UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MONTGOMERY BLAIR SIBLEY,

PLAINTIFF,

VS.

THE HONORABLE MITCH MCCONNELL, AND THE HONORABLE JOHN A. BOEHNER,

DEFENDANTS.
_____/

Case No.:Case 1:15-cv-00730 (JEB)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiff, Montgomery Blair Sibley ("Sibley"), files this, his Memorandum of Points and Authorities in Opposition to the Motions to Dismiss of Defendants, and for grounds in support thereof states:

I. SUMMARY OF ARGUMENT

As all parties agree, this Court does not have subject matter jurisdiction as Sibley does not present the judicially-created "standing" to be privileged to assert the apparently now-lost fundamental right "to require that the Government be administered according to law. . ." in an Article III Court. Accordingly, this Court is without discretion but must remand this matter.

Second, the Speech or Debate Clause affirmative defense must fail as the premise for its invocation by the Defendants is flawed: The Article V duty to "call a convention for proposing amendments" is ministerial, not discretionary, and hence justiciable.

Last, the Political question doctrine is inapposite to Sibley's claims as that doctrine cannot be employed to authorize a manifestly unauthorized exercise of power.

II. REMAND IS THE ONLY OPTION UPON A DETERMINATION OF LACK OF "STANDING"

As more fully briefed in Sibley's Second Motion to Remand – adopted here by reference – this Court must now follow the dictates of 28 U.S.C. §1447(c) and remand this matter as, perversely, Sibley, as a U.S. Citizen, does not possess the requisite "standing" to hold his government accountable in an Article III court.

Sibley maintains that for this "inferior" Court to ignore the plain wording of 28 U.S.C. §1447(c) and take any action other than to: (i) declare that Sibley somehow miraculously has "standing" or (ii) remand this case to the D.C. Superior Court, would be to violate its Article VI oath of office.

Defendants' second standing argument that: "Plaintiff lacks standing because Congress's failure to call a constitutional convention is not traceable to the two named defendants" is well-placed. (Def. McConnell's Mot. Dismiss, p. 6). However, Sibley moots that argument with his contemporaneously-filed Motion for Leave to File First Amended Complaint which creates a class-action including each member of Congress. *See*: *Powell v. McCormack*, 395 U.S. 486 (1969).

III. THE CONGRESSIONAL DUTY SOUGHT TO BE ENJOINED IS OF A MINISTERIAL CHARACTER RENDERING THE SPEECH OR DEBATE CLAUSE INAPPOSITE

As expressed by those who knew the drafters of the Constitution: "The theory of the constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that, **all are subject to regulations by law, touching the discharge of the duties required to be performed.**" *Kendall v. United States*, 37 U.S. 524, 610 (1838)(Emphasis added).

Accordingly, Congress, no less that the Executive or Judicial branches, is "subject to regulation by law touching the discharge of the duties required to be performed." Among those "duties required to be performed" by Congress is that "duty" found at Article V, which states in pertinent part:

> The Congress, . . . 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; . . .

The Court's attention is drawn, once again, to the imperative verb "shall". It leaves no discretion in Congress and requires the purely "ministerial" act of the "call". The definition of "ministerial" is well-settled in the jurisprudence of the United States. "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. . . .There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus." *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866). *Accord*: *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

Here, Article V has proscribed a "simply, definite duty" upon Congress. The "conditions" upon which this duty arises have been "proved to exist" at this Rule 12(b)(6) stage as demonstrated by the thirty-five (35) Applications referenced in Exhibit "A" to the Complaint in this matter.

In contrast to a ministerial act, when discretion is resident, mandamus will not lie. "Where executive officers of the government are directed by an act of Congress to interpret the act for any

purpose, and there is room for more than one construction, the action of the officials in selecting the one rather than the other will not be interfered with by the courts through mandamus. In such a case, the officers exercise a discretion lodged in them by the legislature, and the courts have no power to control the exercise of that discretion." *United States v. Roper*, 48 App. D.C. 69; 1918 U.S. App. LEXIS 2355 (D.C. Cir., 1918).

