Filings Fly in Sibley Suit as Court Deadline nears

By Bill Walker

With a court deadline set for the end of the pre-holiday week for the Sibley v. McConnell lawsuit a blizzard of filings continued leading up to the deadline for the Article V Convention lawsuit. The suit, the third in United States history, was originally filed April 8, 2015 in Superior Court for the District of Columbia by Maryland attorney Montgomery Sibley. It seeks to cause Congress to call an Article V Convention as mandated by Article V of the United States.

At stake is nothing less than the future of the entire amendatory process and through that ultimate control of the entire Constitution. Those who wrote the Constitution intended two forms of amendment proposal deliberately denying Congress exclusive control of the Constitution. However as events have shown by the vigorous opposition of government attorneys who have always opposed obeying the Constitution in this regard, Congress has every intention of seizing control of both processes rendering complete control in the hands of Congress. Yet judging by the public interest generated so far, no one appears to give a damn. As pointed out by a convention supporter, there has been little coverage by the mass media of this lawsuit. But lack of media coverage is a fact of life throughout the entire history of this movement. In this case court victory for defendants Senate Majority Leader Mitch McConnell and Speaker of the House John Boehner means all possibility of legal recourse for any party desiring to use to the courts to force an Article V Convention will be closed. Acting through their government attorneys McConnell and Boehner have asserted nothing less than absolute immunity from the mandate of Article V enabling them to outright ignore the article and refuse to call the convention even when the states apply.

Notably silent on this issue are groups such as Convention of the States and Compact for America whose very political existence depend on the premise Congress must call a convention if the states apply in sufficient number. Of course these groups hold that only THEIR applications matter. The conclusion is obvious: these groups are so politically arrogant they believe a negative ruling will have no bearing on THEIR applications. They ignore an obvious fact. Not once in any case brought before the courts has the government EVER signaled the slightest intention to obey the Constitution and call a convention. Thus the chances of Congress changing its policy regarding a convention when THEIR applications have sufficient number to cause a call (if that ever occurs) are zero; especially if Congress prevails in Sibley.

In short these two groups are ignoring their own best interests. Similarly opposition groups such as the John Birch Society and the Eagle Forum have been equally silent. Given recent events at the Supreme Court this must be especially troubling for these groups as they witness their conservative social agenda melting away under relentless liberal court interpretation all the time realizing their own objections have made the only other constitutional alternative—amendment by convention—impossible for them support. In short these groups have relegated themselves to political irrelevancy as they cannot offer any solution to this onslaught because of their own opposition. Groups which are no longer politically relevant tend to melt away.

Proof of this happening can be easily demonstrated. It was reported recently John Birch Society representatives "spoke to an empty hall" when attempting to address the Massachusetts State Legislature about the "dangers" of an Article V Convention. This is yet another example of how out of step the JBS and Eagle Forum have become in regards to this issue; they are not even given the courtesy of an audience. What began with a single voice of opposition (mine) to their lies in 2008 by simply publishing the public record proving their lies to be just that has become a national wave of rebuke. Not exactly a difficult task for me given all that was required was to point out neither group has any real evidence to prove their hyperboles of a "runaway" convention and so forth. In the meantime, and I do not exaggerate, the evidence of public record disproving them is so massive it cannot be presented in any single article but requires hundreds of pages of congressional record, court records, public statements, newspaper articles and other public material for a full and complete presentation. As people learn the truth they turn away from the liars.

However all the "truth" in the world won't make any difference if the courts rule as requested by McConnell and Boehner, that under the Speech and Debate Clause members of Congress are immune from being compelled to call a convention even if the states do apply as specified in the Constitution or that the court cannot interfere as it violates the political question doctrine.

Briefly, the speech and debate clause and political question doctrines are court dogma developed over the years intended to limit the power of the court from extending itself from areas the Founders did not intend should be the business of the judiciary. The former doctrine is based on the speech and debate clause of the Constitution which states members of Congress are immune from review for any action (or non-action) taken by members of Congress during the course of their duties. However the courts, as well as the Constitution, have provided several exceptions to this immunity. The second doctrine, political question, is based on the concept of separation of powers which states those powers assigned by the Constitution to a specific branch of government cannot be interfered with by another branch of government. Again however the courts have created several exceptions to this rule over the years.

