Sibley Appeal Slows Awaiting Government Response

By Bill Walker

Events have slowed this past month in the Montgomery Sibley lawsuit against Senate Majority Leader Mitch McConnell and Speaker of the House Ryan Paul. Despite the fact public record shows Congress is required to call TEN conventions and the Constitution mandates Congress must call if the states apply in sufficient number, Congress has not called a single convention. Alleging Congress cannot ignore the Constitution and is not above the law, Sibley seeks a court order mandating Congress call the required conventions.

Sibley's suit, currently in the District of Columbia Court of Appeals was dismissed by Superior Court Judge Maurice A. Ross in a one sentence dismissal. According to the Appeals Court website, "The D.C. Court of Appeals is the equivalent of a state supreme court. As the highest court for the District of Columbia, the Court of Appeals is authorized to review all final orders, judgments and specified interlocutory orders of the Superior Court of the District of Columbia."

In the past month Sibley has filed several required legal documents with the Appeals Court including his initial appeal brief. Despite the fact the government has until March 30 to respond to Sibley's filings it has been strangely quiet. This lack of government response is unusual in light of past events. During the initial trial phase the government responded so rapidly it seemed it was attempting to overload Sibley with paperwork, causing him to miss a court deadline thus having the case thrown out on a technicality. Sibley met all court deadlines.

In his appeal brief, Sibley presents unrefuted trial evidence of 35 state applications for an Article V Convention. At trial the government did not object to his statement Congress has a "peremptory" duty to call a convention if two thirds of the states apply (currently 34). It did not object to his evidence of 35 state applications being sufficient for a required convention call. In short, as far as actual evidence necessary to PROVE Congress must call a convention, the government never even attempted to put up an argument.

Having failed to refute Sibley's evidence the government instead chose other arguments such as speech and debate and political question to refute Sibley's suit. While the trial court judge may have accepted the government's position carte blanche (with no explanation) possibly the Appeals Court will not. Acceptance of the government's position establishes the precedent the government can "deviate" from the Constitution.

Sibley's brief presents five issues for appellate review: (1) whether Article III standing was at issue in the Article I Superior Court; (2) whether the Superior Court erred in dismissing Sibley's suit on grounds of the Speech and Debate Clause; (3) whether the Superior Court erred in dismissing Sibley's suit on the grounds of the political question doctrine; (4) whether the one sentence dismissal by Superior Court Judge Maurice A Ross without benefit of a requested oral hearing violated due process and; (5) whether the dismissal by the Superior Court violated the rules of due process and/or rules of procedure.

While Sibley presents many arguments in his 50 page brief, the central issue of this case is Sibley's evidence of 35 state applications and the fact a convention call is "peremptory." The word, "peremptory" is the heart of the entire issue. This legal term was used by Alexander Hamilton in Federalist 85 to describe the obligation of Congress to call a convention. The Founders stated this mandate repeatedly in their comments throughout the historic record. The Supreme Court has echoed this mandate repeatedly in its rulings about the obligation of Congress to call a convention. Congress has repeated this mandate at least twice in its public record.

Yet despite all these statements, nearly everyone from members of Congress to so-called convention supporters to convention opponents fail to grasp or more correctly, accept, the consequence of this single word which, for the purposes of an Article V Convention call, can be described as: IF THE STATES APPLY IN PROPER NUMBER MEANING YOU HAVE TO CALL A CONVENTION THERE IS NO EXCUSE, REASON OR CIRCUMSTANCE YOU CAN USE NOT TO DO SO.

Most so-called convention advocacy groups practice outright hypocrisy stating Congress must call a convention then accept any excuse, reason or circumstance for Congress not to call. One example is the Balanced Budget Task Force which declares 28 states have submitted applications with balanced budget as the subject of the application. BBTF states: "Two thirds of the state legislatures must apply for the convention to propose a specific amendment." The group then quotes Article V as its evidence state legislatures must apply "to propose a specific amendment." Their "evidence" shows no such language exists in Article V: "…on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments." Their reference only proves a convention can propose amendments (many) the exact opposite of "specific" (single) amendment.

