Sibley Wins First Round in AVC Lawsuit

By Bill Walker

Despite a 14 page opinion of judicial diatribe which could have written with a single word—"remanded," Maryland attorney Montgomery Sibley won the first round in his Article V Convention lawsuit against defendants Senate Majority Leader Mitch McConnell, and Speaker of the House John Boehner this week. Boehner, who has announced his resignation from Congress, remains a named defendant until a new Speaker of the House is elected. Under federal court rules the new speaker will be automatically substituted as a named defendant for Boehner. Sibley's suit seeks a court ordered mandamus requiring McConnell and Boehner as respective leaders of the Senate and House to call an Article V Convention as required by Article V of the United States Constitution.

The pro-se suit was originally filed in April of this year in Superior Court for the District of Columbia, Civil Division. Defendants, McConnell and Boehner, through government lawyers, immediately opposed the suit showing no indication from their opening statements of even considering constitutional obedience and calling a convention as mandated by the Constitution. In an obvious attempt at dismissal government lawyers remanded (moved from one court jurisdiction to another) the suit from Superior Court for the District of Columbia to the United States District Court for the District of Columbia. Under federal law (28 USC 1441, 1442, 1446) remand was automatic. However Sibley challenged the remand under provisions of the same federal law (28 USC 1447). As described in previous stories the purpose of the McConnell/Boehner remand was to have the District Court dismiss the suit entirely based on the fact Sibley had no standing to sue. Standing to sue is a federal court doctrine in which federal courts require a plaintiff to satisfy certain court created standards before the court assumes jurisdiction to rule on the merits of the case. The government and the federal courts rely heavily on lack of standing to dismiss citizens' actions the government does not want to argue on merits.

Despite the fact both the Superior Court and District Court are federal courts created by federal law and both have jurisdiction in the District of Columbia, federal law specifies the Superior Court as a "state" court. As such this Court does not require standing to sue as only "federal" courts have this rule. The problem for the defendants was Sibley admitted from the beginning of his lawsuit he lacked standing. Thus, under the provision of the same law used by McConnell/Boehner to remand the suit to District Court, District Court Judge James Boasberg was forced to remand the case back to Superior Court. As noted by Boasberg in his ruling, the law is peremptory, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded [back to "state" court]." [Emphasis in original].

The suit is the third in United States history. The first two, Walker v United States (2000) and Walker v Members of Congress (2004) were filed by this author. The latter suit, Walker v Members of Congress (all members of Congress voluntarily joining against the suit including Boehner and McConnell) was appealed to the Supreme Court. The Court denied certiorari but not before the Solicitor General of the United States, attorney of record for Congress, admitted

formally several statements made in my pleading were correct as to fact and law. Court rules mandated the Solicitor General of the United States, who represented all members of Congress, either refute or agree to all statements made by me before the Court ruled on certiorari. The Solicitor General waived the right to respond meaning under court rules he found no fault in the statements of law or fact expressed in the lawsuit.

Judge Boasberg spent pages blasting Sibley in regards to his suit as well as his personal history but in the end was forced to grant the remand as federal law mandated this as it employed the word preemptive "shall". While it was obvious from his opinion the judge would have given anything to have dismissed the suit, even he was forced to bow to the peremptory effect of the word "shall" in federal law.

The problem Judge Boasberg failed to realize is by ruling the Court and defendants McConnell and Boehner were bound by the peremptory word "shall" as used in law he was, in fact, ruling on the key issue of the entire case, a fact certainly not lost on Sibley. The Constitution uses the identical word "shall" to describe the "peremptory" act by Congress that is Congress "shall" call an Article V Convention. If anything, the word "shall" in the Constitution has more authority than when used in statute. Thus by admitting the word "shall" binds the Court and the defendants to a specific action, however undesired, Judge Boasberg in fact ruled on the peremptory power of that word and its legal authority as well as the obligation of the defendants to obey that word. Thus, in spite of his saying Sibley lacked standing, Boasberg actually made a ruling. Interestingly the same thing occurred in my lawsuits when District Court Judge Coughenour ruled I lacked standing then ruled the convention application process was subject to the Coleman doctrine, a position never before expressed by a federal court.