Interestingly, defendants McConnell and Boehner have not attacked Sibley's evidence; a record of 35 state applications for a convention call filed with Congress by 35 states. More to the point they have not objected to his interpretation of what constitutes the basis of a convention call: a numeric count of applying states with no terms or conditions. This last fact is no surprise given that earlier this year the House of Representatives enacted a rule describing the numeric counting of applications with no other term or condition as the basis of a convention call and supposedly began the process of counting applications.

So the obvious question becomes: why the opposition to something Congress appears to have already acknowledged? The answer is murky at best. There hasn't been any activity of posting new state applications on the House Clerk's website in months. More significantly it appears any effort by the House to count applications from prior years is dead. It could be Congress is afraid of the political fallout from calling a convention. But a closer examination of this premise shows it to be false. The fact is Congress has 100% political cover in regards to calling a convention. The obligation is, according to the Constitution, peremptory. Therefore Congress has no choice but to call. Thus, any consequences from doing so cannot be said to be the "fault" of Congress—

otherwise known in politics as plausible deniability; in this case not only plausible but constitutionally irrefutable. Congress can therefore legitimately and categorically state any issue or problem coming out of a convention is the "fault" of the states. Moreover Congress ends up with the politically enviable position of White Knight—able to swoop in to save the day with counter amendment proposals should that be needed.

So despite the fact nothing else matters (apparently) in Congress but politics, the answer is not politics. It is, however, about raw power which is not exactly the same as political power. For the entire time America has existed Congress has fundamentally controlled the Constitution. Not a single word (including the original document itself) has existed without consent of Congress. Now, thanks to hundreds of applications and a group of 39 men who in 1787 saw the need for such diversity, power has to be shared. Another group will have say over what is put in the Constitution without Congress having any say in the matter whatsoever and those in Washington who realize what that can mean to their world don't like it one bit. So, they oppose obeying the Constitution just as was warned at the time of the Convention by George Mason who observed that unless called for in the Constitution the national rulers would never be disposed to give up power they had acquired. Thus McConnell and Boehner seek court permission to ignore the Constitution on whatever grounds—standing, speech and debate, political question doctrine—they can get to stick that will prevent a convention call.

As already mentioned there is no political logic in this opposition. Article V mandates a convention based on state applications meaning the call is entirely out of congressional hands. Any negative political fallout resulting from the call must be blamed on the states leaving Congress in the perfect White Knight position.

Such is not the case if Congress refuses to call the convention in violation of Article V however. Then Congress can face terrible consequences. The evidence is overwhelming and conclusive. Even a child of five can count the necessary 34 applications given the 766 applications from 49 states to choose from. Thus the conclusion is equally overwhelming and politically damaging: Congress is willfully and directly disobeying the Constitution. While many may oppose a convention and thus desire it not be held, I have yet to find a single American who has said when confronted with the above reality that they support the government no longer being bound by the terms of the Constitution. But such will be the case if the government prevails in Sibley; it will be matter of public record. There is nothing to say once Congress achieves this power it will remain confined to Article V and that's where it is likely the terrible consequences will ensue—when the court concessions granted in Article V come crawling out to contaminate the entire Constitution.

In order to gauge how committed Congress is to defeating a convention call and establish veto of the Constitution simply requires acknowledgment of the fact all this is happening during an election cycle where one third of the Senate and the entire House face reelection. Under the usual rules of "safe" politics this shouldn't be happening at all. Every statement of opposition to the Constitution can be quoted by a political opponent. The political disaster for an incumbent who can be legitimately accused of disloyalty to the Constitution during the election is obvious. The facts show Congress is so committed to defeating a convention call it is willing to go to any

length to achieve it even if it means losing political power for a particular political party or membership along the way.

As to the specifics of the week:

On Monday June 29, 2015 Sibley filed a reply to opposition to motion to remand. On the same day the District Court Judge issued a "minute order" denying Sibley's earlier request to extend filing deadlines for response to deadlines set by court for filing responses to motions filed by the government as being moot. The single sentence order read, "Court ORDERS that Plaintiff's [26] Motion is DENIED as moot. Signed by Judge James E. Boasberg on 06/29/2015."

On Tuesday June 30, 2015 Sibley filed a second motion to enlarge time to respond to defendants' motions to dismiss.

On Wednesday, July 1, 2015 Sibley filed an amended complaint naming all members of Congress in a class action suit for failure to call an Article V Convention. Also filed on the same day were Plaintiff's "Memorandum of Points and Authorities in opposition to Defendants' motions to Dismiss" and Plaintiff's "Motion for Leave to Amend the Complaint."

On Thursday, July 2, 2105 government attorneys for Mitch McConnell filed a final brief opposing remand.