Being caught in the textual lie of twisting constitutional language for your own political purpose is one thing. Proving you can't count especially when that count benefits your political purpose makes an organization look like political idiots. Few in politics have ever snatched defeat from the jaws of victory and been congratulated for it. According to BBTF the 34 applications necessary for their amendment proposal to cause a convention is presently six states short. Yet the public record clearly shows 40 states (including the recent West Virginia application not yet recorded by Congress) have applied IF you accept "same subject" as the basis for a convention call. The correct method of count specified in the Constitution is a numeric count of applying states. In such case TEN conventions are mandated. Either way the public record proves BBTF already has the necessary applications for their amendment proposal, hence their statement of 28 states "is a tale told by an idiot, full of sound and fury, signifying nothing."

The reason for their mistake—BBTF believes states can rescind or more correctly, nullify federal public record. According to the Constitution and federal law once state applications are submitted to Congress they are federal public records. According to BBTF (and others) states can "instruct" Congress to "nullify" these federal records. Under federal criminal law anyone removing a federal public record from that record goes to jail. States have been submitting so-called "rescissions" since 1947. Congress has never "nullified" or "rescinded" a single application probably because members of Congress do not want to spend several years in a

federal penitentiary. Despite all the mealy mouth efforts of so-called supporters and opponents to the convention, the public record of applications remains intact and undisturbed. This means all applications still have constitutional effect. Hence, 40 states, not 28, have submitted applications with the subject of balanced budget.

BBTF ignores the fact IF Congress had the power of rescission it could just as easily "rescind" all applications for a balanced budget amendment instead of just those the states instruct Congress to remove. BBTF ignores the effect of its position on federal public records. Once the states have a "federal" power to "instruct" Congress which federal public records it will "remove" that power extends to all federal public records--public law, regulations—even court rulings—under the 14th Amendment's equal protection clause. Such result would be anarchy. Federal courts have correctly and repeatedly ruled states cannot nullify federal public records.

For its part the government persists in practicing dichotomy; stating the call is peremptory in public record then creating a compost of excuses to deny this fact. The government can't rescind applications because of federal criminal law. So the government turns to the courts to do the dirty work of "deviating" from the Constitution. For its part Congress simply ignores the Constitution. Government attorneys use the doctrine of standing to prevent anyone forcing Congress to obey the Constitution. In court case after court case, the government asserts lack of standing of standing on the part of the plaintiff. If the plaintiff lacks standing this means the court lacks jurisdiction to rule. The court agrees with the government; case dismissed. (Of course in the first federal lawsuit about a convention, Walker v United States, the district federal judge ruled I lacked standing then proceeded to issue a ruling anyway exposing the hypocrisy of standing).

The court conveniently ignores the fact if the duty to call is peremptory meaning no excuse, this must include the courts as the command comes from the Constitution which affects all branches of the government. In Federalist 85 Hamilton said, "The national rulers shall have no option," not just Congress. The term "national rulers" applies to all branches of national government. Otherwise Hamilton would have noted that fact with something like, "The national rulers shall no option unless they go to a federal judge and get a ruling exempting Congress from this part of the Constitution."

The Constitution states federal court jurisdiction is a legislative function of Congress not the courts. The Constitution provides several "standings" in Article III, Section 2 including cases "arising under this Constitution." Under the terms of the Constitution therefore the courts have no constitutional authority to create "standing." It is up to Congress to create the doctrine of standing by means of legislation IF allowed to do so by the Constitution. As court jurisdiction is assigned specifically to Congress by the Constitution if Congress does not or cannot create such a constitutional doctrine then it constitutionally cannot exist. The problem with Congress writing legislation defining standing is, as the Supreme Court has stated, Congress cannot compose such a law; it violates the First Amendment right of the people to petition for redress. Article III, Section 2 does not grant the courts power to create new standings beyond the 15 or so listed in the Constitution. Yet this is exactly what the courts have done—created a doctrine of standing based on standards written by justices using terms other than those written in the Constitution. The only thing the judges have used from the Constitution is the title "cases and controversies."