As the word "peremptory" basically means no excuse allowed whatsoever, the fact Sibley lacks standing or any other objection defendants care to assert, is irrelevant as the peremptory requirement of the Constitution expressed through the word "shall" renders all of them unconstitutional and equally applies ("It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.") to Congress and the Court. All that remains for Sibley is present this fact to the Superior Court along with the ample evidence that (1) the states have applied in sufficient number to cause a convention call; (2) the call is based on a numeric count of applying states with no other terms or conditions; (3) that because no vote, debate or even a committee is permitted (See: General Annals of Congress 1 (J. Gales Ed.) Pg 00257-258 Yr 1789 , Pg 00259-00259 , and Pg 00261-00262) by Congress thus allowing it to escape its ministerial peremptory duty suing any member of Congress is sufficient to cause the call and; (4) in 1789 Congress established a procedure where it is to be notified when a sufficient number of applications have been filed by the states and the two defendant officers have within their power as officers of Congress the ability to request such information. (See Senate Rule 7—"On each legislative day after the Journal is read, the Presiding Officer on demand of any Senator shall lay before the Senate messages from the President, reports and communications from the heads of Departments, and other communications addressed to the Senate, and such bills, joint resolutions, and other messages from the House of Representatives as may remain upon his table from any previous day's session undisposed of. The Presiding Officer on demand of any Senator shall then call for, in the following order: The presentation of petitions and memorials." (All applications by the states have been filed by Congress as

memorials). House Rule VII: "Receipt of Referral of Measures and Matters Messages 1. Messages received from the Senate or the President, shall be entered on the Journal and published in the Congressional Record of the proceedings that day. Referral 2. (a) The Speaker shall refer each bill, resolution, or other matter that relates to a subject listed under a standing committee named in clause 1 of rule X in accordance with the provisions of this clause … (6) may make such other provision as may be considered appropriate." As the 1789 Congress precluded a convention call being submitted to a committee of Congress, clearly the only official empowered by the rules of the House to "make such other provision as may be considered appropriate" is the Speaker of the House. Congress also made provision in 1789 that the applications be sent to the national archives. (In a related side note I recently submitted a petition for rulemaking to the NARA for the purpose of establishing formal notification to Congress by NARA of the record of applications submitted by the states).

Judge Boasberg's opinion demonstrates he did not properly research the facts. Obviously a federal judge is supposed aware of the content of the United States Constitution. Any judge that is not aware should, in the interest of justice, resign his office for incompetence. Judge Boasberg seems a candidate for resignation as he repeatedly makes factual errors in regards to the Constitution. Fox example, throughout his opinion he refers to an Article V Convention as a "constitutional convention." While the terms "Article V Convention" and "amendments convention" commonly used in connection with Article V of the United States Constitution may not be precise, they do describe the essence of the actual words in Article V, "convention for proposing amendments." The words are simultaneously self-limiting and descriptive. The convention's purpose is singular—the proposal of amendments by convention to the United States Constitution. There is no such thing as a "constitutional convention" in the Constitution. Therefore any use of such term given that legal dictionaries define a "constitutional convention" as meaning a convention intended to create a new constitution, is clearly demonstrative of the ignorance of the person employing the term when his referring to the convention described in Article V especially when the provision of Article V ("…to this Constitution…") preclude such an interpretation as the language mandates that even if a convention (or Congress as it has identical proposal power) does propose a new constitution it would be an adjunct to our present Constitution, an impossible scenario. These terms are simply two different legal creatures and are neither mutual nor interchangeable. Judge Boasberg demonstrates his legal ignorance when he mixes them or worse yet labels an Article V Convention as a constitutional convention.

On first page of his opinion the judge refers to Federalist 85 quoting Alexander Hamilton who discussed the obligation of Congress to call a convention. The judge quotes the text but obviously does not believe it as he then spends almost the entire 14 pages blasting Sibley for holding the exact same view the judge himself quotes. Like many people opposed to a convention the judge attempts to slime in the proposition applications must be on the identical amendment subject (usually referred to as "same subject) in order to "count" meaning if Congress determines the applications are not on the same subject it is not obligated to call a convention.