When all is said and done, District Court Judge James E. Boasberg will face a simple choice: obey the law or do what the government says. As stated in Madison v Marbury, "Between these two points there is no middle ground." The law is plain and admits no option for the court; if the court lacks subject matter jurisdiction, it shall remand the case to the court (in this case Superior Court) that has subject matter jurisdiction. The government wants Judge Boasberg to ignore the law and dismiss the case without ruling on the issue of subject matter jurisdiction and obeying the law which demands remand if Judge Boasberg determines his court lacks subject matter jurisdiction.

A list of Supreme Court rulings longer than your arm mandates a federal court cannot issue any ruling unless it has subject matter jurisdiction. So in effect (and in fact) the government is asking Judge Boasberg to assume subject matter jurisdiction just long enough to determine the court lacks subject matter jurisdiction but only after his court first rules the Speech and Debate Clause gives members of Congress absolute immunity from any such suit in the future. Then the government asks having determined his court lacks subject matter jurisdiction but nevertheless can issue a ruling ignore entirely the law which mandates if the court finds it lacks subject matter jurisdiction it must remand the case and dismiss the case outright without remand.

To give an idea to the convoluted reasoning of the government consider: in order to be in compliance with court precedent Judge Boasberg will have to, at some point, assume subject matter jurisdiction before making the Speech and Debate clause ruling asked for by the government because that particular argument is known as a substantive or merits argument rather than a jurisdictional argument. (Thus the court may rule a plaintiff has standing (jurisdiction) and assume the case in order to hear arguments but later find against the plaintiff on the basis of a

substantive argument such as violation of the Speech and Debate Clause). This means actually denying the government's motion to dismiss the case for lack of subject matter jurisdiction. The problem for the court is once it determines it has subject matter jurisdiction in order to make the Speech and Debate Clause ruling as well as deny Sibley's request for remand means the court has to assume Sibley has "standing" (something he and the government both deny). If Sibley is granted standing then the court has determined it has subject matter jurisdiction. Hence it cannot dismiss the case for want of jurisdiction. The end result is the case is argued on its merits in district court rather than superior court. Hence Sibley gets his day in court either way but not as a result of his arguments, but rather based on the convoluted arguments of the government.

In short the government hopes to do again what it did in the Walker lawsuits: get a court ruling granting total control to Congress of the convention process while simultaneously having the court state it lacks subject matter jurisdiction to make a court ruling. Frankly, it is doubtful the court will go along this time if for no other reason than if the court does as the government asks, it still faces a problem with the law: if it dismisses for lack of subject matter jurisdiction it still is required, under the law, to remand the suit back to federal Superior Court. So Sibley still gets his day in court.

What about the issue of the Speech and Debate Clause McConnell and Boehner's attorneys seem so focused on? Obviously they have not studied the congressional record closely. Congress answered this question over 200 years ago (May 5, 1789 to be precise) when Congress excluded speech and debate from the convention call process. As shown in the official record of Congress, Congress determined if the proper number of states apply, "it precluded deliberation by the House" but more importantly determined, "it is out of the power of Congress to decline complying the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this nature. … From hence it must appeal that Congress have no deliberative power on this occasion." The problem for McConnell and Boehner therefore is the fact Congress has already decided on the question of the Speech and Debate clause and emphatically stated no debate (or vote) is permitted regarding a convention call.

Thus according to the language of Article V ("…on the application to two thirds of the several state legislatures…Congress…shall call a convention for proposing amendments…), from the point of view of Congress, a convention call is ongoing and perpetual. The actual execution of a convention call is dependent, not on any action or inaction by Congress but rather the action or inaction of the several state legislatures in submitting applications. This puts McConnell and Boehner in a difficult position: if they lose their fight for dismissal/remand in district court, they have no defense not already refuted by the Founders as well as Congress.

Some people in the legal know not wishing to go on the record who I've spoken to have raised the question of whether a judge would be willing to issue a writ of mandamus as requested by Sibley in his lawsuit saying that it would make a judge look "foolish" as there is no way for the judge to enforce his writ. Possibly so were it not for the fact the court is not obligated to "force" the defendants to do anything but instead can simply acknowledge Congress has already satisfied Article V and therefore a convention call now exists based on the evidence of public record thus being in harmony not only with the Constitution but their own oath of office.