In the hundred or so Supreme Court cases addressing standing to sue, not one has ever referred to the 15 or so itemized standings listed in Article III. Not one ruling has explained in plain English why the specific case in question is not addressed by one of these itemized provisions which define standing to sue. Instead the courts have consistently ignored the specifics of the "cases and controversies" clause as it has come to be called without providing any reason why the specific text circumstances of Article III can be ignored by the courts in questions of standing. The court instead (for the obvious reason it gives them total control over which provisions of the Constitution will be enforced and which will not) substitutes phrases such as "no standing as it constitutes a generalized grievance," or "must be a concrete controversy." Please show me in the Constitution where these standards are listed. I've read the Constitution countless times and cannot find such language or more importantly, constitutional authorization for the court to base their rulings of standing on this non-constitutional language.

This lack of specificity leaves me wondering, why, in the Sibley case, as the United States is a party to the suit and it is a case clearly arising under the Constitution and these specific provisos in Article III grants court jurisdiction, Sibley lacks standing. Of course all the blame cannot be piled on the courts. Few briefs actually mention one of the specific provisos of Article III as a basis for standing. Such assertion would cause the Court to deal with its constitutional evasion. At the least the opposing party, in this case the United States, is forced to explain why a case concerning Congress' refusal to call a convention when mandated by constitutional text is not a case "arising under this Constitution." The United States is also forced to explain when they are a party to the suit why this proviso does not provide standing. Unlike others however, Sibley raises these questions in his brief.

Ultimately, this case will distill into a single query: is the Constitution or the doctrine of standing law of the land? The Constitution mandates a "peremptory" action of Congress. Congress, in direct contradiction of this mandate presents arguments of standing to a court asserting it does not have to call a convention because of those excuses. In reality, Congress argues for the right to "deviate" from the Constitution. This should scare the hell out of every American given recent history. In 1932, the German government "deviated" from their Constitution. Fifty million people paid for that "deviation" with their lives.

The courts have created their own form of "deviation." Currently they can determine whether an issue of constitutional law is decided by a court doctrine based on a generalized title. Such laxness by the judiciary is abominable and unconstitutional. Little wonder many state applications can be classified under the general subject title of federal judiciary excesses.

As the issue is on the convention agenda likely it will consider an amendment formalizing the terms under federal courts can declare a law unconstitutional; it will discuss how this power is reviewed. Presently there isn't even language in the Constitution stating a federal court can declare anything unconstitutional. As used by the judiciary "unconstitutional" is just another word for "veto." Judicial veto comes from an 1803 court ruling where the court "discovered" this power. The courts never requested an amendment formalizing judicial veto thus asking the people to consent to judicial veto. Isn't it about time we the people got around to formalizing this power and set out the rules for it? The only veto in the Constitution is the President's reviewable by Congress and the people. Obviously the Founders intended any veto be reviewable. When

issues of constitutional obedience are at stake can we trust a judiciary who creates false doctrines on which to judge that issue without benefit of review by anyone outside the judiciary?

So it boils down to this: on the one hand is the people's right of alter or abolish guaranteed them in the Declaration of Independence, made law of the land by the Treaty of Paris in 1783 and enshrined in the Constitution by several means, not the least of which is an Article V Convention. On the other hand is the court created doctrine of standing. If employed in the Sibley case, it results in court sanctioned veto of the Constitution. A body which is supposed to be subject to the Constitution thus reconstitutes itself into a body whose doctrine places it above that of the Constitution.

So all that is at stake in the Sibley lawsuit is the fate of the Constitution and the validity of its provisions versus a court created doctrine that is supposed to be subservient to the Constitution but in fact is not. The judges who will hear this case have taken an oath to support the Constitution. After all this premise was the basis for their court discovered veto power in 1803—that judges could not take an oath of office to support the Constitution then sanction an act contrary to that Constitution. Permitting Congress to veto the Constitution is clearly an act contrary to the Constitution.

The Constitution states Congress must call a convention if the states apply; the call is "peremptory." The states have applied. Judges forget they still take the same oath of office their earlier brethren took in 1803. It still carries with it the same sworn oath to support the Constitution. This means judges cannot sanction an act contrary to the Constitution. This 1803 doctrine now threatens to destroy the very Constitution these judges are supposed to uphold by letting Congress "deviate" from the Constitution. The real danger for us is that there is any question whatsoever as to how the court will respond to Sibley's lawsuit which in the end asks the court to do what they have sworn an oath to do—make the government obey the Constitution. Must we go through what the German people learned with millions of deaths when their government was allowed to "deviate" from their Constitution? I hope not.