Sibley argues that Article V leaves no "room for more than one construction". The Supreme Court agrees with Sibley: "[A]rticle 5 is clear in statement and in meaning, contains no ambiguity and calls for no resort to rules of construction. . . . 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**." *United States v. Sprague*, 282 U.S. 716 (1931)(Emphasis added).

Without contention, the parties agree that the touchstone of the Speech or Debate clause affirmative defense is that the conduct must reside within the: "sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). However, *Tenney* went on to recognize that it was equally clear that "legitimate legislative activity" is not all-encompassing, nor may its limits be established by the Legislative Branch: "Legislatures may not of course acquire power by an unwarranted extension of privilege. . . . This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* at 377, (Citations omitted).

In *Gravel v. United States*, 408 U.S 606, 625 (1972), the Court in determining whether the Speech or Debate clause was applicable looked to see if the activities are: "an integral part of the deliberative and communicative processes by which Members participate in committee and House

proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Here, without question, there is no "consideration and passage or rejection of proposed legislation" with respect to an Article V "call". Admittedly, the Constitution does place the "other matters" of the Article V "call" within the jurisdiction of Congress, but that is not a bar to this Court's rejection of the Speech or Debate clause affirmative defense.

To allow Congress the liberty of refusing to do their express "duty" and then hide from review and enforcement of that duty under the Speech or Debate clause would render the promise of *Fairchild v. Hughes*, 258 U.S. 126, 130 (1922) that every Citizen of the United States, possess the general right: "to require that the Government be administered according to law. . . ." a farce.

Accordingly, the ministerial duty to "call" an Article V Convention to Propose Amendments is not defeated by the Speech or Debate clause and Defendants' motion to dismiss in this regard must be denied.

IV. THIS COURT CAN NOT STAND IMPOTENT BEFORE AN OBVIOUS INSTANCE OF A MANIFESTLY UNAUTHORIZED EXERCISE OF POWER

Sibley here raises the first-impress legal issue of the jurisdiction of this Court to address the omission by Congress of its duty to make the Article V "call".[1] As such, the Defendants' argument

[1] In *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798)(The President of the United States has no formal role in the process of amending the United States Constitution); *Hawke v. Smith*, 253 U.S. 716 (1920)("The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the states, or conventions in a like number of states. *Dodge v. Woolsey*, 18 How. 331, 59 U. S. 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the

that "the Complaint also presents a non-justiciable political question" and thus must be dismissed likewise must be rejected by this Court. Plainly, as observed in *Baker v. Carr,* 369 U.S. 186, 215-217 (1962): "The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder. . . .[The Courts] will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." Here, Sibley argues that the refusal of Congress to "call" an Article V Convention is the very definition of an "unauthorized exercise of power."

Patently, there has been no judicial determination of this first-impression issue of an omission being "unauthorized". Initially, Sibley reminds this Court that the Constitution is not a "suicide pact" designed to irrevocably concentrate power in a central government. As Alexander Hamilton noted in the Federalist No.: 85:

> 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**. . . . We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority. (Emphasis added).

Accordingly, Defendants' claim that they can ignore the "peremptory" words of Article V by hiding behind the Speech or Debate clause is an aberrant violation of the carefully-balanced distribution of

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method which the Constitution has fixed."); *Dillon v. Gloss*, 256 U.S. 368 (1921)("A further mode of proposal—as yet never invoked—is provided, which is, that on the application of two-thirds of the states Congress shall call convention for the purpose.");

power between the People, States and the federal government. Simply stated, to allow by this device of the Political Question affirmative defense the central government to ignore the pleas of the States would put Hamilton's promise to waste.[2]

Moreover, the Supreme Court has rejected the Political Question affirmative defense in a compellingly analogous situation in *Powell v. McCormack*, 395 U.S. 486 (1969). In *Powell*, the Court had to determine whether or not Congress could exclude a member-elect of Congress based on a majority vote for reasons other than those qualifications of office specified in the Constitution.. As with Article V, the absolute imperative of a two-thirds (2/3s) vote to remove was employed in Article I, §5.[3] As discussed in *Powell*, the Constitution uses an imperative verb in regard to Congress being able to judge elections, returns and qualifications of its members, and it does permit under a specified procedure that a Chamber of Congress can expel a member.

