b) precluded "live" links within the comments submitted (c) was either shutdown or offline for an unknown period of time and reason thus excluding all public comments from being submitted in a timely fashion. Thus public comments on the issue of change to 11 CFR 100.4 was restricted and censored. Thus undue hardship was placed upon the public in that the prior formatting of the site place needless limitations on the submission of relevant material to the FEC on this matter thus unfairly limiting public comment. Further the fact the site was inoperative during the period of public comment without an extension of time by the FEC to compensate for such shutdown also unfairly limited public comment.

Further the "rules" for such comments have been changed mid-stream. What might be presented to the FEC for its consideration in a three file upload is clearly not the same as might be presented in a ten file upload situation. The alteration (apparently) of the rule of preclusion of "live" links also placed an undue hardship on the ability of the public to make comment on this matter. I therefore believe for these reasons that the FEC should consider (1) extension of the public comment deadline so as to compensate for the downtime of the original site and (2) the contacting of all individuals who may have submitted public comments prior to the change of commenting sites with the provisions that they be permitted to submit new comments if they desire employing the new format permitted on the new site.

To play it safe as specified in the new website I am submitting my comments in a pdf file (File 1) in which the links are complete and thus "live." Given the past events I have already described and the inconsistency of information by the FEC I believe this action is well within the bounds of submission.

Objection to the Proposed Language of the Petition

While I favor a change in language to 11 CFR 100.4 as generally proposed I do believe a change in the proposed language is mandated so as to be in compliance with Article V of the United States Constitution and relevant Supreme Court decisions. The proposed language is copied from 18 U.S. Code 601 which reads (relevant portion italicized):

> "(a) Whoever, directly or indirectly, knowingly causes or attempts to cause any person to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of—
> (1) any employment, position, or work in or for any agency or other entity of the Government of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position, or work; or

(2) any payment or benefit of a program of the United States, a State, or a political subdivision of a State;
if such employment, position, work, compensation, payment, or benefit is provided for or made possible in whole or in part by an Act of Congress, shall be fined under this title, or imprisoned not more than one year, or both.
(b) As used in this section—
(1) the term "candidate" means an individual who seeks nomination for election, or election, to Federal, State, or local office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal, State, or local office, if he has
(A) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or
(B) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;
(2) the term "election" means
(A) a general, special primary, or runoff election,
(B) a convention or caucus of a political party held to nominate a candidate,
(C) a primary election held for the selection of delegates to a nominating convention of a political party,
(D) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and
(E) *the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States* or of any State; and
(3) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States."

The relevant portion (italicized) of Article V of the United States Constitution reads:

"*The Congress*, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, *shall call a convention for proposing amendments*, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

Black's Law Dictionary defines a "constitutional convention" as "a duly constituted assembly of delegates or representatives of the people of a state or nation for the purpose of framing, revising, or amending its constitution." The significance of the fact a convention must be a "constituted assembly of delegates or representatives of the people" will be discussed later in this comment at

some length as will other portions of 18 U.S. Code 601. The second portion of the definition that the purpose of a constitutional convention is for "framing, revising or amending" a constitution provides the general powers of a generic convention. It does not, however, explicitly describe the conventions within Article V of the Constitution. Here, the Constitution has limited a convention to the proposal of amendments or the ratification of a proposed amendment *and nothing more*. Therefore as described by the Constitution, the convention referred to in the proposed language changing 11 CFR 100.4 is *not* a "constitutional" convention but a "convention for proposing amendments" more properly described as an Article V Convention or amendments convention, two terms which will be interchangeably in this comment henceforth.

The United States Supreme Court has addressed the issue of interpretation of Article V in several Supreme Court decisions. The most relevant to this portion of the discussion regarding 11 CFR 100.4 is United States v Sprague, 282 U.S. 716 (1931). In that decision the Court stated:

> "The United States asserts that Article V *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. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses, *or, on the application of the legislatures of two-thirds of the states, must call a convention to propose them. Amendments proposed in either way become a part of the Constitution* "when ratified by the legislatures of three-fourths of the several states or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . ." [Italic emphasis added].

The Court, in discussing the specifics of the complaint before them requesting the Court declare ratification of the 18th Amendment unconstitutional because it was ratified by legislature rather than by state ratification convention further stated:

> "Thus, however, clear the phraseology of Article V, they [plaintiffs] urge we ought to insert into it a limitation on the discretion conferred on the Congress, so that it will read, '"as the one or the other mode of ratification may be proposed by the Congress as may be appropriate in view of the purpose of the proposed amendment."'
>
> This cannot be done." [Clarification of the word "they" added].

Finally the Court stated:

> "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. *Martin v. Hunter's Lessee*, 1 Wheat. 30; *Gibbons v. Ogden,* 9 Wheat. 1; *Brown v. Maryland,* 12 Wheat. 419; *Craig v. Missouri,* 4 Pet. 410; *Tennessee v. Whitworth*,117 U. S. 13; *Lake County v. Rollins*,130 U. S. 662; *Hodges v. United States*,203 U. S. 1; *Edwards v. Cuba R. Co.*,268 U. S. 628; *The Pocket Veto Case*,279 U. S. 655; Story on the Constitution (5th ed.) § 451; Cooley's Constitutional Limitations (2d ed.) pp. 61, 70." [Italics in original].