But the judge's own action in his ruling disproves his position by making clear the peremptory obligation of the word "shall". An action cannot be peremptory if the party at which the peremptory act is intended possesses an option not to perform the act. Granting Congress the

power to define applications beyond the basic numeric count called for in Article V provides such an option and therefore is unconstitutional. Further, Judge Boasberg ignored relevant federal court rulings. As the judge refers to two items on page one, neither of which were mentioned by either party during their briefs, obviously the judge did research (or more likely had his clerk do the legwork). At the minimum relevant decisions by the Supreme Court should have been consulted. The fact Congress must call a convention has been stated by the Supreme Court no less than four times throughout its history; all of the decisions have been unanimous opinions by the Court.

Most relevant to this point is United States v Sprague in which the Supreme Court not only expressly stated Congress must call a convention but went on to express that Article V cannot suffer "rules of construction, interpolation or addition." [Emphasis added]. Simply put this means the Supreme Court was telling all other judges that what you see is what you get and what is is what is. Obviously this judge didn't get the memo. He used same subject as the basis to state, "None of these efforts [at a convention call] has been successful" without bothering to explain why they have been "unsuccessful."

An explanation of why "these efforts" have not been "successful" can be succinctly expressed: Congress has deliberately and willfully ignored the Constitution and refused to call a convention. Until recently Congress didn't even have a list of applications available to them to know when the states had applied. The first tentative attempt by Congress in history at creating a list began this year but its progress has been appallingly slow. A full and complete list of the 766 applications from 49 states can be read the FOAVC website.

Judge Boasberg's suggested Sibley's correct reading of the Constitution was incorrect. Thus when Sibley read Article V at face value as required by Sprague such that when the Constitution says "on the application of two-thirds of the several state legislatures" it means "on the application of two-thirds of the several state legislatures" this meant something else other than a numeric ratio of all states to some of the states with nothing else added. It has always been interesting to me how people can read every other numeric ratio used the Constitution and correctly state it to be a ratio of some part to the whole (with no other interpretation) but when it comes Article V and the convention suddenly this numeric ratio means everything but a ratio of the part to the whole. While he did not say it directly obviously the judge questioned Sibley's application evidence. Had he bothered to do his homework the judge would have discovered the source of the 35 applications Sibley provided in his lawsuit; the FOAVC list of 766 applications from 49 states taken directly from official government documents, namely the Congressional Record. Had he even read the relevant Supreme Court rulings he would have known how to correctly interpret the evidence and even this federal judge has to know two thirds of 50 is 34 and 49 is greater than 34 meaning the states have satisfied the requirement making a call peremptory on all members of Congress—including McConnell and Boehner.

But the matter does not stop there. Examination of the public record shows at least three same subject issues (repeal of federal income tax—39 states; apportionment—38 states and balanced budget—36 states) have already reached and exceeded the two thirds mark. Thus regardless of whether Sibley is correct or the judge is correct, a convention is mandated.

The Founders clearly state a convention call is based on the number of applying states as the references already provided to the May 5, 1787 congressional record proves. Indeed as already shown, the public record proves Congress itself has reached this conclusion with publication of its 1930 report regarding applications. Indeed there is no record whatsoever supporting the assertion that the Founders, Congress or the courts have held any position but that the trigger cause for a convention call is a numeric count of applying states.

At the end of this short, inaccurate discussion of applications, Judge Boasberg then concedes the argument by stating "This Court has no opportunity to determine whether Sibley's quest is quixotic; as he concedes he has no Article III standing, remand is the only appropriate outcome." Bluntly, the judge could have ended his opinion at this point but instead choose to employ irrelevant personal attacks against Sibley.

The judge spends the next several paragraphs beginning on page 2 discussing Sibley's previous legal history of court filings none of which have anything to with the current issue as none relates to it. In other words, he attempts to smear Sibley's reputation and implies that the present lawsuit is part of Sibley's "unmeritorious lawsuit" history. While I will not comment on these prior lawsuits as I have not read them, I can only observe in this case at least Sibley presents irrefutable public record—irrefutable in that neither the defendants nor the judge are able to present any evidence which refutes Sibley's statement that the states have applied in sufficient number to cause a convention call. Thus if the courts ultimately reject Sibley's suit it will be more than meritorious. Its outcome will decide whether the government has to obey the Constitution. The judge assumes but presents no court ruling backing his assumption of same subject. The reason is there is no record which disproves numeric count in United States history. If there were convention opponents would have long since used it and the judge obviously would have referred to it.