In *Powell*, the Speaker of the House argued that these provisions provided exclusive discretion to Congress to determine under what terms and conditions an elected member of Congress could be seated, and that Congress could create any terms it wished in order to deny a Citizen elected to Congress a seat in Congress. The Supreme Court disagreed saying: "For these reasons, we have

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[2] *Accord*: *Prigg v Commonwealth of Pennsylvania*, 41 U.S. 539 (1842)("[T]he 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"); *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"); *Wright v U.S.*, 302 U.S. 583 (1938)("In expounding the Constitution, every word must have its due force and appropriate meaning"; *United States v. Classic*, 313 U.S. 299 (1941)("The courts cannot rightly prefer, of the possible meanings of the words of the constitution, that which will defeat rather than effectuate the constitutional purpose.")

[3] "Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member."

concluded that Art. I, §5, is, at most, a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the 'textual commitment' formulation of the political question doctrine does **not** bar federal courts from adjudicating petitioners' claims." *Id*. at 548. (Emphasis added).

Likewise, the "textually demonstrable commitment" to Congress to "call" an Article V Convention does not bar this Court from adjudicating Sibley's claim. In the case of election to Congress, residency, age and citizenship requirements are enumerated in Article I. In the case of the Article V Convention "call", a specific number of applying states (based on a ratio to the total number of states in the Union) is enumerated. In the case of *Powell*, Congress attempted to limit the selection; in the case of the Article V Convention "call", Congress has attempted to ignore its duty in this regard.

Simply stated, an Article V Convention "call" is "textually demonstrable commitment" to Congress to judge only the qualifications expressly set forth in the Constitution: Conducting a numeric count of the applications to determine that two-thirds of the states have applied for a convention. Thus, just as Congress could not exclude a member by a simple majority vote, neither can Congress refuse to "call" a Convention.

Last, Defendants argue that: "Thus, the questions about the Constitutional amendment process are committed exclusively to Congress, and there are no judicially manageable standards to answer them. Therefore, the Complaint presents a nonjusticiable political question." (Def. McConnell's Mot. Dismiss, p. 11). Defendants' argument in this regard must fail once resort is had to *State of Rhode Island v. Palmer*, 253 U.S. 350, 386 (1920) in which the Court ruled: "The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds

of the members present-assuming the presence of a quorum-and not a vote of two-thirds of the entire membership, present and absent."

Plainly, the interpretation of "two-thirds of both Houses shall deem it necessary" found in Article V was open to a final definition – and thus not barred by the Political Question doctrine – by the Supreme Court. In so defining these words (two-thirds) the Court established a precedent: that it possesses definition jurisdiction of the words used in Article V and the intent of their meaning. Thus, this Court is able to define other words contained in Article V of the Constitution where confusion, politically motivated or otherwise, exists as to their intent and meaning. Therefore, this Court can and must define the meaning of the word "call" as it applies to Article V and the resultant duty of Congress to act.

V. CONCLUSION

WHEREFORE, Sibley respectfully requests that Defendants' Motions to Dismiss be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. First class mail on (i) Peter R. Maier, Special Assistant United States Attorney, Counsel for Defendant, The Honorable Mitch McConnell, 555 4th St., N.W., Washington, D.C. 20530, Telephone: (202) 252-2578, (Peter.maier2@usdoj.gov) and (ii) William Pittard, Deputy General Counsel, Counsel for The Honorable John A. Boehner, Office of General Counsel, United States House of Representatives, 219 Cannon House Office Building, Washington, District of Columbia 20515, Telephone: (202) 225-9700, (William.Pittard@mail.house.gov) this July 1, 2015.

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By: _____
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