In sum the Court made it clear that what is textually stated in Article V is what is precisely meant and that no "addition" of language or interpolation is permitted. The reason for this is obvious: Article V describes an amendment *process*, that is a means whereby through certain actions, an amendment to the Constitution may be added to the Constitution. If the process is not followed, no amendment is added. To allow for "additions" or "interpolations" means the process is altered beyond that which is expressed in the text thus rendering the process meaningless. Such an event cannot be permitted. Thus to preserve the integrity of the Constitution, no addition, interpolation or rules of construction are permitted thus excluding such mischief.

As the word "constitutional" does not appear in Article V (or anywhere else in the Constitution for that matter) and the language of Article V *clearly* limits a convention to a specific task, that of proposing amendments to our present Constitution and thus eliminates all other functions of a convention usually associated with the term "constitutional convention" the term "constitutional convention" should be stricken from the proposal and only the word "convention" used in the proposed language. Such change brings the proposed language in line with the actual language of Article V of the United States Constitution as well as relevant Supreme Court rulings and removes any implication of an Article V Convention having the authority of "framing" or "revising" the Constitution itself.

Statement in Support of Proposed Change to 11 CFR 100.4

The obvious and clear commonality of 11 CRF 100.4 in its present form is that it refers to some (but not all) public offices created within the Constitution. The Constitution, for example clearly states, that the position of federal judge is an office. Article III, §1 reads:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, *shall hold their offices* during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished *during their continuance in office.*" [Italics added].

Further Article VI, §3 of the Constitution refer to "executive and judicial officers, both of the United States and of the several States…" Thus it is clear 11 CFR 100.4 only refers to a particular subset of public offices within the Constitution. Clearly excluded are federal judges and officers of the several states as well as "executive" officers of the United States who are required to take an "Oath or Affirmation to support this Constitution" *other* than the oath of office required of the President in Article II. Hence, CFR does not, for example, include cabinet officers and other similar officials.

Therefore the common factor binding officials named in 11 CFR 100.4 is they form a subset of individuals described in the Constitution. The commonality is obvious: all such officials are *elected* by the public for a *federal office* and are not state officials. Thus the named officials hold public office as a consequence of election by the people. In short, they are representatives of the people. Black's Law Dictionary describes a public office as "The right, authority and duty created and conferred by law, by which for a given period, either

fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government for the benefit of the public."

In Hollingsworth v Virginia, 3 U.S. 378 (1798) the Supreme Court excluded the President from participation in the amendment process. The Court established a distinction between the amendatory process and what the court termed "ordinary cases of legislation." In the former, the President is not a participant as Article V does not describe any such participation. In the latter the President is an active participant as the legislative process provides for review (and possible veto) of all legislation proposed by Congress by the President. Hence the Constitution *cannot be altered* by ordinary legislative means as the President is precluded from usual participation and without his review *any such legislation is unconstitutional*. The reason for such exclusion is obvious: if the President were involved in the amendment process, in calling a convention for example, he could easily act unilaterally to block the call by simply vetoing it just as he could block any proposed amendment submitted by Congress. To prevent such dictatorial hijacking of the Constitution, the Founders wisely excluded the President from the amendment process and the Hollingsworth decision merely reflected that fact. However, as will be discussed later, the President still retains constitutional authority, responsibility and powers which can be employed to *facilitate* the amendment process, specifically a convention call.

In Hollingsworth, the Court (quoting Attorney General Lee) stated:

> "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*." In a footnote to the decision Justice Chase (responding to arguments by the plaintiffs that the proposed 11th Amendment was improper as it had never been submitted to the President for his review) stated: "There can, surely, be no necessity to answer that argument. 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." [Italics added].

A consequence of the Hollingsworth decision and language of Article V is that as a function of investing "some portion of the sovereign functions of government for the benefit of the public" in the President and members of Congress the President receives a single portion dealing with "ordinary cases of legislation" while members of Congress receive *two portions* of sovereign function of government for the benefit of the public—one portion dealing proposing ordinary cases of legislation and one portion dealing with proposing amendments.

An Article V Convention receives a single portion of sovereign function—proposal of amendments—a portion identical to the portion meted out by the Constitution to Congress in regards to proposing amendments. It is true Congress receives a second portion in the amendment process—determination of ratification mode for all proposed amendments—but as Congress is only charged with choosing a mode of ratification and has no authority to *veto* a proposed amendment made by convention (thus combining its two portions into a single,

omnipotent portion), Congress has no constitutional means whereby it can obstruct the alternate amendment process prescribed in Article V.

To ensure Congress could not prevent amendment proposal by convention the Founders crafted language in Article V making a convention call "peremptory" on Congress meaning it shall have no option regarding calling a convention if the single numeric requirement of the Constitution—the submission of applications for a convention call by two-thirds of the several state legislatures—is satisfied.

As stated in Federalist 85, Alexander Hamilton wrote:

> "In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone, I think there is no weight in the observation just stated. … But there is yet a further consideration, which proves beyond the possibility of a doubt, that the observation is futile. It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged* "on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments, which *shall be valid*, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof." The words of this article are peremptory. The Congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body. … If the foregoing argument is a fallacy, certain it is that I am myself deceived by it, for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of a mathematical demonstration." [Italics in original text; underlining added].[1]

There is a clear legislative nexus established by act of Congress leaving the FEC little choice in changing the language of CRF 100.4. Title 2, Chapter 14 of United States Code §437c establishes the Federal Election Commission. 2 U.S. Code 437c (b) (1) requires that "the Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act [Chapter 14 et.al.]. Title 2, Chapter 14 of United States Code §431 provides definitions of words used in the Act. As described in §431(1) "When used in this Act: The term "election" means (A) a general, special, primary, or runoff election."