The judge then reviews the facts of the case and then moves to discuss legal standards. He then cites several federal cases all of which mandate that the Court must "treat the complaint's factual allegation as true…and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged." Thus, despite the best effort of the judge unless defendants can prove with factual evidence Sibley's assertion of numeric count is factually incorrect or his presumption regarding count methodology is incorrect, it must be accepted as true.

The judge discusses briefly the arguments of the defendants which are (1) Sibley lacks standing and therefore the court has no jurisdiction to hear the case and must therefore dismiss; (2) the Speech and Debate Clause of the Constitution "blocks Plaintiff's claims 'because they arise out of an alleged failure to take legislative action'; (3) the question is barred due to the political question doctrine.

It should be noted defendants McConnell/Boehner did not assert Coleman v Miller which was somewhat surprising as their lawyers could then have simply said, "the Court has said we have total control of the amendment process and therefore you (the Court) have nothing to say about it." No doubt however this argument will arise. What is more interesting the argument regarding the "legislative" act. Simply put, a call is not a legislative act. In Hollingsworth v Virginia the Supreme Court eliminated the President from the amendment process stating the amendment

process was not ordinary legislation and therefore the president shall have no part of it. Without presidential participation (which is to say presidential review and possible veto) Congress cannot pass legislation. Moreover Article V does not grant legislative powers to Congress in regards to call. Now this is not to say Congress cannot by rule or legislation create a process for the operational aspects of a convention (such as how applications are processed in Congress and other pragmatic issues related to a convention) as this is necessary to facilitate the peremptory call. What it means Congress cannot legislatively regulate a convention and prevent its calling by means of a presidential veto or attempt to control convention agenda, delegate selection or predetermination of an amendment proposal because they lack legislative authority to do so. The convention agenda, delegate selection and probable outcome is established by the people when they elect convention delegates who have sought office based on their position regarding amendment proposals not by a cabal of politicians in a smoke filled room.

"The text of the removal statue is unequivocal: it instructs that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction the call case shall [sic] be remanded." Despite his finding the text of federal law "unequivocal Judge Boasberg next attempted to assert because he believed the case to "futile" it could be dismissed without remand (thus ignoring the federal law entirely) but that "[t]he circuits [federal appeals courts] are split" on the question. Thus the courts are "split" on whether an explicit federal law should be obeyed as written or ignored based on the opinion of a judge who feels a particular case is "futile" without bothering with the cumbersome but constitutionally required process of congressional revision of the statute. The problem is, in reaching such a conclusion the court is, in fact, ruling on the merits of the case finding it "futile" meaning the court holds it can ignore its own standing to sue doctrine entirely and rule anyway. I can think nothing else that so clearly demonstrates the hypocrisy of the doctrine of standing than this attempt by Judge Boasberg.

The fact is the Constitution is as unequivocal as the statute and therefore presents the same identical question of obedience to the Superior Court. It will be interesting to see in upcoming litigation how the Court handles this question—not one of obedience by the government to a federal law but outright obedience to the entire Constitution. Not only is the word "shall" used in Article V but throughout the Constitution. Indeed the preemptive word "shall" is responsible for causing compliance by the government to every provision in the document. Thus, all provisions of the Constitution using the word "shall" are peremptory. Establish anywhere in that document the word "shall" can be disregarded by the government and you've destroyed the entire Constitution as it becomes nothing more than an "advisory" opinion from some long dead colonial leaders. To give an idea of the effect on the Constitution if the word "shall" is nullified—according to one source the word "shall" is used 185 times in the Constitution with all usage denoting either a prescribed limit or required action. Hence 185 provisions of the Constitution will be nullified if Sibley loses his battle over the word "shall."

