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Convention of States: Con-Con Is Best and Only Option for Restraining Federal Government

One of the attorneys representing former President Donald Trump in his legal challenge to the election result in Georgia believes that "the only path forward" toward avoiding future election intrigue is to hold an Article V Constitutional Convention.

As quoted in a Convention of States (COS) blog post, Trump lawyer Jenna Ellis believes that the way to prevent the miscarriage of justice and to protect the integrity of federal elections is to add "really solid amendments" to the Constitution by way of a Convention of States.

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"As I've continued to grow in my knowledge and understanding and genuine love of the Constitution, I've also grown in my advocacy in support of Convention of States because it truly is the best and only solution," Ellis said, as quoted in the COS blog post.

The author of the COS post follows up Ellis's advocacy of an Article V Convention with the following claim:

> Article V is the best way we can ignore Washington, D.C. When a Convention of States is called, no one in Congress will have any say or any power over what state legislators do in terms of proposing amendments. They will also play absolutely no role in ratifying amendments, meaning they are irrelevant to the process that will restrict them directly.

For an organization whose entire existence is bound to one article in the U.S. Constitution, that organization's lack of either honesty or understanding about the prose and process of that article is astounding.

First, Article V does not bypass Washington, D.C., and no one reading the plain text of Article V would believe otherwise.

Just as a refresher: Article V identifies *Congress* as the body that "shall call a convention for proposing amendments" and grants to *Congress* the power to propose the "mode of ratification" of those amendments. That sounds like quite a bit of control in the hands of *Congress*.

As for the states, Article V allows that "the legislatures of two thirds of the several states" can make an "application" for a Convention to propose amendments, and, depending on what *Congress* decides, "the legislatures of three fourths of the several states, or … conventions in three fourths thereof" will be called on to ratify or reject the proposed amendments. That's it.

Does that sound like a procedure that bypasses Washington, D.C., as COS claims it does?

As for a Constitutional Convention being the best solution for reducing the power of the federal

government, arguments can be made in favor and against that proposition. As for it being the *only* solution, however, that statement is factually false. There is another solution, a solution that Thomas Jefferson called the "rightful remedy."

Nullification is the name given by Thomas Jefferson to the constitutional concept that states, as principals and the federal government as the agent created to serve them, retain the power to refuse to recognize as legally binding any act of the federal government that exceeds the authority granted to it in the contract that created its agency, i.e., the U.S. Constitution.

The states created the the federal government, set the boundaries of its power, and reserved to themselves all other rights not specifically delegated to the new national authority. The contract containing the rights and responsibilities of the parties to this contract that created the federal government is called the Constitution. This act of collective consenting is called a compact, or, more commonly today, a contract.

This element of the creation of the Union is precisely where the states derive their power to negate acts of the federal government that exceed its constitutional authority. It is a thread woven inextricably in every strand of sovereignty. It was the sovereign states that defined the territory of authority which the federal government may legally occupy.

The law of agency applies when one party gives another party legal authority to act on the first party's behalf. The first party is called the principal and the second party is called the agent. The principal may grant the agent as much or as little authority as suits his purpose. That is to say, by simply giving an agent certain powers, that agent is not authorized to act outside of that defined sphere of authority.

Upon its ratification, the states, as principals, gave limited power to the central government to act as their agent in certain matters of common concern: defense, taxation, interstate commerce, etc.

The authority of the agent — in this case the federal government — is derived from the agreement that created the principal/agent relationship. Whether the agent is lawfully acting on behalf of the principal is a question of fact. The agent may legally bind the principal only insofar as its actions lie within the contractual boundaries of its power.

Should the agent exceed the scope of its authority, not only is the principal not held accountable for those acts, but the breaching agent is legally liable to the principal (and any affected third parties who acted in reliance on the agent's authority) for that breach.

Under the law of agency, the principal may revoke the agent's authority at will. It would be unreasonable to oblige the principals to honor promises of an agent acting outside the boundaries of its authority as set out in the document that created the agency in the first place.

The ability of a principal to refuse to recognize as binding the act of an agent is well-settled in the jurisprudence of commercial law in the United States. The argument that a principal would have to be bound by an agent's unauthorized acts is so unsound as to be legally laughable.

Imagine the chaos that would be created if principals were legally bound by the acts of an agent that "went rogue" and acted prejudicially to the interests of the principals from whom he derived any power in the first place. It is a fundamental tenet of the law of agency that the agent may lawfully act only for the benefit of the principal.

Inexplicably, this is the position taken by COS when they argue that the states may not nullify unconstitutional federal acts and refuse to be bound by an agent that repeatedly exceeds its authority.

Not only does this agent (the federal government) habitually breach the agency contract, but it does so in a manner that irreparably harms the principal (the states).

So, while Ms. Ellis may be forgiven for asserting that an Article V Convention is the best option — she is, after all, entitled to her opinion — the follow-up claim that such a convention is the only solution is historically, constitutionally, and legally false.

The refusal by the states to enforce or endorse any unconstitutional act of the federal government — known commonly as nullification — is not only another option, but it is the safest and surest option for forcing the federal beast back inside its constitutional cage.