[1] (See also: File 2—Discussion by members of Congress following the submission of the first application by the state of Virginia, May 5, 1789 where references are repeatedly made regarding the fact a call must be made based on a numeric count of applying states and that Congress has no right to debate, vote or even refer the matter to committee. See also: http://www.article-5.org/file.php/1/Amendments/index.htm showing that presently 49 states have submitted 762 applications for a convention call nearly 20 times the amount required for a convention call. See also: File 10 records showing congressional receipt of sufficient applications to cause convention call February 1, 1930).

Title 18, Chapter 29- Elections and Political Activities- §601 Deprivation of employment or other benefit for political contribution (2)(A) describes the term "election" means "a general, special primary or runoff election" and describes the section extends to "(E) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or of any State;…"

The words of the two pieces of legislation are clearly identical. Thus a nexus of authority and responsibility for the FEC is established. The Supreme Court has ruled when operating in the amendment process, states operate under the authority of the federal Constitution rather than under the authority of state constitutions.

As described in Hawke v Smith, 253 U.S. 221 (1920) the Court said:

> "It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented."

Further the Court stated:

> "This article [Article V] makes provision for the proposal of amendments either by two-thirds of both houses of Congress or on application of the legislatures of two-thirds of the states, thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the states or by conventions in a like number of states. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people." [Article V inserted for clarity].

Thus the power and authority to apply for a convention call by the states "has its source in the federal Constitution and thus "the state derives its authority from the federal Constitution to which the state and its people have alike assented." 18 U.S. Code 601, which legislatively reflects the Hawke decision, extends the "deliberative assemblages representative of the people" principle expressed in Hawke to include an Article V Convention. It is noteworthy the Court, in its Hawke decision, nor in any other ruling it has ever rendered regarding the amendment process, did not single out nor exclude the convention process from the affect or effect of the particular ruling in question. Therefore as the Court did not express nor even imply that an Article V Convention was not to be a "deliberative assemblage representative of the people" it must be assumed this was the intent of the Court as common sense dictates that if this was the intention of the Court, it would have made such intent abundantly clear. In any event, even if the Court did not intend an Article V Convention be elected and therefore become a "deliberative assemblage representative of the people", the intent of Congress by passage of 18 U.S. Code 601 is unmistakable.

As stated in several cases by the Supreme Court the purpose of any interpretation of the Constitution (and therefore any laws derived from the authority of the Constitution) must be to effectuate rather than defeat the constitutional purpose. Such examples include U.S. v Classic, 313 U.S. 299 (1941): "Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred." Other examples include Prigg v Commonwealth of Pennsylvania, 41 U.S. 539 (1842): "[The] Court may not construe Constitution so as to defeat its obvious ends when another construction, equally accordant with the words and sense thereof, will enforce and protect them." Finally is Jarrolt v. Moberly, 103 U.S. 580 (1880), "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed." The FEC which is required "by oath or affirmation, to support … this Constitution and the laws of the United States which shall be made in pursuance thereof" is as equally bound as the Court to effectuate the Constitution and the federal laws, not defeat them. Thus where the law already exists which includes an election of an official which for whatever reason is not described in a FEC regulation, that agency is required to alter that regulation so as to accommodate and effectuate that law and bring it under the equal protection of law mandated by the Constitution.

If the FEC takes any other action other than amending 11 CFR 100.4 as requested by the petition it clearly violates of the principle of equal protection under the law espoused in the 14th Amendment. The Court, in numerous decisions, had made it abundantly clear that group of individuals who comprise a legal class must be treated equally under the law. Thus, for example, all citizens who are voters must be treated equally under the law. If there is to be discrimination within a legal class it cannot be arbitrary or unreasonable. In other words there must be some basis in fact for such discrimination. No such fact exists regarding a convention and Congress.

As stated by the Court:

> "While acknowledging the currency of the view that "*if the law deals alike with all of a certain class*" it is not obnoxious to the Equal Protection Clause and that "*as a general proposition, this is undeniably true*," the Court in Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 155, said that it was "*equally true that such classification cannot be made arbitrarily* . . .." *Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis*." Ibid. "[A]rbitrary selection can never be justified by calling it classification." Id., at 159. This approach was confirmed in Atchison, T. & S. F. R. Co. v. Matthews, 174 U.S. 96, 104 -105, and in numerous other cases. [Footnote omitted] McLaughlin v Florida, 379 U.S. 184, 190-191 (1964) [Underlined emphasis added].

This Court ruling and numerous others by the Court all reflecting the position established in Gulf establish that unless there is justification for classification of states into different groups, i.e., giving one state more voting power at a convention than another, such a classification is unconstitutional. There is no substance or support that citizens who would comprise a convention, would be elected by citizens, all of whom are subject to the Constitution, suddenly obtains independence from that Constitution simply because they are fulfilling a role entirely

created by that Constitution. On the contrary, the text of the Constitution, in total, makes it clear convention delegates are entirely subservient to the Constitution. Hence, a convention cannot make a rule that is in conflict with the Constitution as it is limited to a single purpose; amendment proposal which in no way can be stretched to include judicial interpretation or legislative power. Thus, laws in effect and current court rulings affect the convention, not the other way around.

