

Flurry of Motions, Responses Marks latest Events in Sibley lawsuit

By Bill Walker

As the time draws nearer for a ruling from a federal judge as to whether the Montgomery Sibley lawsuit, *Sibley v McConnell* will be dismissed in District Court in contradiction to federal law or remanded back to federal Superior Court as required by federal law where the issue of the refusal of Congress to call an Article V Convention faces a decision based on the merits of the case, this week saw a flurry of [legal motions](#) and [responses](#) from both sides.

The Sibley lawsuit, filed pro-se by Maryland attorney Montgomery Sibley against Senate Majority Leader McConnell and Speaker of the House John Boehner, was originally filed in District of Columbia Superior Court earlier this year. This particular court, created by Congress in the 1970's acts much like any county courthouse to address the legal issues for the District of Columbia. Unlike the more familiar federal districts courts the Superior Court does not require standing to file a lawsuit. This is because the Superior Court was created by Congress under its authority granted it in Article I of the Constitution; the district courts are created under authority of Article III. Based on language in that article the Supreme Court subsequently created the doctrine of standing to sue as a basis to bring a federal lawsuit.

Simply put the doctrine of standing is a court doctrine for Article III courts requiring the plaintiff in any case bringing a lawsuit to satisfy certain standards to the satisfaction of the court such as proving a particularized and concrete injury before the court can accept jurisdiction and proceed with the case. There is no statute defining these standards and over the years the courts have changed and varied them substantially. Nevertheless courts have used standing to deny (or dismiss) court cases probably by the thousands. In legal terms court authority to try the merits of a case is called subject matter jurisdiction. Without that jurisdiction Supreme Court rulings dictate the District Court must dismiss the suit for lack of subject matter jurisdiction. And therein lies the problem. In the case of the Superior Court [Federal law](#) dictates that if a district court determines it lacks subject matter jurisdiction it must remand the case back to the Superior Court which, according to law, then proceeds *without* any issue of standing barring the way. In other words, the issue is then decided on the merits of the case thus defeating the usual robotic action by the government to use standing to defeat an issue rather than having to fight it out based on merit.

In the case of *Sibley v McConnell* both sides have stated Sibley lacks standing. Thus it would appear a simple proposition: the government and the plaintiff having both stated to the District Court the plaintiff lacks standing, under peremptory standing of the law (“the court shall remand...”) the court has no choice but to remand the case back to Superior Court. The problem is the government wants the court to dismiss the case (thus assuming subject matter jurisdiction just long enough to declare it lacks subject matter jurisdiction) on the basis of lack of standing but not remand the case. In other words the government is asking the court to ignore the law.

The crux of the question is whether a court created by Congress, authorized by the Constitution, which is not subject to any state laws, having jurisdiction only in a federal district created by the Constitution, financed entirely by federal funds, whose judges are appointed by the President and

subject to approval by the United States Senate and whose rulings are based on federal law, is a state court. Mr. Sibley has asserted some of the law in question may be unconstitutional. It may be the court may have to address this question to some extent though it is unlikely the court will overturn the statute allowing federal officials to remand a case to federal court. The question of the constitutionality of whether a court created entirely in the federal system can be labeled a “state” court without any state input whatsoever is a constitutional question worthy of consideration starting with the first obvious question: under what authority is Congress allowed to create any “state” court? That authority comes from state constitutions and is exercised by state legislatures, governors and so forth. It is a clear demonstration of the separation of powers doctrine enunciated in the Tenth Amendment.

Thus the court may, though it is highly unlikely, address the constitutionality of the statute in question. More to the point however is given the language of the law and the fact it offers no alternatives to the District Court if it determines it lacks subject matter jurisdiction as well is precluded from dismissal (as the law also states the state court shall continue with the case thus at least implying if not outright denying the right of the District Court to dismiss a case it determines is out of its subject matter jurisdiction).

Generally speaking District Courts, once all motions, responses and so forth are filed, responds quickly to the issue of subject matter jurisdiction. In this case, the answers should come at the speed of light given both sides admit the court has no subject matter jurisdiction.

