Government Defies Constitution

By Bill Walker

As expected, attorneys for Senate Majority Leader Mitch McConnell and Speaker of the House John Boehner filed court papers in United States District Court for the District of Columbia asking the court to dismiss the recently filed Sibley v McConnell federal lawsuit. The lawsuit, filed pro se by Maryland attorney Montgomery Sibley seeks a writ of mandamus from the court causing Congress to call an Article V Convention.

The legal maneuver of requesting dismissal based on lack of standing after first causing the case to be remanded from Federal Superior Court where it was originally filed which requires no standing to Federal District Court which does require standing, is a frequently used tactic employed by federal attorneys who wish to avoid a legal battle based on the merits of the case and instead rely on the unconstitutional standard of standing to have the court dismiss the case for lack of standing and thus avoid the issue altogether.

Technically, the government is requesting dismissal of the case on its allegation that the district court lacks subject matter jurisdiction, that is, that under the terms of Article III of the Constitution, the court is not authorized to hear the case. For the court to be able to hear a case and decide on its merits, the Supreme Court has, over the years, issued a series of rulings defining what is known as standing to sue. These rulings apply to the plaintiff in a case and must, according to the Supreme Court, be satisfied in order to prove the plaintiff has "standing." If the plaintiff has "standing" then according the Supreme Court, the court has subject matter jurisdiction and therefore can hear the case and decide it on its merits.

While the courts have created several versions of standing, some applying only to single case, the general rules of standing require the plaintiff must prove, to the satisfaction of the court, three criteria in order to have standing: (1) the plaintiff must prove an injury in fact, that is some kind of actual injury such as loss of income that is particularized; (2) the alleged injury must be "traceable" to the defendants in the case, that is the plaintiff must be able to prove the injury was caused in some manner by actions of the defendants in the case: (3) the plaintiff must prove the court has the ability through the use of its judicial powers to redress the injury, that is that a court order in favor the plaintiff will actually solve the issue the plaintiff has brought before the court.

In addition attorneys for both McConnell and Boehner have asserted immunity under what is known as the "Speech and Debate Clause" of the Constitution. This clause gives immunity to members of Congress protecting them legal prosecution for actions they undertake while performing their official duties. However the clause contains several provisions whereby action can be undertaken if it can be shown they have violated those provisions. For example members of Congress are subject to arrest if they commit a felony.

Under court rules the opposing party is given a certain number of days, usually ten though in some cases the period can be as long as 30 days, in which to respond to the motion and present their arguments to the court for its consideration before the court renders a decision. For his part

Montgomery Sibley submitted a motion requesting additional time to respond to the motions for dismissal by defendants McConnell and Boehner.

The problem for the defendants in this is by asserting lack of standing on the part of Sibley they opened the door for the case to be remanded back to Federal Superior Court which does not require standing as it was created under authorization of a different part of the Constitution (Article I). The applicable federal law regulating remanding of a case from one jurisdiction to another jurisdiction is usually applied to remanding cases from state courts to federal courts. However the law contains some important quirks. First, because the usual function of the Federal Superior Court is to act like a state court for the District of Columbia, federal law describes it as a "state" court. Federal law also allows for cases such as the one originally filed by Sibley to be heard by the court the court is, despite the designation of being termed a "state" court, a federal court.

For his part Sibley has admitted he lacks standing to sue in Federal District Court. Thus both plaintiff and defendants agree Sibley has no standing to sue in district court meaning the court has no subject matter jurisdiction. The problem for the defendants is that under the same federal law they used to remand the case from superior to district court, the law emphatically states that if the district court lacks subject matter jurisdiction the case must be remanded back to the "state" court (in this case Federal Superior Court) from whence it came.

Assuming the District Court judge obeys the federal law and related court rulings regarding subject matter jurisdiction, this means the court must remand the case back to Superior Court which requires no standing meaning the case will be heard by that court on its merits rather than on the issue of standing. Hence the issue of whether or not Congress can refuse to call an Article V Convention when the states have submitted sufficient applications to cause it to do so under the terms of Article V will finally be presented to a court of law with the defendants being compelled to present arguments to why the Constitution should not be obeyed and a convention called given the fact 49 states have submitted 766 applications when Article V only requires 34 states submit 34 applications.

Whether the District Court will obey federal law in regards to an Article V Convention remains to be seen. In the Walker lawsuits the District Court judge ruled that I, as the plaintiff, lacked standing which should have meant the case was dismissed without further action by the court. However the court then proceeded to attach the political question doctrine of Coleman v Miller (which grants "exclusive" control of the amendatory process to Congress) meaning the court ignored the rules of standing and made a ruling anyway. Hence there is no way of knowing whether the court in this instance will simply remand the case as mandated by law or will ignore that law as well as the mandates of the Constitution and rule against Sibley anyway.

Under federal law the defendants can appeal a ruling remanding the case back to Superior Court. The problem for the government is that having already admitted the District Court lacks subject matter jurisdiction any appeal is equally affected. Thus the government will be asking an appeals court to rule on an issue which it admits going in the appeals court has no jurisdiction over whatsoever. Whether an appeals court can or will issue a ruling on this basis appears tenuous requiring the appeals court to first assume jurisdiction in order to make its ruling returning the

case to District Court for the sole purpose of determining the case can be dismissed because the District Court lacked jurisdiction in the first place. The question then becomes: how can an appeal from a District Court be valid if the District Court never had jurisdiction to make the ruling on which the appeal is based?

As to the Speech and Debate Clause objections this will only become important if standing is granted by the District Court or if the case is presented in Superior Court. Otherwise the issue is moot as the court will not address it or any other argument on the merits of the issue until it first determines whether it has subject matter jurisdiction. For the record, a convention call is described as "peremptory" by the Founders. This legal term precludes any speech or debate on the issue of a convention call thus nullifying the immunity in this instance by not allowing any debate by members of Congress.

As the only other person in United State history who has ever litigated a case involving mandating Congress call a convention, I can only make to comments: (1) thus far the government is repeating the exact steps it took in the two Walker lawsuits and (2) the fact it appears the issue of Congress refusing to obey the Constitution finally being aired in a court of law forcing Congress to come clean is long overdue. There is no certainty as to how the District Court will rule on this and obviously many legal hurdles lie ahead but it appears that the government's usual play of standing has this time failed. Congress is going to have to explain its position and I suspect when called upon to do so we will see them relying on the already disproved theories advanced by the John Birch Society. If the government does this it will be a grave legal mistake for them because the reason the JBS theories have been disproved is because the JBS has not been able to provide evidence to support its claims and in a court of law evidence supporting a position is obligatory if a client expects to win the case.