Similarly, the function of both convention and Congress is constitutionally indivisible, i.e., the proposal of amendments to the Constitution. The effect of the proposal, if ratified, is identical. The Constitution authorizes no other political bodies to make amendment proposal. Article V strictly and equally limits the power of amendment proposal upon both convention and Congress. Given these facts, there is no possible way to classify the two bodies differently, i.e., two legal classes, as they are identical as to authority, effect, limit and exclusiveness. As the Constitution excludes all others from amendment proposal, there is no constitutional basis for anybody to create a classification. There is no authority in the Constitution allowing any political or judicial body to do so.[2] More importantly, there is no "difference which bears a reasonable and just relation to the act in respect to which the classification is proposed" as the functions of both Congress and convention are identical in all respects.

In sum, as 11 CFR 100.4 dictates that a federal office shall include a "senator or representative in…the Congress of the United States" then Supreme Court rulings regarding equal protection under the law dictate that such regulation must also include delegates to an Article V Convention. Further statutory actions already undertaken by Congress mandate the FEC take regulatory action to bring its regulations with already established statutory acts of Congress.

The Consequences of the FEC failing to alter 11 CFR 100.4

The Effect of Walker v Members of Congress

As already demonstrated sufficient applications from the states have already been submitted to Congress for an Article V Convention call. As Congress has refused to call, it can be asserted those members are in violation of their individual as well as collective oaths of office to "support" the Constitution. Such violation of oath of office is a federal criminal offense. This fact was admitted as being correct as to fact and law by the attorney of record (the Solicitor General of the United States) before the Supreme Court. In 2004, a federal lawsuit, Walker v Members of Congress was filed in federal court. This case was appealed to the Supreme Court in 2006 which ultimately denied certiorari.

However under Supreme Court Rule 15.2 the defendant in the case (in this case all members of Congress who were served individually as well as collectively) was required to state before the Court ruled on certiorari whether or not the facts and interpretation of law made by the plaintiff

[2] *See* Hawke v Smith, 253 U.S. 221, 227 (1920): "It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."

in his writ of certiorari was correct. If the defendant believed the matters not be correct, the rule mandated the defendant raise such objections as necessary to correct the record and present its objections to the Court. The defendant's attorney, the Solicitor General of the United States, waived the right to respond and thus, under the rule, acknowledged the statements made in plaintiff's writ were correct as to fact and law.

The writ asserted the following is true and correct: (1) that under Article V of the United States Constitution, Congress is required to call an Article V Convention if two-thirds of the state legislatures apply for one; (2) that the Article V Convention call is based on a numeric count of applying states; (3) that all 50 states have submitted 567 applications for such a convention [Later research showed 49 states applied, the state of Hawaii being the sole exception and the number of applications is currently 762]; (4) that an Article V Convention call is peremptory on Congress; (5) that the political subject matter of an amendment application is irrelevant and does not affect Congress' obligation to call an Article V Convention; (6) that the refusal of the members of Congress to obey the law of the Constitution and immediately call a convention is a violation of their oath of office as well as a violation of federal criminal law and; (7) that by joining a lawsuit to advocate in open public court they can ignore, veto, disobey or otherwise thwart a convention call, the members of Congress violated federal criminal law.[3]

The John Guise Criminal Complaint

In January 2012, Mr. John Guise of the state of Georgia filed a criminal complaint against the members of Congress with Attorney General Eric Holder under the provisions of 28 U.S. Code 591. In his complaint Mr. Guise charged that, as admitted by the attorney of record for all members of Congress in Walker v Members of Congress, all members of Congress were in violation of their individual as well as collective oaths of office[4] for failure to call an Article V Convention and therefore had committed a criminal act under the definition of the law in that they had advocated the "overthrow of our constitutional form of government" in that their action of refusing to obey Article V and call a convention when mandated by the Constitution to do so constituted "advocacy… of the alteration of the form of government of the United States by unconstitutional means."

In accordance with that statute the attorney general, having first satisfied the information received from Mr. Guise was (a) specific and (b) creditable as demanded by statue, referred the matter to the criminal division of the Department of Justice who in turn referred it to the Federal Bureau of Investigation (FBI). The FBI, in violation of federal statute[5], refused the attorney general's instructions to investigate Mr. Guise's complaint. As federal statute mandates an

[3] See also: all legal filings regarding Walker v Members of Congress, see generally, www.article5.org. See also: http://www.foavc.org/file.php/1/Articles/FAQ.htm#Q9.1 for full discussion of Walker v Members of Congress.

[4] See generally File 4, January 11, 2012 letter from Mr. Guise to Attorney General Eric Holder (pp.1-4); 28 U.S. Code 591 (pp. 5-9); 5 U.S. Code 3331 (p. 10); 5 U.S. Code 7311 (p. 11), Executive Order 10450 §8(a)(4), (pp. 11-15); 18 U.S. Code 1918 (p. 16).

[5] See Executive Order 10450 §8(d) "There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information … relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation *shall make a full field investigation.* [Italics added].

investigation of violation of oath of office by government officials is required and the only discretion afforded the FBI is the level of investigation, the complaint is therefore still valid and awaiting investigation as mandated by federal law. The FBI has never officially closed the case.