In their response attorneys for McConnell and Boehner rely heavily on their supposed immunity granted them in the Speech and Debate Clause of the Constitution. This clause of the Constitution provides for immunity for members of Congress from being “questioned in another place” meaning immune from legal prosecution (except in the case of felony) for any action (or lack thereof) they may take while in Congress. Based on this the defendants assert the District Court has “discretion to decide Defendants’ dismissal motions before Mr. Sibley’s Remand Motion.” The defendants cite, [“Ruhrgas AG v Marathon Oil Co., 526 U.S. 574, 586-87 \(1999\).”](#)

A simple examination of this citation shows the desperation of the defendants. On page 583 the court said, “*Steel Co.* held that Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case. “For a court to pronounce upon [the merits] when it has no jurisdiction to do so,” *Steel Co.* declared, “is . . . for a court to act ultra vires.” 523 U. S., at 101–102. The Fifth Circuit incorrectly read *Steel Co.* to teach that subject-matter jurisdiction must be found to exist, not only before a federal court reaches the merits, but also before personal jurisdiction is addressed. See 145 F. 3d, at 218.”

The Court then continued (pages 587-88): “In accord with Judge Higginbotham, we recognize that in most instances subject-matter jurisdiction will involve no arduous inquiry. See 145 F. 3d, at 229 (“engag[ing]” subject matter jurisdiction “at the outset of a case . . . [is] often . . . the most efficient way of going”). In such cases, both expedition and sensitivity to state courts’ coequal stature should impel the federal court to dispose of that issue first. See *Cantor Fitzgerald, L. P. v. Peaslee*, 88 F. 3d 152, 155 (CA2 1996) (a court disposing of a case on personal jurisdiction grounds “should be convinced that the challenge to the court’s subject-matter jurisdiction is not easily resolved”). Where, as here, however, a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction.”

Boiling all this legal mumble jumble down in plain terms means the Supreme Court ruled the District Court should tackle whichever issue is the easiest to decide first. The more complex the issue of subject matter jurisdiction the more likely therefore the Court should decide other issues before addressing that issue. However in this instance the issue of subject matter jurisdiction is as simple as it gets: Both sides have stated the court has no subject matter jurisdiction because both sides agree the plaintiff has no standing. Thus, according to their own evidence the government believes the issue of subject matter jurisdiction should be addressed first. If so, then the government is actually advancing the proposition the matter be remanded back to Superior Court.

On the other hand a decision regarding the Speech and Debate Clause is highly complex especially given statements made in Congress on May 5, 1789 and never altered, refuted or changed by Congress since. In sum Congress stated that it has no right of debate, speech, vote or even a committee regarding a convention call. Thus by act of Congress it was recognized in the matter of an Article V Convention call there is no immunity granted by the Speech and Debate clause because Congress has no right to debate the issue. Indeed according to the members of Congress, many of whom were delegates to the recently completed 1787 Convention (most notably Madison who wrote Article V) Congress doesn't even have the right to vote on the proposition.

Thus this issue of speech and debate in light of historic evidence is highly complex and convoluted. The Supreme Court has stated on four occasions that if the states apply Congress must call a convention. The infusion of the Speech and Debate Clause into this implies Congress has an option as to whether to call a convention. Thus the “debate” part of the clause presents several thorny legal issues if it is presumed Congress does have the right of veto of the provisions of the Constitution which is actually what the government is suggesting. Nothing can be more complex than that.

The government also presents arguments regarding 28 USC 1447 in which it asserts there has been “no change” in the legal language of this statute since it was first created some 200 years ago. Again an examination of their evidence disproves this claim. The earlier versions of the law allowed for a court to “dismiss or remand” a case where the court believed it had no subject matter jurisdiction thus supporting the proposition of the government. But like Article V opponents who cite earlier versions of Article V proposed in 1787 convention as the basis for their arguments rather than referring to the current and final version adopted in the Constitution, present law removes this option stating, “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” [Emphasis added].

Thus it appears the court has no option in this as the law is clear, concise and unequivocal as are the facts: both sides say the court has no subject matter jurisdiction. It only remains to see whether the court will obey the law as written or do what the government wants—dismiss the case so it can continue to ignore the Constitution and not call an Article V Convention as it is mandated to do. As I've said before and I will say again: changes are needed in this country and they can only be accomplished by one of two methods, peaceful amendment or violent revolution. McConnell and Boehner had better think hard on this fact. Sooner or later people are

going to stop trying to use the system to correct its defaults and when that happens (and it will) it will be too late to stop their alternative.