If Sibley presents the fact the Founders viewed the call as a peremptory act of agency (a form of contract long since recognized by the courts) and that this agency already binds Congress to an action, then a different face appears on the matter. The judge can, preemptively, assume ongoing agency onus on the part of Congress as described in the May 5, 1789 record. Hence he can presume under the rule of agency that Congress is bound to call a convention. All that then is required is evidence Congress has, at any time, counted state applications and determined those applications are sufficient in number to satisfy Article V requirements. As with any agency agreement it is well settled law that once accepted (and by ratification of the Constitution and swearing by required oath to obey the Constitution members of Congress have accepted this agency role) an agent is bound to execute the terms of agency in this case call a convention when the states apply. Hence all that is really required is proof on the part of Sibley Congress has counted and tabulated state applications and determined in a public document the two thirds requirement of Article V has been satisfied. Congress has already provided the necessary evidence for such a conclusion having already counted a previous set of applications.

With this evidence the judge does not need to order Congress to do anything. Instead he can consider this previous tabulation as evidence of an official action already taken by Congress satisfying the requirement of Article V. In doing this Judge Boasberg avoids violating the principles political question doctrine and the Speech and Debate clause raised by McConnell and Boehner. These defenses deal with the process of arriving at a decision and preventing outside influences from corrupting that process. In the case of the 1930 evidence however Judge Boasberg is considering the result of Congress' action and, as stated by Congress itself recognizing that action as evidence of satisfaction of a constitutional requirement. Judge Boasberg can thus declare the call already to have been made; hence no writ of mandamus is required because the need for such writ is moot. Nevertheless Judge Boasberg's finding of evidence causes the convention call.

The fact is the applications, which neither McConnell nor Boehner have challenged, are the Achilles heel in their defense. There is nothing either in the Constitution or in law which mandates the evidence presented by Sibley must be the basis for the convention call Sibley requests. If any public record shows acknowledgement by Congress of the necessary two thirds states applying at any time, (that is evidence of an official count by Congress) then the judge is free to use that evidence as the basis of his determination Congress has already called the convention because it has counted the applications and announced the result in an official congressional document. Hence Congress waiting until "…enough are presented to make two-thirds of the whole States" is simply deemed at an end. As the Founders removed any method for Congress to make a determination of this constitutional point (i.e., no debate, no vote) a determination by a federal judge that 34 applications exist from 34 states (especially when backed up by a prior admission from Congress) is all that is required. As stated in 1789 that is the full obligation of Congress to wait "until enough are presented to make two-thirds of the whole States." Beyond this Congress is neither authorized nor required to carry out any further action on the matter. So instead of issuing a questionable writ of mandamus based on untried legal grounds, Judge Boasberg simply interprets evidence doing no more than counting from one to 34.

There is a rule of law regarding appeal which the court no doubt is aware. In a court of original jurisdiction, that court, and only that court is the tribunal of fact which of course includes interpretation and admissibility of evidence. Appeal courts deal only with issues of law and are explicitly forbidden from trying evidence (unless you count the Walker v Members of Congress lawsuit where the 9th Circuit Court of Appeals served as trial court as the United States failed to appear at district court. But that's another story). Thus McConnell and Boehner will not be able to appeal Judge Boasberg's decision as it deals with a matter of fact rather than law. The problem is therefore threefold for the government: (1) once a call is issued there is nothing in the Constitution permitting Congress to withdraw it; (2) a call is based solely on evidence of a sufficient number of applications being submitted by the states to Congress and Congress acknowledging such receipt some public manner by expression in a public record and; (3) nothing in the Constitution or jurisprudence forbids a court from citing as the basis of its decision evidence of a prior act by a defendant and determining such action satisfies the present question before the court when such action is binding and ongoing on the part of the defendant, i.e., an agency relationship.

A court of original jurisdiction is the only court empowered to make such evidentiary determination. According to Congress and the Founders, Congress has no authority to even debate or discuss the matter. Congress cannot therefore overturn 1930 congressional declaration decision which, because the obligation is ongoing, is still binding on the present day Congress. That public record shows Congress already determined a sufficient number of states applied to cause a convention call and has counted the applications noting the number of applying states. Consequently Congress has already carried out its assigned constitutional duty of counting applications and published the results in an official congressional record. Accordingly any debate on the matter, even assuming it is permitted, has transpired. The court can recognize what Congress has already done as being sufficient to satisfy the terms of Article V, a simple matter of interpretation of the Constitution, its specific language, the express and clear language of the Founders and Congress, public record and well settled evidentiary rules.

A decision regarding dismissal/remand at district court should be forthcoming by the end of July according to reliable sources. The rest remains to be seen.