The Dan Marks Letter and Response by House Counsel

On April 15, 2013 Mr. Dan Marks of the state of Hawaii sent a letter petitioning Karen Haas, Clerk of the House of Representatives and an ex-officio member of this commission requesting she provide a count of all applications submitted by the states for an Article V Convention call by Congress.[6] On June 17, 2013 Mr. Marks received a response from Mr. Kirk Boyle, which in essence stated the Ms. Haas was unable to comply with Mr. Marks' request due to the fact no one in Congress had ever been assigned the duty to count the applications.[7] At the request of Mr. Boyle Mr. Marks consented to refer his letter of request of the judiciary committee of the House of Representatives "for its consideration" despite historical evidence that Congress was not empowered to put any request by the states before any congressional committee.[8] On October 24, 2013, Speaker of the House John Boehner noted in the Congressional Record that Mr. Marks' letter of request had been forwarded to the judiciary committee.[9] There has been no action whatsoever by the House Judiciary Committee—a clear indication of the intent of the government to "bury" the matter.

This has been the repeated tactic of the government in regards to calling a convention or dealing with any aspect of it, save for the sole passage of 18 U.S. Code 601—bury it in public record and ignore the matter altogether. Even when Congress has officially acknowledged the states have submitted sufficient applications to cause a convention call, Congress has refused to call the convention.[10] Because the public was generally unaware of the number of applications and states that had submitted them along with relevant applicable federal laws this malfeasance of office went largely unnoticed. However this is no longer true.

As already described, a centralized list of applications has been complied showing (as of the date of submission of this comment) 762 applications from 49 states. This number exceeds the constitutional mandate of 34 applications from 34 states by nearly twenty times. Moreover members of the public have conducted extensive research of federal public laws. Such research demonstrates members of the government are in violation of these public laws by not calling a convention. The public laws regarding the John Guise criminal lawsuit have already been presented. There are other public laws involving the statements of Mr. Boyle to Mr. Marks which disprove Mr. Boyle's statement that the Clerk of the House of Representatives has not been directed to provide a count of applications.

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[6] Mr. Marks included copies of 43 state applications taken from the Congressional Record in his letter. Due to the limitations imposed by the FEC regarding file size, these applications have been omitted in File 5 (p.1). The letter and all applications can be viewed at www.foavc.org/reference/Marks_Letter_04152013.pdf.
[7] See File 5, (p. 2).
[8] Ibid, (pp. 3-5).
[9] Ibid, (p. 6).
[10] See File 10.

Public Law Regarding the Counting of Article V Convention Applications

As stated in Federalist 85 and affirmed in several Supreme Court decisions[11] a convention call is peremptory upon Congress meaning that whenever Congress becomes aware that at least two-thirds of the several state legislatures have submitted applications for a convention call to Congress, Congress must call a convention. As stipulated in the already discussed Walker v Members of Congress lawsuits, the Solicitor General acknowledged that no terms or conditions other than a numeric count of applying states attached to this requirement.

As the call is peremptory on members of Congress it is particularly so for the leadership in Congress who, due to their added position of congressional leadership, are expected to set an example of constitutional obedience.[12] Simply put, the public record clearly demonstrates that the Speaker of the House John Boehner was aware of the fact that 43 states had submitted applications for a convention call and therefore satisfied the Constitution and its peremptory requirement by *the fact he submitted the letter himself to the Congressional Record*. Common sense dictates it is reasonable to presume John Boehner, Speaker of the House of Representatives of the Congress of the United States *actually reads material before associating his name and office with it*. Therefore Speaker Boehner had personal knowledge of the fact an Article V Convention was required simply by reading Mr. Marks' letter.

Thus the constitutional existence of the requirement being triggered by the term 'on the application' demands an immediate and continual presence of obligation (and obedience) by Congress to know *precisely* how many states have applied for a convention call. The Speaker had knowledge of this number by the fact that (1) he was a named defendant in the Walker lawsuits and therefore as a named defendant would have received all relevant information about the lawsuit including the number of applications submitted and (2) had received Mr. Marks' letter, read it and published the same in his name in the Congressional Record.

The oath of office required of all federal officials (except the President of United States) states (in part) that the person taking the oath shall:

> "support…the Constitution of the United States…bear true faith and allegiance to the same…without any mental reservation or purpose of evasion; and…will well and faithfully discharge the duties of the office on which I am about to enter."[13]

The duties of office of the Speaker include calling a convention when the states apply. The duty is of course imposed by Article V of the Constitution. Clearly, this involves a count of applications which in turn involves a report describing that count of applying states. In order to comply with his oath of office, to "bear true faith and allegiance [to the Constitution], to support the Constitution without any mental reservation or *purpose of evasion* and thus to well and faithfully discharge the duties of the office" mandate the Speaker require such a report if he has

[11] See Dodge v Woolsey, 59 U.S. 331 (1855), Hawke v Smith, 253 U.S. 221 (1920), United States v Sprague, 282 U.S. 716 (1931).
[12] See generally Rule 1(2), Rules of the House of Representatives 113th Congress, "The Speaker shall preserve order and decorum…", Rule XXIII (1) "A Member…shall behave at all times in a manner that shall reflect creditably on the House."
[13] See File 5, (p.7).

evidence or reason to believe the states have applied for a convention call.[14] To do otherwise constitutes, as admitted by the Solicitor General, a criminal violation of oath of office.