Now that the case has been remanded to Superior Court and assuming the government doesn't attempt to waste countless tax dollars in an useless appeal hoping that federal appeals court judges can't read the law, a logical question is how will the case proceed. Sibley has already indicated in previously filed papers that he desires a jury trial (and thus testimony by the defendants). Whether this occurs remains to be seen. But what arguments will both sides present? Obviously the government will again attempt to raise the issue of standing hoping for a

home run of dismissal without having to address the merits of the issue—primarily the fact the peremptory word "shall" as used both in the federal law and the Constitution defeats their case. Unfortunately for the government the judge's ruling makes that impossible as both sides will have no choice but to refer to it in the record meaning whether raised by Sibley or the defendants, the fact "shall" is peremptory and thus excludes all excuses offered is bound to come up.

The next tactic of the government will be to assert Coleman v Miller much as they did in my two lawsuits. But Sibley has two alternatives which were not open to me in my suits. First, he has a published public record proving the states have applied in sufficient number to cause a convention call. I only had an article from a law review which, while it listed the applications, did not present the irrefutable proof of publication which Sibley, thanks to FOAVC gathering the applications from public record, now exists. While the judge attempted to slant this evidence it was not refuted as inaccurate meaning both judge and government concede the states have satisfied the terms of Article V.

Second, if the government uses Coleman it may backfire on them. It will open the door for a discussion of the doctrine of standing in general if Sibley desires. Standing to sue relates to the court having jurisdiction over a case. Over the years the courts have evolved a series of tests, none of which are supported by constitutional language and more importantly, none of which are authorized by act of Congress. For under the Constitution it is Congress, not the courts that establish court jurisdiction. Thus any determination of what constitutes standing is a legislative act not a judicial one. But Congress is prohibited by the Constitution from setting such standards which is why they have never passing a standing to sue law. Moreover, the courts have always based their doctrine of standing on the "cases and controversies" clause of Article III. The problem with this is the 11th Amendment (and the 7th Amendment) introduced the word "suits" into the Constitution. A suit is neither a controversy nor a case. Each term has a different legal definition.

Thus, the doctrine of standing, which has never addressed the third form of legal appeal allowed in the Constitution, a suit, is constitutionally lacking. Indeed it could be argued that the word "suit" being in the amendments, altered the words of the Constitution and removed the terms "cases" and "controversies" from its text. So basically what is stated in the Constitution is the only "standing" the court can enforce. If a party satisfies any of the listed jurisdictions (those found in Article III, Section 2) in Article III they have satisfied the only constitutional standing there is. So while a case may be a suit, the fact the word "suit" is specifically described in the Constitution meaning it is clearly delineated from inclusion as a case or a controversy. Basically a "suit" refers to the "redress of any injury or the enforcement of a right."

Obviously the people have the "right of alter or abolish" as guaranteed in the Declaration of Independence and agreed to by treaty thus making it law of the land under the terms of the Constitution. The fact this right is being denied by Congress by denying the people a convention and allowing that convention to propose amendments to the Constitution. Thus Sibley's action is most properly a suit which has never been included in the doctrine of standing by the courts and therefore must be presumed not be subject to that doctrine.

Further Coleman (See page 457 of the opinion) grants Congress extraordinary powers as the Court determined a ratification vote contrary to congressional desire is an act of rebellion. Thus the Court authorized Congress to seize power of the military from the President and employ that military to remove state legislatures and replace those legislatures with people of congressional choosing in order to achieve a desired ratification vote. The Court said despite these powers stated Congress must obey the Constitution. One can only assume therefore if Congress uses these powers it is obeying the Constitution according to the Supreme Court. Indeed Coleman states Congress has "absolute" control over the amendment process under what is termed the political question doctrine. Finally the Court stated any opinion given by the Court regarding the amendment process is an "advisory" opinion. The problem for the government is an "advisory" opinion does not require standing. Sibley can request the Court give him an opinion, albeit advisory, and entirely sidestep the issue of standing if he chooses to raise Coleman or the government does him a favor and brings it up themselves.

Given the issue comes down to documented public record which favors Sibley if the suit goes to merits (and you can bet the government will expend every effort to avoid that happening) the defendants will lose. However don't look for a convention that soon—no doubt the government will appeal. In short, while it will be a long battle Sibley will prevail. If not the Court will face a distinct distasteful alternative; granting Congress authority to veto the Constitution and full control of the amendment process summed up with a single word: dictatorship.