Under the Rules of the House the Speaker, being required to ask for such a report, is mandated to require the Clerk of the House of Representatives (an ex-officio member of FEC) for such a report.[15] Further House Rules mandate the Clerk is responsible for transfer of any records of the House to the Archivist of the United States.[16] The oath of office taken by the Speaker also is taken by the Clerk and the Archivist. The Clerk therefore is as duty bound to ensure a count of states is available for use as is the Speaker. As noted in a letter from the Archivist of the United States, the Archivist does not separate applications for a convention such that it can be determined when the states have applied in sufficient number to cause a convention call.[17]

The purpose of these comments is not determine who is to blame for this oversight—the Speaker for failing to request the report, the Clerk for failing to separate applications in the records so as to permit counting or the Archivist for failure to catalogue them correctly. The failure would seem to fall most heavily on the Clerk and Archivist as federal laws mandates the Archivist (and thus the Clerk who provides the records of Congress to the Archivist) "provide for the …publication of inventories…to facilitate their use."[18] Obviously, in regards to applications for a convention call, the term "facilitate their use" can only mean having the records in such condition as to know the count of applications and how many states have applied so as issue a convention call "on the application" of the several state legislatures.

As criminal activity is involved in that the oath of office for all officials is violated then other criminal charges, i.e., Conspiracy to Defraud the United States, are applicable.[19] As noted in the U.S. Attorneys Criminal Resource Manual 923, "18 U.S.C. 371, creates an offense '[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." The Manual goes on to state fraud is demonstrated, (quoting the Supreme Court in Hass v Henkel, 216 U.S. 462 (1910) and Hammerschmidt v United States, 265 U.S. 182 (1924) if there is a conspiracy which:

"is calculated to obstruct or impair its [the United States]efficiency and destroy the value of its operations *and reports as fair, impartial and reasonably accurate*… by depriving it of its lawful right *and duty* of promulgating or diffusing the information so officially acquired in the way and at the time required by law…" The report then continues (again quoting the Court) "To conspire to defraud the United States…also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. … It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, *but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.*" [Italic added].

[14] See File 5, (p.8).
[15] Ibid, (p.8).
[16] Ibid, (p.9).
[17] Ibid, (pp.10-12).
[18] Ibid, (pp.13-14).
[19] Ibid, (pp.15-17).

The Manual continues that "The general purpose of this part of the statute is to protect governmental functions from frustration and distortion through deceptive practices. Section 371 reaches "any conspiracy for the purpose of impairing, *obstructing or defeating the lawful function of any department of Government*." [Italic added].

Clearly calling an Article V Convention when mandated by the Constitution is a lawful and constitutional act of a department of Government—namely Congress and all associated with that department of government in any capacity. To act in any manner contrary to that lawful act means those who do so run the risk of criminal charges. The facts are clear: by federal statute the federal government is mandated to keep its records in such a manner as to be available for use in providing the count request made in Mr. Marks' letter. Not doing so therefore means violations of oaths of office and other associated criminal violations have occurred. Thus the statement in Mr. Boyle's letter the Clerk has no means to satisfy his request is false and serves obstruct and defeat the lawful function of Congress.

Moreover any government official who in any manner joins in this conspiracy faces the possibility of criminal charges. Bluntly, the members of the FEC will have consider which side of the law they wish to land on—by refusing to change 11 CFR 100.4 as requested, they facilitate an already ongoing criminal fraud and violation of oath of office by preventing a convention delegate to receive equal treatment under the law and continuing the well-established government policy of violation of oath of office. Altering 11 CFR 100.4 as requested relieves the commission members of any involvement in the fraud and violation of oath of office.

Finally the commissioners should be aware of the fact that the filing of a writ of mandamus in federal court is being drafted for the specific purpose of causing a count of applications. The writ will focus on the requirements of 44 U.S. Code 2109 and mandate the Archivist comply with federal law in regards to cataloguing state applications for a convention call. In short, all that has been described in these comments will shortly be put forth before a federal judge.

The Effect of the Coleman v Miller on the Proposal

As discussed in the accompanying file[20] the Coleman ruling has no effect on the decision of the FEC in this matter. It is true the Court stated Congress exclusively controls the amendment process. However, as already noted, Congress has passed a statute demanding that all delegates to a convention be elected. Further in Coleman the Court clearly stated that Congress must act in accordance with the Constitution. *At no time in the Coleman decision did the Court exempt members of Congress or any other member of the government from any criminal liability that federal laws impose for violation of oath of office or other discussed illegal actions.* Thus while the Court gave an advisory opinion giving Congress "exclusive" control of the amendment process it still left in place criminal sanctions preventing such acts should Congress choose to do act on such advice and move to exclude the states or the people from their part in the amendment process. Further the Coleman ruling places *the government* in a precarious position. It cannot, as is its usual practice, "dump" a hot political question it wants to avoid into the lap of the judiciary

[20] See generally File 6.

and leave it to them to solve. In this instance the judiciary has beaten Congress to the punch and walked away leaving Congress holding the political bag. If Congress does not call when mandated then it stands alone in violation of the Constitution and suffers the consequences for not doing so.

Similarly, the FEC cannot refer this matter to the judiciary in hopes of avoiding this issue. If the commissioners reject the request, there is the already discussed issue of criminal acts where the judiciary may be involved but in which case the FEC rather than being in the enviable position of plaintiff enters the judicial ring as defendants.

A Negative Decision Defaults the Issue of Office of Delegate to the States

A decision by the FEC not to modify 11 CRF 100.4 does not end the issue and thus "bury" it as has been the custom and result in the past. The FEC should be aware that those days are over. Instead, thanks to the efforts of several groups, several states have recently passed laws intended to "regulate" a convention.[21] Assuming a negative response by the FEC the states would rightly interpret this action as a "green light" sanctioning such state laws and thus lead to these laws spreading throughout the states like wildfire.

These state laws are premised solely on a legal theory proposed in 2010 by Professor Robert Natelson. In sum, Natelson proposed "fiduciary" (master/slave) control of the convention by state legislatures.[22] Since then based on this flawed theory, several political groups had managed to persuade at least six state legislatures to pass laws disenfranchising citizens (approximately 15% of the voting public) from participation in delegate selection by election as mandated by 18 U.S. Code 601 and Hawke v Smith. These state laws ignore the ruling in Hawke v Smith which states that operate under the federal Constitution rather than their own state constitutions when involved in the amendment process of the federal Constitution and that conventions shall be elected by the people. The laws further mandate these so-called "delegates" are selected by state legislatures and can be charged with felonies for violation of "instructions" given them by the state legislatures even if the "felony" occurs outside the boarders of the state. In other words, the state laws claim state jurisdiction *outside* the boarders of the state thus establishing a so-called "federal jurisdiction" by a single state into the boarders of another state. Thus, under these laws a decision by the FEC not to modify 11 CRF 100.4 does not end the matter—it merely defaults the "office" of delegate to dictatorial state control. Such an act by the FEC is in direct contradiction to U.S. Code as well as Supreme Court rulings.[23]

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[21] For an example of state laws now in effect, see File 8, (pp.1-24).

[22] See File 7.

[23] For the information of the commission, a federal criminal complaint has been lodged with the voting rights section of the Department of Justice alleging violation of the civil rights of the citizens in the states in that have denied them the right to vote for the position of delegate to a convention in contradiction of 18 U.S. Code 601. Further the complaint alleges the state laws are unlawful in that they violate 18 U.S. Code 600, Promise of employment or other benefit for political activity and 5 U.S. Code 1502, Interference in elections by state officials. Further the complaint alleges violations of the civil rights (primarily the First Amendment) of the so-called "delegates" in that they face felony arrest for failure to "obey" "instructions" by members of the state legislatures and face felony arrest for actions taken outside the jurisdiction of the state in question. Information as to the progress of the complaint can be obtained by contacting Ms. Sandra Hill of the Department of Justice (202) 305-7734 or (202) 307-2767. See File 8, (pp. 26-27).

These state laws provide a basis whereby the states can circumvent the Constitution's requirement of a call by Congress. The argument is as follows: As Congress has failed to call a convention when mandated to do so by the Constitution it has thus committed a criminal act admitted to by Congress' legal representative in open public court. Any criminal act by the government cannot be said to acting "in pursuance" of the Constitution as such action is inherently illegal and therefore unconstitutional. As Congress is acting illegally and therefore unconstitutionally it has no authority (as it has forfeited such authority by acting in a criminal manner) under the Constitution. Therefore Congress cannot obstruct the states from holding a convention where clear evidence exists that (1) Congress is aware of the number of applications from the states and (2) has refused requests by the states for a count (and subsequent call) of the state applications.[24]

The states would presume a call from Congress *in absentia*. As the call is peremptory they would move ahead under state law to hold the convention and pass such amendment proposals as the convention (or those controlling the convention through the already presented state laws) desire. Further, the states could claim the same state laws can be applied to the ratification process and thus (1) ratify the proposed amendment by act of the state legislature simultaneously to its "proposal" by a regulated convention or (2) pass such state laws as necessary to regulate a state ratification convention to achieve the same control and result. The act of holding a convention *in absentia* by the state legislatures would be a political rather than criminal trial where, based on the facts of easily demonstrated public record guilt on the part of Congress is presumed.

With such presumption the states can charge Congress and the government with an act of secession from the Union of States and from the Constitution which was created by the states under the sovereign authority of the people. As the states are acting "in pursuance" of the Constitution, that is, attempting to take actions as to *effect* a provision of the Constitution rather than obstruct it, their actions could not be construed as illegal or unconstitutional unlike those of Congress. Hence Congress has no constitutional basis on which to prevent the actions of the states. Further, such charges need not be from all states. Given the extraordinary powers claimed under the Natelson theory of "state" jurisdiction outside state boarders, it is conceivable a single state could charge Congress with such an act of secession.[25] At the least it grants the states authority to place Congress under the same controls of state law as currently exist in some states

[24] For state request of count of applications see recent application by state of Idaho, File 8 (p.25).

[25] Any denial by Professor Natelson that he has never suggested delegates be charged with felony for refusing to obey instructions by a state legislature is easily refuted by the fact Professor Natelson bases his theory of "fiduciary" (master/slave) control by the state legislatures on events and law of the *American colonial era*. In his theory cites no example where such control extends under the Constitution. The fact Professor Natelson ignores is that during the colonial times the law of the land was the despotic rule of the King of England. Hence, if the King instructed two sets of delegates from two colonies to only discuss a single subject a convention that was what occurred *because under English law at the time it was a felony to disobey the instructions of the King*. Natelson either ignored the fundamental fact that under English law of the time period *all acts of the legislatures were not acts based on their authority or the authority of the people they represented but on the authority of the King.* Thus whether intended or not, Natelson by advancing his theory of "fiduciary" (master/slave) control of a convention also advocated the law under which such control was exercised at the time.

for a convention. Thus the entire amendment process can be brought under the control of single state.[26]

This political "trial" is in perfect harmony with the Coleman ruling as the Court, in removing itself from the amendment process, declared that all questions regarding the amendment process fall under the political question doctrine. Congress would be forced to either affect the resolution of the question under the political question doctrine approved by the Court (removal of state legislatures by military force) or take no action whatsoever as the Court declared any ruling given by it in the amendatory process is "advisory…given wholly without constitutional authority" meaning the matter could not be resolved by the Court.[27] Meantime the position of the states would be they are merely obeying the text of the Constitution which Congress refuses to do.

All of this constitutional mischief can be avoided by commissioners approving the modification of 11 CFR 100.4 as discussed in these comments. The effect of making the delegate position a federal office *automatically* removes it from dictatorial state control as exemplified in the accompanying state laws. It brings the office of delegate in line with appropriate Supreme Court decisions and it facilitates the government obeying the Constitution and calling a convention as it is required to do. However, the FEC cannot simply "sit" on this proposal indefinitely. The commission should be aware that according to political sources close to the groups advocating state control, plans are to finalize "rules" controlling the convention by December 2014 and to then issue a convention call forthwith.

An Example of a Proposed Convention Call

There are two reasons the government has been, at best, reluctant to call a convention. One is the mistaken belief that the 1787 Federal Convention was a "runaway" convention—that is that it exceeded its original authority granted it by Congress on February 21, 1787. Public record disproves this claim. On September 27, 1787, *ten days* after the 1787 Federal Convention concluded Congress took up the question of whether or not the convention had exceeded its authority. Those suggesting the convention was a "runaway" received four votes in Congress and the motion was struck from the record. Thus officially Congress resolved this question at the most opportune time—when all who participated in the convention were alive with full memory of recent events and those judging the question were in full knowledge of what was intended by Congress in its February 21, 1787 call.[28]

[26] The effect of defeating this so-called "federal" jurisdiction by a single state does not resolve the issue of state control of a convention. If it is accepted that the state laws in question are constitutional, then it follows that in whichever state a convention is held, the state governing convention delegates applies to *all* delegates in attendance at the convention. Thus, a single state, by use of a state law controls not only its own delegates but every other delegate in attendance (and therefore under state jurisdiction) as well. Thus, a single state legislature could "instruct" all delegates how they act, what issues will be consider and so forth. Obviously, if the delegates failed to obey, felony charges could be levied against any delegate as all are under the authority of the state law as long as they are within the boundaries of that state.

[27] See generally File 6.

[28] See Journals of the Second Continental Congress, Volume 33, pp.540-544 Thursday, September 27, 1787.

The other reason for government reluctance—assuming the government is not operating deliberately in a criminal manner—is the notion that the operational procedures cannot be determined. Many have suggested the operational aspects of an Article V Convention are insurmountable. This is incorrect. While a full examination of the question of operational issues of a convention is outside the scope of this comment, it is clear the Supreme Court has answered the questions in a series of decisions based mainly on the proposition of equal protection under the law already discussed. An example included with these comments of a proposed convention call shows clearly the call can address all operational aspects of a convention yet allow it to function as a representative body of the people as described in Hawke v Smith.[29]

The basic constitutional principle behind the call is the fact the President of the United States under authority of Article II, §3 of the Constitution, "may, on extraordinary occasions, convene both Houses [of Congress], or either of them…" The Supreme Court has ruled in Hollingsworth v Virginia, 3 U.S. 378 (1798) that the president shall have no part in the amendment process. However the Constitution does not specify the President is required to address Congress or even be present for the business of the "extraordinary occasion." Further the President is authorized under his oath of office to "preserve" the Constitution, which is to ensure the Constitution is obeyed by all—including the Congress.

Therefore the President can assemble Congress for the purpose of counting applications in order to preserve the authority of the Constitution, but leave the actual counting of applications to the only official in the government who holds duel office in two branches of government—the vice president[30] (together with the Speaker of the House). The vice president is not mentioned in Hollingsworth as being prohibited from participation in the amendment process. The reason is obvious: the vice president is the only constitutional officer who occupies two simultaneous offices, one in the executive branch and one in the legislative branch. Thus the Hollingsworth ruling is not violated as the President takes no actual part in the amendment process other than to use an assigned constitutional power to preserve the Constitution by compelling Congress to do its mandated duty. The actual operation of the call remains with Congress as described by Article V.

Conclusion

In conclusion based on the reasons presented in these comments, the commission must modify 11 CFR 100.4 as requested in the submitted petition (with the changes in language noted in these comments) in order prevent constitutional mischief by the states and those political groups who would use a refusal by the FEC to their selfish advantage.

[29] See File 9.
[30] See File 8, (p. 28).